To The Memory

OF THE LATE

THE RIGHT HONOURABLE

SIR LAWRENCE HUGH JENKINS, K C I E

CHIEF JUSTICE

OF

THE HIGH COURT OF JUDICATURE AT BOMBAY

PREFACE TO THE NINTH EDITION.

The present edition contains cases in the authorised and unauthorised series reported up to the end of 1929.

Since the publication of the last edition there have been a number of important rulings both by the Judicial Committee of the Privy Council and the High Courts of India. This rendered it necessary to rewrite many portions of the Commentary.

Order 34 which relates to suits on mortgages has been amended by the Transfer of Property (Amendment) Supplementary Act 1929 and the Transfer of Property (Amendment) Supplementary Act, 1930. The commentary under that Order has been entirely rewritten and the distinction between the old and the new law has been pointed out. The Letters Patent of the various High Courts have also been amended by the Letters Patent of 1928 and the Letters Patent of 1929. These amendments also have been dealt with in their proper place.

The writer desires to acknowledge gratefully the valuable assistance rendered by Mr Justice Pratt in preparing the present edition.

The High Courts Act 1861, the Government of India Act 1915 and the Letters Patent of the seven High Courts, with an exhaustive commentary on each clause, are relegated to an Appendix. The Rules made from time to time by the Chartered High Courts will be found in the remaining Appendices. The writer has to thank the Registrars of the High Courts of Bombay, Calcutta, Madras, Allahabad, Patna, Lahore and Rangoon for the assistance kindly rendered in furnishing him with copies of the Rules of those High Courts and with complete information in connection with them.

Pursuant to the desire of a large number of legal practitioners references have been given throughout to Indian Cases and the All India Reporter. The mode of citation of the All India Reporter is as follows —

(29) A PC	= (1929) All India Reporter,	Privy Council	Reports
(29) A A	= (,,) ,, ,,	Allahabad	,,
(29) A B	= (,,) ,, ,, ,,	Bombay	,,
(29) A C	= (,,) ,, ,,	Calcutta	,,
(29) A L	= (,,) ,, ,,	Lahore	,,
(29) A M	= (,,) ,, ,,	Madras	,,
(29) A P	= (,,) ,, ,,	Patna	,,
(29) A R	= (,,) ,, ,,	Rangoon	,,
(29) A O	= (,,) ,, ,,	Lucknow	,,

For the revision of the proofs the writer is indebted to Mr B K Desai M A LL B, Advocate (O S) of the High Court of Bombay Mr K S Shavaksha B A of the Middle Temple Barrister at Law Mr B D Mehta (A S) of the High Court of Bombay, and Mr J R Dhurandhar, B A, LL B, of the Legal Department, Government of Bombay The Index has been brought up to date by Mr B K Desai

The author desires to thank the Times of India Press, Bombay for the remarkable despatch in printing the work and for the accuracy throughout in the work

CHAMBERS No 17
HIGH COURT, BOMBAY
February 1930

D F M

PREFACE TO THE THIRD EDITION.

In preparing the present edition I had the unique assistance of the notes of Sir Lawrence Jenkins—the eminent and illustrious lawyer who filled the office of Chief Justice of the High Court of Bombay with great ability and distinction for well nigh ten years The notes above referred to were prepared by Sir Lawrence Jenkins while he was on the Special Committee which met at Simla in June 1907 and modelled the Code of Civil Procedure in its present form That the Code of 1908 is a considerable improvement upon its predecessor is beyond all question The arrangement though novel is scientific It proceeds upon the lines of the Judicature Acts and the Rules framed under those Acts It consists of two parts—the first containing provisions of a substantive character and the second containing provisions which relate to matters of mere machinery The 158 sections which form the body of the Code constitute the first part The Rules and Orders comprised in Schedule I constitute the second part The provisions of the Code of 1882 relating to arbitration have been transferred to a separate schedule being Schedule II the object being to facilitate the repeal of these provisions on the passing of a new and comprehensive Arbitration Act Sections 321 to 325 C of the same Code which relate to execution of decrees by Collectors have been transferred to Schedule III Schedule IV contains a list of enactments amended and Schedule V a list of enactments repealed by the new Code

The arrangement of the present work is a simple one Long familiarity with the section numbers of the Code of 1882 has rendered it necessary to give a comparative table of the sections of the old and the new Code Such a table has accordingly been given and to facilitate reference to it which is likely to be constant the table portion has been marked off by a piece of tape attached to the volume At the same time we have given at the beginning of each section and rule of the new Code references to the corresponding sections of the Code of 1882 in thick black types enclosed in square brackets There are besides a large number of rules comprised in the First Schedule which have been borrowed from the Rules made under the Judicature Acts References to the latter rules also have been given in square brackets at the beginning of the corresponding rules of this Code and are indicated by the letters R S C, being an abbreviation of the words Rules of the Supreme Court of England see for instance, Order 1 rule 1, at p 304

There have been numerous alterations and additions introduced into the new Code of which the following require the immediate attention of practitioners —

1 S 2 cl 2 —definition of decree
2 S 2 cl 11 —definition of legal representative
3 S 7 O 50 —Provincial Small Cause Courts
4 S 8 O 51 —Presidency Small Cause Courts
5 S 20 cl (c) —arising of *part* of cause of action within jurisdiction
6 S 21 —objections to jurisdiction
7 S 24 —general power of transfer and withdrawal of suits
8 S 25 —power of Governor General in Council to transfer suits
9 S 35 —costs
10 S 37 —definition of Court which passed a decree
11 S 40 —transfer of decree to Court in another province
12 S 46 —precepts
13 S 47 —questions to be determined by the Court executing decree
14 S 48 —execution barred in certain cases
15 S 53 —liability of ancestral property in execution
16 S 55 sub s (1) second proviso and sub s (4) —arrest and detention
17 S 60 sub s (1) cls (a) (b) (h) and (k) —property liable to attachment and sale in execution of decree
18 S 61 O 21 rr 44 45 rr 74 75 O 38 r 12—agricultural produce
19 S 62 sub s (2) —seizure of property in dwelling house
20 S 64 *Explanation* —private alienation pending attachment
21 S 65 —execution purchaser s title
22 S 73 —sub s (2) rateable distribution
23 S 88 —interpleader
24 S 91 —public nuisances
25 S 92 sub s (2) —public charities
26 S 96 sub s (3) —appeal from original decree
27 S 97 —appeal from preliminary decree
28 S 99 —material irregularity
29 S 103 —power of High Court to determine issues of fact in second appeal
30 S 104 O 43 —appeal from orders
31 S 105 sub s (2) —appeal from order of remand
32 Ss 121 131 —Rules See also Index under the head Rules
33 S 141 —application of procedure provided in Code to miscellaneous proceedings
34 S 144 —application for restitution
35 S 145 —enforcement of liability of surety
36 Ss 146 to 153 —these sections are new
37 O 1 rr 1 to 5 r 7 —joinder of parties
38 O 2 r 2 *Explanation* r 4 r 7 —frame of suit
39 O 5 r 17 —procedure where defendant refuses to accept service or cannot be found
40 O 6 —pleadings The whole of this order is new
41 O 7 —rr 7 8 —plaint
42 O 8 rr 2 5 rr 7 8 —written statement
43 O 9 r 13 —setting aside decree *ex parte*
44 O 11 r 12 r 15 r 19 —discovery and inspection
45 O 12 —admissions and judgment on admissions

46 O 16 r 1—witness summons
47 O 20 r 11 r 12 r 17 r 19—decrees
48 O 21 r 3 r 11 r 22 sub r (2) r 32 sub r 5 rr 47 48 rr 49 50 r 53 r 56 r 57 r 90—execution
49 O 22 rr 3 4 r 6—abatement
50 O 23 r 3—compromise of suit
51 O 30 suits by or against firms
52 O 33 r 4—next friend and guardian
53 O 33 r cl (d)—rejection of petition for leave to sue as a pauper
54 O 34—suits relating to mortgages of immovable property
55 O 37 r 3—leave to appear in summary suit
56 O 40 r 1—appointment of receiver
57 O 41 r 2 r 5 sub r 1 r 6 r 11 r 22 sub r 4 r 33—appeal from original decrees
58 O 43 r 1 cl (m)—appeal from orders
59 O 45 rr 4 5 appeal to the Privy Council
60 Schedule II para 1 para 15 cl (c) para 18 para 21 arbitration

The High Courts Act and the Charters of the High Courts have been set out respectively in Appendix I and Appendix II

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26th October 1908

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47 O 20 r 11 r 12 r 17 r 19—decrees
48 O 21 r 3 r 11 r 22 sub r (2) r 32 sub r 5 rr 47 48 rr 49 50 r 53 r 56 r 57 r 90—execution
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60 Schedule II para 1 para 15 cl (c) para 18 para 21 arbitration

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COMPARATIVE TABLE OF THE SECTIONS OF THE OLD AND THE NEW CODE

C P Code 1882	C P Code 1908	C P Code, 1882	C P Code 1908
1	S 1	33	O 1 r 10 (4)
2	S 2	34	O 1 r 13
3	Ss 154 156 157 158	35	O 1 r 12
4	S 4	36	O 3 r 1
4A	S 5	37	O 3 r 2
5	S 7	38	O 3 r 3
6 paras (*c*) and (*d*)	Omitted.	39	O 3 r 4
		40	O 3 r 5
6 last para	S 6	41	O 3 r 6
7	*Cf* S 4	42	O 2 r 1
8	S 8	43	O 2 r 2
9	Omitted.	44	O 2 rr 4 5
10	Omitted	45	O 2 rr 3 6
11	S 9	46	*Cf* O 2 rr 6 7
12	S 10	47	*Cf* O 2 rr 6 7
13	S 11	48	S 26 O 4 r 1
Expln. VI	S 14	49	*Cf* S 137
14	S 13	50	O 7 rr 1 2 4 5 6
15	S 15		
16	S 16	51	O 6 rr 14 15 (1)
16A	S 18	52	O 6 r 15 (2) (3)
17	S 20	53	O 6 r 17 *cf* O 7 r 11
18	S 19		
19	S 17	54	O 7 r 11 *cf* O 6 r 18
20	Omitted		
21	Omitted	55	O 7 r 12
22	Ss 22 23 (1)	56	O 7 r 13
23	Ss 22 23 (2)	57	O 7 r 10
24 paras 1 & 3	Ss 22 23 (3)	58	O 7 r 9
24 para 2	Omitted.	58 last para	O 4 r 2
25	S 24	59	O 7 r 14
26	O 1 rr 1 4 (*a*)	60	O 7 r 15
27	O 1 r 10 (1)	61	O 7 r 16
28	O 1 rr 3 4 (*b*)	62	O 7 r 17
29	O 1 r 6	63	O 7 r 18
30	O 1 r 8 (1)	64	S 27 O 5 r 1
31	O 1 r 9	65	O 5 r 2
32	O 1 rr 8 (2) 10 (2) (3) (5) 11	66	O 5 r 3
		67	O 5 r 4.

Comparative Table of the Sections of the Old and the New Code—contd

C P Code 1882	C P Code 1908	C P Code 1882	C P Code 1908
68	O 5 r 5	109	O 9 r 14
69	O 5 r 6	110	O 8 r 1
70	O 5 r 7	111	O 8 r 6
71	O 5 r 8	112	O 8 r 9
72	O 5 r 9	113	O 8 r 10
73	O 5 r 10	114	*Cf* O 6 r 2
74	O 5 r 11	115	*Cf* O 6 rr 14 15
75	O 5 r 12	116	rr 16 17
76	O 5 r 13	117	O 10 r 1
77	O 5 r 14	118	O 10 r 2
78	O 5 r 15	119	O 10 r 3
79	O 5 r 16	120	O 10 r 4
80	O 5 r 17	121	O 11 r 1
81	O 5 r 18	122	*Cf* O 48 r 2
82	O 5 rr 19 20 (1)	123	O 11 r 3
		124	O 11 r 5
83	O 5 r 20 (2)	125	O 11 r 6
84	O 5 r 20 (3)	126	O 11 r 8
85	S 28 O 5 rr 21 23	127	*O 11 r 11*
86	O 5 r 22	128	O 12 r 2
87 } 88 }	*O 5 rr 24 29*	129	O 11 rr 12 13
		130	O 11 r 14
89	O 5 r 25	131	O 11 r 16
90	O 5 r 26	132	O 11 r 17
91	O 5 r 30 (1) (2)	133	O 11 r 18 (1)
92	O 5 r 30 (3)	134	O 11 r 18 (2)
93	O 48 r 1	135	O 11 r 20
94	S 142 O 48 r 2	136	O 11 r 21
95	S 143	137	O 13 r 10
96	O 9 r 1	138	O 13 r 1 (1)
97	O 9 r 2	139	O 13 r 2
98	O 9 r 3	140	O 13 rr 1 (2) 3
99	O 9 r 4	141	O 13 r 4
99A	O 9 r 5	141A	O 13 r 5
100	O 9 r 6	142	O 13 r 6
101	O 9 r 7	142A	O 13 r 7
102	O 9 r 8	143	O 13 r 8
103	O 9 r 9	144	O 13 r 9
104	Omitted	145	O 13 r 11
105	O 9 r 10	146	O 14 rr 1 2
106	O 9 r 11	147	O 14 r 3
107	O 9 r 12	148	O 14 r 4
108	O 9 r 13	149	O 14 r 5

Comparative Table of the Sections of the Old and the New Code—contd

C P Code 1882	C P Code 1908	C P Code 1882	C P Code 1908
150	O 14 r 6	191	O 18 r 15
151	O 14 r 7	192	O 18 r 16
152	O 15 r 1	193	O 18 r 17
153	O 15 r 2	194	O 19 r 1
154	O 15 r 3	195	O 19 r 2
155	O 15 r 4	196	O 19 r 3
156	O 17 r 1	197	S 139
157	O 17 r 2	198	S 33 O 20 r 1
158	O 17 r 3	199	O 20 r 2
159	O 16 r 1	200, 201	*Cf* S 137
160	O 16 r 2	202	O 20 r 3
161	O 16 r 3	203	O 20 r 4
162	O 16 r 4	204	O 20 r 5
163	O 16 r 5	205	O 20 r 7
164	O 16 r 6	206 first and second paras	O 20 r 6
165	O 16 r 7	206 third para	S 152
166	O 16 r 8	207	O 20 r 9
167	O 16 r 9	208	O 20 r 10
168	O 16 r 10	209	S 34
169	O 16 r 11	210	O 20 r 11
170	O 16 r 12	211, 212	S 2 (12) O 20 r 12
171	O 16 r 14	213	O 20 r 13
172	O 16 r 15	214	O 20 r 14
173	O 16 r 16	215	O 20 r 15
174, 175	O 16 rr 10 to 13 17 18	215A	O 20 r 16
176	O 16 r 19	216	O 20 r 19
177	O 16 r 20	217	O 20 r 20
178	O 16 r 21	218, 219, 220	*Cf* S 35 (1) (2)
179	O 18 rr 1 2 (1)	221	O 20 r 6 (3)
180	O 18 rr 2 (2) (3) 3	222	*Cf* S 35 (3)
181	O 18 r 4	223 first para	S 38
182	O 18 r 5	223 second and third paras	S 39
183	O 18 r 6	223 fourth para	S 41
184	O 18 r 8	223 fifth para	O 21 r 4
185	O 18 r 9	223 sixth para	O 21 r 5
185A first and second paras	S 138	224	O 21 r 6
185A third para	O 18 r 7	225	O 21 r 7
186	O 18 r 10	226	O 21 r 8
187	O 18 r 11		
188	O 18 r 12		
189	O 18 r 13		
190	O 18 r 14		

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C P Code 1882	C P Code 1908	C P Code 1882	C P Code 1908
227	O 21 r 9	262	O 21 r 34 (5)
228	S 42	263	O 21 r 35
229	S 43	264	O 21 r 36
229A	S 4	265	S 54
229B	S 44	266	S 60
230 first para	O 21 r 10	267	O 21 r 41
230 second para	O 21 r 21	268	O 21 r 46
230 third and fourth paras	S 48	269	O 21 r 43
		270	O 21 r 51
231	O 21 r 15	271	S 62
232	O 21 r 16	272	O 21 r 52
233	S 49	273	O 21 r 53
234	S 50	274	O 21 r 54
235	O 21 r 11 (2)	275	O 21 r 55
236	O 21 r 12	276	S 64
237	O 21 r 13	277	O 21 r 56
238	O 21 r 14	278	O 21 r 58
239	O 21 r 26 (1) (2)	279	O 21 r 59
240	O 21 r 26 (3)	280	O 21 r 60
241	O 21 r 27	281	O 21 r 61
242	O 21 r 28	282	O 21 r 62
243	O 21 r 29	283	O 21 r 63
244	S 47	284	O 21 r 64
245	O 21 r 17	285	S 63
245A	S 56	286	O 21 r 65
245B	O 21 r 37	287	O 21 rr 66 70
246	O 21 r 18	288	Omitted.
247	O 21 r 19	289	O 21 r 67
248	O 21 r 22	290	O 21 r 68
249	O 21 r 23	291	O 21 r 69
250	O 21 r 24 (1)	292	O 21 r 73
251	O 21 rr 24 (2) (3) [illegible] (1)	293	O 21 r 71
		294	O 21 r 72
252	S 5	295	S 73
253	*Cf* S 145	296	O 21 r 76
254	O 21 r 30	297	O 21 r 77
255	O 21 r 42	298	O 21 r 78
256	O 21 r 11 (1)	299	O 21 r 79 (1)
257	O 21 r 1	300	O 21 r 79 (2)
257A	Omitted	301	O 21 r 79 (3)
258	O 21 r 2	302	O 21 r 80
259	O 21 r 31	303	O 21 r 81
260	O 21 r 32	304	O 21 r 82
261	O 21 r 34 (1) to (4)	305	O 21 r 83

Comparative Table of the Sections of the Old and the New Code—contd

C P Code 1882	C P Code 1908	C P Code 1882	C P Code 1908
306	O 21 r 84	340	O 21 r 39 (5)
307	O 21 r 85	341	S 58
308	O 21 r 86	342	
309	O 21 r 87	343	O 21 r 25
310	O 21 r 88	344—360A	Repealed by the Provincial Insolvency Act 1907
310A	O 21 r 89		
311	O 21 r 90	361	O 22 r 1
312	O 21 r 92	362	O 22 r 2
313	O 21 r 91	363	O 22 r 3 (1)
314	O 21 r 92	365	O 22 r 3 (1)
315	O 21 r 93	366	O 22 r 3 (2)
316	S 65 O 21 r 94	367	O 22 r 5
317	S 66	368	O 22 r 4
318	O 21 r 95	369	O 22 r 7
319	O 21 r 96	370	O 22 r 8
320	Ss 68 70 and 71	371	O 22 r 9 (1) (2)
321	The Third Schedule	372	O 22 r 10
322		372A	O 22 r 9 (3)
322A		373	O 23 r 1
322B		374	O 23 r 2
322C		375	O 23 r 3
322D		375A	O 23 r 4
323		376	O 24 r 1
324		377	O 24 r 2
324A		378	O 24 r 3
325		379	O 24 r 4
325A		380	O 25 r 1 (1) (3)
325B		381	O 25 r 2
325C		382	O 25 r 1 (2)
326	S 72	383	O 26 r 1
327	S 67	384	O 26 r 2
328	O 21 r 97	385	O 26 r 3
329	O 21 r 98	386	S 76 O 26 r 4
330	O 21 r 98	387	O 26 r 5
331	O 21 r 99	388	O 26 r 6
332	O 21 rr 100 101 103	389	O 26 r 7
333	O 21 r 102	390	O 26 r 8
334	O 21 rr 97 98	391	S 78
335	O 21 rr 97 99 103	392	O 26 r 9
336	S 55	393	O 26 r 10
337	O 21 r 38	394	O 26 r 11
337A	O 21 r 40		
338	S 57	395	O 26 r 12
339	O 21 r 39 (1) to (4)	396	O 26 rr 13 14.

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C P Code 1882	C P Code 1908	C P Code 1882	C P Code 1908
397	O 26 r 15	440	O 32 rr 1 4 (2)
398	O 26 r 16	441	O 32 r 5 (1)
399	O 26 r 17	442	O 32 r 2
400	O 26 r 18	443	O 32 rr 3 (1) 4 (2)
401	O 33 r 1	444	O 32 r 5 (2)
402	Omitted	445	O 32 r 4 (1)
403	O 33 r 2	446	O 32 r 9
404	O 33 r 3	447	O 32 r 8
405	O 33 r 5	448	O 32 r 10 (1)
406	O 33 r 4	449	O 32 r 10 (2)
407	O 33 r 5	450	O 32 r 12 (1)
408	O 33 r 6	451	O 32 r 12 (2) (3)
409	O 33 r 7	452	O 32 r 12 (4)
410	O 33 r 8	453	O 32 r 12 (5)
411	O 33 r 10	454	O 32 r 13
412	O 33 r 11	455	O 32 r 14
413	O 33 r 15	456	O 32 rr 3 (2) (3) 4 (4)
414	O 33 r 9	457	O 32 r 4 (1)
415	O 33 r 16	458	O 32 r 11 (1)
416	S 79 O 27 r 1	459	O 32 r 11 (2)
417	O 27 r 2	460	Omitted
418	O 27 r 3	461	O 32 r 6
419	O 27 r 4	462	O 32 r 7
420	O 27 r 5	463	O 32 r 15
421	O 27 r 6	464	O 32 r 16
422	O 5 r 27	465	O 28 r 1
423	O 27 r 7	466	O 28 r 2
424	S 80	467	O 28 r 3
425	Omitted [See s 55 sub sec (2)]	468	O 5 rr 28 29
426	O 27 r 8 (1)	470	S 88
427	O 27 r 8 (2)	471	O 35 r 1
428	S 81	472	O 35 r 2
429	S 82	473	O 35 r 4
430	S 83	474	O 35 r 5
431	S 84	475	O 35 r 6
432	S 85	476	O 35 r 3
433	S 86	477, 478	O 38 r 1
434	S 87	479	O 38 r 2
435	O 29 r 1	480	O 38 r 3
436	O 29 rr 2 3	481	O 38 r 4
437	O 31 r 1	482	Omitted
438	O 31 r 2	483, 484	O 38 r 5
439	O 31 r 3		

Comparative Table of the Sections of the Old and the New Code—contd

C P Code 1882	C P Code 1908	C P Code 1882	C P Code 1908
485	O 38 r 6	529	O 36 r 3
486	O 38 r 7	530	O 36 r 4
487	O 38 r 8	531	O 36 r 5
488	O 38 r 9	532	O 37 r 2
489	O 38 r 10	533	O 37 r 3
490	O 38 r 11	534	O 37 r 4
491	S 95	535	O 37 r 5
492	O 39 r 1	536	O 37 r 6
493	O 39 r 2	537	O 37 r 7
494	O 39 r 3	538	O 37 r 1
495	O 39 r 5	539	Ss 92 and 93
496	O 39 r 4	540	S 96
497	S 95	541	O 41 r 1
498	O 39 r 6	542	O 41 r 2
499	O 39 r 7	543	O 41 r 3
500	O 39 r 8	544	O 41 r 4
501	O 39 r 9	545	O 41 r 5
502	O 39 r 10	546	O 41 r 6
503	O 40 rr 1 to 3	547	O 41 r 7
504	O 40 r 5	548	O 41 r 9
505	Omitted.	549	O 41 r 10
506		550	O 41 r 13
507		551	O 41 r 11
508		552	O 41 r 12
509		553	O 41 r 14
510		554	O 41 r 15
511		555	O 41 r 16
512		556	O 41 r 17
513		557	O 41 r 18
514		558	O 41 r 19
515		559	O 41 r 20
516	The Second Schedule	560	O 41 r 21
517		561	O 41 r 22
518		562	O 41 r 23
519		564	Omitted
520		565	O 41 r 24
521		566	O 41 r 25
522		567	O 41 r 26
523		568	O 41 r 27
524		569	O 41 r 28
525		570	O 41 r 29
526		571	O 41 r 30
527	O 36 r 1	572	*Cf* S 135
528	O 36 r 2	573	

Comparative Table of the Sections of the Old and the New Code—contd

C P Code 1882	C P Code 1908	C P Code 1882	C P Code 1908
574	O 41 r 31	617	S 113 O 46 r 1
575	S 98	618	O 46 r 2
576	O 41 r 34	619	O 46 r 3
577	O 41 r 32	620	O 46 r 4.
578	S 99	621	O 46 r 5
579	O 41 r 35	622	S 115
580	O 41 r 36	623	S 114 O 47 r 1
581	O 41 r 37	624	O 47 r 1
582	S 107 (2) O 22 r 11	625	O 47 r 3
582A	*Cf* S 146	626	O 47 r 4
583	*Cf* S 144 (1)	627	O 47 r 5
584	*Cf* S 100	628	O 47 r 6
585	*Cf* S 101	629	O 47 rr 7 9
586	S 102	630	O 47 r 8
587	S 103 O 4[illegible] r 1	631	S 116
588	S 104 O 43 r 1	632	S 117
589	S 106	633	S 12[illegible]
590	S 108 O 43 r 2	634	S 118
591	S 105	635	S 119
592	O 44 r 1	636	O 49 *r* 1
593	O 44 r 2	637	S 128 (2) (i)
594	O 45 r 1	638	S 120 (1) O 49 r 3
595	S 109	639	S 120 (2)
596	S 110	640	S 13[illegible]
597	S 111	641	S 133
598	O 45 r 2	642	S 135
600	O 45 r 3	643	Omitted.
601	O 45 r 6	644	O 48 r 4
602	O 45 r 7	645	S 137
603	O 45 r 8	645A	S 140
604	O 45 r 9	646	*Omitted.*
605	O 45 r *10*	646A	O 46 r 6
606	O 45 r 11	646B	O 46 r 7
607	O 45 r 12	647	S 141
608	O 45 r 13	648	S 136
609	O 45 r 14	649	Ss 36 37
610	O 45 r 15	650	Omitted
611	O 45 r 16	650A	S 29
612	*Omitted.*	652	Ss 122 129 130 and 131
613		653	S 59
615			
616	S. 112.		

CHRONOLOGICAL TABLE

OF

PREVIOUS AND AMENDING ACTS

Year	No of Act	Short Title	How affected
1841	VIII	Interpleader	Rep Act X of 1877
1847	XVII	Defects in Civil Procedure	Act XII of 1873
1859	VIII	Code of Civil Procedure	Act X of 1877
1860	IV	Civil Procedure	Act XXIII of 1861
1861	X	Repealing Enactments relating to Civil Procedure	Act XIV of 1870
1861	XXIII	Code of Civil Procedure	Act X of 1877
1863	IX	Amending the Code of Civil Procedure	Act X of 1877
1864	V	Extension of Civil Procedure Code to Sindh	Act VIII of 1868
1877	X	Code of Civil Procedure	Act XIV of 1882
1878	XVIII	Amending the Code of Civil Procedure	Act XII of 1879
1879	XII	Do do	Act XIV of 1882
1882	XIV	Code of Civil Procedure	Act V of 1908
1908	V	**The Code of Civil Procedure**	Amndg Act I of 1914 *Act IV of 1914* Amndg and Replng Act X of 1914 Amndg and Replng Act XVII of 1914 Amndg Act XIII of 1916 XXIV of 1917 XVIII of 1919 XXIV of 1920 XXVI of 1920 XXXVIII of 1920 III of 1921 IX of 1922 XI of 1923 XXVI of 1923 XXIX of 1923 XX of 1925 I of 1926 VI of 1926

ADDENDA

P 7, S 2—Strike out from the la t paragraph the words Again a finding have been overruled (*f*) and substitute the following —

Findings on issue —It was at one time held by the High Court of Bombay that a finding on a preliminary issue that a suit was not bad for misjoinder or that it was not barred by limitation or that the Court had juri diction to entertain a suit was in the nature of a preliminary decree and appealable as such *Sidhanath v Ganesh* (1913) 37 Bom 60 17 I C 461 *Narayan v Gopal* (1914) 38 Bom 39_ 398 3 I C 889 These decisions have since been overruled by a Full Bench of the same High Court and it has been held that a finding on an issue cannot be the subject of an appeal until it has been embodied in the judgment and the decree It was accordingly held in that case that a finding that the que tions in dispute were not caste questions and were not therefore outside the juri diction of Civil Courts do not amount to a preliminary decree and that no app al lay from uch finding *Chanmalswami v Gangadharappa* (1915) 39 Bom 339 _6 I C 885 It has similarly been held that a finding that the matter is not res judicata and that the trial can proceed is not a preliminary decree

P 7 S _—Strike out foot notes (*e*) and (*f*)

P 8 S _—Strike out in the last paragraph the words The High Court of Bombay Gangadharappa (*i*) and substitute the following —

It was held at one time by the High Court of Bombay that a finding on a preliminary issue that a suit is *not* bad for misjoinder or that it is *not* barred by limitation or a decision that the Court *has* jurisdiction to entertain a suit was a preliminary decree *Sidhanath v Ganesh* (1913) 37 Bom 60 17 I C 461 *Narayan v Gopal* (1914) 38 Bom 392 398 23 I C 889 But these decisions have since been over ruled by a Full Bench of the same High Court *Chanmalswami v Gangadharappa* (191) 39 Bom 339 26 I C 885 In the last mentioned ca e it was held that a finding that the matters in dispute are *not* caste questions and are not therefore outside the jurisdiction of Civil Courts does not amount to a preliminary decree from which an appeal can lie *Chanmalswami v Gangadharappa* (1915) 39 Bom 339 26 I C 885 Similarly it has been held that a finding that a matter is *not* res judicata and that therefore the trial can proceed is not preliminary decree *Bharma v Bhamagaida* (1915) 39 Bom 421 28 I C 461 *Genna v Khuda Baksh* (1913) P P No 16 p 56 15 I C 563 Nor is a finding that the plaintiff is competent to maintain the suit brought by him *Kamini Dabi v Promotha* (1914) 19 C W N 755 27 I C 317 Nor is a finding that a suit is not barred by limitation *Khushi Ram v Tulsa Ram* (1917) P R No 7 p 25 39 I C 100 Nor is a finding that the defendant is not an agriculturi t *Rupchand v Bhogilal* (1926) 28 Bom L R 307 94 I C 72 (26) A B 237 A finding that the defendant is an agriculturist within the meaning of the Dekhan Agriculturists Relief Act 18 9 is not by itself an adjudication which can be embodied in a preliminary decree though it may result in the plaint being returned for presentation to the proper Court *Dattatraya v Radhabai* (19_1) 45 Bom 627 60 I C 885 *Gulabchand v Baliram* (1915) 39 Bom 423 28 I C 589 *Vamanacharya v Govind* (1923) 25 Bom L R 826 834 76 I C 1014 (_4)

A B 33 [see O 7 r 10] An interlocutory order that a plaint should be stamped with a higher court fee than what it is stamped with does not amount to a preliminary decree *Mir Umar Ali v Nasib un nissa* (1911) P R No 82 p. 303 13 I C 900 None of these findings determines the rights of the parties with regard to *all or any* of the matters in controversy in the suit it merely enables the Court to proceed to inquire into those rights (1921) 45 Bom 627 at p. 634 60 I C 88 *supra*

P 17 S 2—Add the following in f n. (g) —

Muthu Paramaliga v Shanmuga (1928) 51 Mad 242 107 I C 804 (28) A M 175

P 86 S 13—Add the following as a separate paragraph before the paragraph headed Limitation —

The period of limitation for a suit on a foreign judgment is six years from the date of the judgment see Limitation Act 1908 Sch 1 art 117 The period begins to run even if an appeal is filed from the judgment *Hari Singh v Muhammad Sa d* (1927) 8 Lah 54 102 I C 523 (26) A L 200

P 89 S 15—Add the following in paragraph 5 after f n (t) —

Thus where in a suit for accounts the plaintiff values his claim at less than Rs 5 000 which is the maximum pecuniary jurisdiction of the Court in which the suit is filed and the amount found due on the taking of accounts exceeds Rs 5 000 the Court has the power to pass a decree for that amount *Krishnaji v Motilal* (1929) 31 Bom L R 476 (29) A B 337

P 155 S 47—Add the following in f n (t) —

Chettyar Firm v Toteo Ma San (192) 5 Rang 393 104 I C 1 1 (27) A R 54

P 159 S 47 f 37—Add the word his before the word co sharers

P 159 S 47 f 43—Strike out the words the decree holder

P 226 S 70—In paragraph 4 substitute the word any for the word and

P 227 S 70 f 6—Substitute the words The Collector again has no power for the words The Collector has no jurisdiction

P 227 S 70—Add the following in the beginning of the paragraph headed Revision —
The High Court has no power to interfere in revision with an order made by the Collector even though such order may not be in accordance with the provisions of Sch III cl 1 of the Code *Krishna Das v Para Gopal* (1928) 50 All 827 (28) A A 558

P 231 S 73 f 14—Add the following as a new paragraph —

Application for execution—The application for execution must be in the form prescribed by O 21 r 11 It has however been held that an application for execution though it may not contain all the particulars required by O 21 r 11 may yet be sufficient for the purposes of this section *Abdul Salam v Veerabhadra* (1926) 52 Mad 760 118 I C 72 (29) A M 73

P 231 S 73 f 16—For the words in the form prescribed by substitute the words as provided by

P 231 S 73 f n (g)—Strike out the figures 204 and the Madras case

P 247 S 79—Add the following in f n (e) —

Govinda v Secretary of State (1927) 50 Mad 449 105 I C 576 (27) A M 689

P 283 S 92—Add the following as a new paragraph immediately after the paragraph headed Cy pres doctrine —

Appeal —An order refusing to join as parties to a suit under Sec 92 is a judgment within the meaning of cl 15 of the Letters Patent and appealable as such *C E Doopley* v *M E Moola* (1927) 5 Rang 263 103 I C 261 (27) A R 180

P 291 S 96—Add the following in the beginning of f n (*y*) —

Ram Bahadur v *Lucho Kuer* (1885) 11 Cal 301 *Nando* v *Bidhu* (1886) 13 Cal 17 *Midnapore Zamindari Co Ltd* v *Naresh* (1921) 48 Cal 460 *Tausukh Rai* v *Gopal* (1929) 8 Pat 617 (29) A P 586

P 333 S 110—Add the following in f n (*s*) —

Maung Shwe v *Ma Phe* (1929) 7 Rang 271 (29) A R 260

P 443 O 9 r 9—Add the following in f n (*m*) —

Bajit Lal v *Maharaja* (1928) 7 Pat 333 109 I C 264 (28) A P 335

P 463 O 3 r 4—Add the following as a separate paragraph —

Signed —See s 2 (20)

P 543 O 9 r 9—Add the following in the fourth line of f n (*l*) after the figures 176 —

Narayana v *Muthu* (1927) 50 Mad 67 92 I C 653 (26) A M 114

P 553 O 9 r 13—*Add the following as a new paragraph at the bottom of p 553* —

Insolvency of defendant and deposit in Court.—Where an ex parte decree is set aside on condition that the defendant should deposit in Court a sum equivalent to the amount of the plaintiff s claim or any other sum and the amount is so deposited and a decree is eventually passed for the plaintiff the plaintiff and not the Official Assignee or receiver is entitled on the insolvency of the defendant to the money paid into Court *Parsotam Das* v *David* (1915) 13 All. L J 893 30 I C 779

P 553 O 9 r 13—Add the following at the end of the paragraph headed Appeal —

An appeal lies from an order rejecting the application for an order to set aside a decree passed ex parte when the order is made because the conditions which were lawfully impo ed on the defendants were not complied with *Narayan* v *Vaikunt* (1927) 51 Bom 67 99 I C 384 (27) A B 1

P 553 O 9 r 13—*Add the following in f n (q)* —

Bajit Lal v *Maharaja* (1928) 7 Pat 333 109 I C 264 (28) A P 335

P 565 O 11 r 13—Add the following as a new paragraph after the paragraph headed A party is not bound etc —

The rules regarding inspection and discovery of documents are not different for suits relating to boundary disputes and other disputes Assertions of a party on oath that documents required to be produced relate only to his own title cannot be disregarded if the Court is satisfied that they are true and that the party asserting has not misconceived the nature and effect of those documents *Chowood Ltd* v *Lyall* (1929) 2 Ch 406

P 794 O 22 r 4—Add the following in f n (*f*) —

See also *Perumal* v *Perumal* (1928) 51 Mad 701 112 I C 116 (28) A. M. 914

P 821 O 23 r 3—Add the following in f n. (*d*) after the figures 503 —

Ram Devi v *Shamshi Lal* (1926) 48 All. 475 95 I C 416 (26) A. A 501

P 881 O 33 r 1—Add the following as a new para immediately after the paragraph headed Pauper —

An order granting leave to file a suit in *forma pauperis* is not a judgment within the meaning of cl 15 of the Letters Patent and not appealable as such *Ma Than* v *Maung Ba* (1926) 4 Rang 20 93 I C 823 (26) A R 110

P 12 6 Cl 15 of Letters Patent—Add at the end of the second paragraph after f n (*g*) —

An order refusing leave to amend a plaint followed by a dismissal of the suit is a judgment and appealable as such *P M Chettyar Firm* v *Ma Shwe* (1927) 5 Rang 115 101 I C 6_8 (_7) A R 1_4

P 1_ 9 Cl 1 of Letters Patent 1 6—Add the following after f n (*k*) —

An order passed in a winding up proceeding refusing leave to a mortgagee decree holder to execute his decree and in effect directing him to prove the mortgage debt to the satisfaction of the official liquidator is a judgment and is appealable as such *Hansraj* v *Official Liquidators* (19 9) 51 All 695

P 1_ Cl 25 of Letters Patent—Add the following as a note to cl 28 —

Contempt of Court —It has been held by a Full Bench of the High Court of Patna that a Division Bench has power under this clause to issue a rule to show cause against committal for contempt *Re Murli Manohar* (1929) 8 Pat 3 3 (29) A R _

THE

CODE OF CIVIL PROCEDURE

ACT V OF 1908

RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON THE 21ST MARCH 1908

An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature

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WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature, It is hereby enacted as follows —

Preliminary

Short title commencement and extent

1 [S 1] (1) This Act may be cited as the Code of Civil Procedure, 1908

(2) It shall come into force on the first day of January, 1909

(3) This section and sections 155 to 158 extend to the whole of British India the rest of the Code extends to the whole of British India, except the Scheduled Districts

Previous Procedure —*The first Code of Civil Procedure was Act 8 of 1859* Before that the procedure of the Mofussil Courts was regulated by special Acts and Regulations which were repealed by Act 10 of 1861 and the procedure of the Supreme Courts was under their own rules and orders and certain Acts *e g* Act 17 of 1852 and Act 6 of 1854 The Code of 1859 applied to Mofussil Courts only In 1862 the Supreme Courts and the Courts of Sadder Diwany Adalat in the Presidency Towns were abolished by the High Courts Act 1861 (24 and 25 Vic c 104) and the powers of those Courts were vested in the Chartered High Courts The Letters Patent of 1862 establishing the High Courts extended to them the procedure of the Code of 1859 The Charters of 1865 which empowered the High Courts to make rules and orders regulating proceedings in civil cases *required them to be guided as far as possible by the provisions of the Code of 1859 and* subsequent amending Acts. Such amending Acts are Act 4 of 1860 43 of 1860 23 of 1861 9 of 1863 26 of 1867, 7 of 1870 14 of 1870 9 of 1871 32 of 1871 and 7 of 1872

The next Code was Act 10 of 1877 which repealed that of 1859 This was amended by Acts 18 of 1878 and 12 of 1879 and then superseded by the Code of 1882 (Act 14 of 1882) This was amended by Acts 15 of 1882 14 of 1885 4 of 1886 10 of 1886 7 of 1887 8 of 1887 6 of 1888 10 of 1888 13 of 1889 8 of 1890 6 of 1892 5 of 1894 7 of 1895 and 13 of 1895 and then superseded by the present Code

The chief feature of this Code is its division into two parts on the lines of the Judicature Acts and the Rules framed under those Acts The main body of the Code is in the sections and the rules refer to matters of mere machinery which the High Courts may adapt to local condition

Consolidate and amend—The preamble shews that the object of the present Act is not only to amend but also to consolidate the law of civil procedure If the meaning is plain no regard should be paid to the previous law and the language of the Act must be interpreted uninfluenced by any considerations derived from the *previous state of the law* But if the meaning be doubtful resort may be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Act (*a*)

Interpretation of the Act—The following are some leading rules for the construction of statutes —

1 The golden rule for the interpretation of this as well as all other Acts is to consider the plain meaning of the words used (*b*) The Court's function is not to say what the Legislature meant but to ascertain what the Legislature has said it meant (*c*) and it is always dangerous to paraphrase an Act (*d*)

2 Procedure is mere machinery and its object is to facilitate and not to obstruct the administration of justice (*e*) The Code should therefore be construed liberally and so far as possible technical objections should not be allowed to defeat substantial justice (*f*) No defence should be excluded except where to do so would be to negative the provision of a rule of procedure It is no longer a province of procedure to exclude defences (*g*)

3 The Code is one continuous whole the sections being enacted simultaneously (*h*) and so when two procedures or two remedies are provided one of them is not to be construed as in derogation of the other (*i*)

4 In matters of procedure uniformity of decision is important (*j*) and if a Judge finds a principle laid down by competent authority it is better to accept and apply it even if his own mind is not satisfied than to fritter it away in its application to cases which manifestly come within it (*k*)

5 Previous legislation may be referred to as an aid to construction but only in case of ambiguity (*l*)

6 Proceedings of the Legislature in passing an Act are to be excluded from consideration in the judicial construction of the Act The e proceedings include Reports of Select Committees Statements of Objects and Reasons attached to *Bill* and debates of the Legislature Before the rule had been settled by the Privy Council in

(*a*) *Bank of England v Vagliano* [1891] A C 10 144 145 *Krishna Ayyangar v Nallaperumall Pillai* (1920) 4 I A 33 4 43 M 1 5 0 9 6 6 I C 163 *Administrator General v Premlal* (189) 1 I 2 I A 10 *Nrend v Kamal Basini* (1 96) 23 Cal 63 23 I A 18 *Kandaswami v Narain* *Aui* (1 2) 30 M 4 9 103 *Lala Raj Pros d v Golab Chand* (1901) 28 Cal 51

(*b*) Maxw ll pp 5 8 ed 6th

(*c*) *Lala Sij Col I Chand* (1900) 27 Cal 4

(*d*) *Durga Chowdhra v J wahir Singh* (1890) 17 C L 3

(*e*) *Kendall v Hamilton* (18 8) 4 A C

(*f*) *Ghirdhar Singh v Hool h I Singh* (1840) 2 M I A 344 *Hasoom prasad Panday v Mt Koonwaree* (1856) 6 M I A 393 410 *H a v Pr no* (1891) 9 C 1 03 *Mah b l v Ku hanna* (1838) 1 Ma l 373 *See also* 9)

(*g*) *Chh ttoo Lal v d* (1 9) 6 Cal 704

(*h*) *J da v I mdh* (1896) 2 Cal. 38 743

(*i*) *Aj dhia I d v Bal nd* (18 6) 8 All 3

(*j*) *S I ra I Il v P mal ga* (18 5) I A 10 15 B L. R 3 3 *Fulkumari v Ghanshyam* (1903) 31 Cal 11

(*k*) *L l v Il d* (18) 3 C. I D 3 *Hurro Ch der S ondh ee* (1864) 9 W R 402

(*l*) *Bank of England v Vagliano* [1891] A C 10 144 145

Administrator General v *Premlal* (m) the cases were not consistent (n) and even later the Madras High Court referred to the report of a Select Committee in *Assan* v *Pathumma* (o)

7 Marginal notes to the sections of an Act are not to be referred to for the purpose of construing an Act (p)

8 Illustrations in Acts of the Legislature although not part of the sections are helpful in the working and application of the Acts and it is the duty of a Court of law to accept them if that can be done as being both of relevance and value in the construction of the text The illustration should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which the sections deal And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves It would be the very last resort of construction to make any such assumption (q) But an illustration cannot be allowed to control the plain meaning of a section (r)

9 The essence of a Code is to be exhaustive on the *matters in respect of which it declares the law* and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction (s) In cases however *where there is no specific provision in the Code* the Court has the power and it would seem it is its duty to act according to justice equity and good conscience (t) See s 151

10 Every statute which takes away or impairs vested rights acquired under existing law must be presumed to be intended not to have a retrospective operation But this presumption does not apply to enactments affecting *procedure or practice* such as the Code of Civil Procedure The reason is that no person has a vested right in any course of procedure The general principle indeed seems to be that alterations in the procedure are always retrospective unless there be some good reason against it (u) But an appellate Court cannot reverse an order made under an old Code on the ground that the new Code has enacted a different rule (v) The right of appeal however is in the nature of a vested right and hence the provision in s 154 of the Code declaring that nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement

11 The Code consists (i) of that which is termed the body of the Code and (ii) of the rules The body of the Code is fundamental and is unalterable except by the Legislature the rules are concerned with details and machinery and can be more readily altered Thus it will be found that the body of the Code creates jurisdiction

(m) (1895) Cal 88 ? I A 10 *Queen Empress* v *Sri Churn* (189) Cal 101 *Queen Empress* v *Tilak* (1898) Bom 11 *Maharaj Tewari* v *Har Charan* (1903) 26 All 144

(n) Referred to in *R* v *Kartic Chunder* (188) 14 Cal 21 *Romesh Chunder* v *Hiru Mondal* (1890) 17 Cal 85 *Shaikh Moosa* v *Shaikh Essa* (1884) 8 Bom 241 (report of Law Commissioners) *Mathoora Kant* v *India General S N Co* (1886) 10 Cal 166 *Yesu Ramji* v *Balkrishna* (1891) 15 Bom 583 *Fadhi Jhala* v *Gour Mohan* (189) 19 Cal 544 *Chunilal Fanalal* v *Bomanji* (1883) Bom 310 *Mahomed Jakeria* v *Ahmed Mahomed* (1888) 15 Cal 139 *Ramchandra Joshi* v *Hari Kasim* (189) 16 Mad 0 Excluded in *Moldoodeen* v *Dy* v *B m ch n* (1864) 1 Hyd 100 *Tarak Nath* v *Prosonno Coomar* (18 3) 19 W R 48 *Shaikh Moosa* v *Shaikh Essa* supra (statement of objects and reason) *Kadir Bakhsh* v *Bla* (1891) 14 All 145

(o) (1899) Mad 494 504

(p) *Balaj Kuwar* v *Jagatpal Singh* (1904) 6 All 393 31 I A 13 *Dulhmall* v *Halw* (1896) 23 Cal 55 *Puardo* v *Ra Sarup* (1898) Cal 858

(q) *Mahomed* v *Yeoh* (1916) 43 I A 6 63 39 I C 401 *Mulraj Khatau* v *Vishvanath Prabhuram* (1913) 40 I A 24 30 37 Bom. 198

(r) *Fowlasl Chunder* v *Sonatan* (1890) Cal 13

(s) *Gokul Mandar* v *Pudmanand* (190) 29 I A 196 20 9 C I 0 15 *Shibo* v *Baban* (1908) 35 Cal 3 3

(t) *Hukum Chand* v *Kamalanand* (1906) 33 Cal 9 931 93 948 *Abdul Rahm* v *Shahna* (10 0) 1 Lah 339 341 58 I C 48 *Rai Lall* v *Badhu Mulh* (1906) 33 Cal 1094 *Panchanan* v *Dwarkanath* (1905) 3 C L J 9

(u) Maxwell on the Interpretation of Statutes Chap viii s c h Craies on Statute Law pp 3 7 3 9 *Hurjivan Akramnu* v *Lalul issa* (1894) 18 Bom 4 9 *Balkrishna Bapu* (189) 19 Bom 04 *Krishna Chunder* v *Apu ba* (1894) 1 Cal 940 9 5 *Bisseswar* v *Jasoda Lal* (1913) 40 Cal 04 19 I C 391

(v) *Gurumoorthy Naidu* v *Varadappa Chetty* (1911) 2 M W N 338 1 I C 5 3

while the rules indicate the mode in which it is to be exercised It follows that the body of the Code is expressed in more general terms and it has to be read in conjunction with the more particular provisions of the rules (w)

Courts of Civil Judicature—These are Civil Courts in British India In olvency procedure is civil procedure but the procedure of Insolvency Courts both in the Mofussil and in Presidency Towns is regulated by special Acts though in certain matters the procedure of the Code is applied so far as it may be applicable (x) The Code applies to proceedings on the Admiralty side of the High Court (y) It also applies to proceedings in the testamentary and intestate jurisdiction of the High Courts and Mofussil Courts except as otherwise provided by the Indian Succession Act 19.. ( ) and to matrimonial suits subject to the provisions of the Indian Divorce Act As to Small Cause Courts there is special provision in sections 7 and 8 Revenue Courts are Civil Courts and it has been held that they are governed by the Code except in matters where a special procedure is enacted by the local Act (a) Special provision is made in sec 5 for such Courts in order to preserve the summary character of rent litigation under local laws But the Code does not apply to Mamlatdars Courts (b)

British India—The expression British India is not defined in the Code In the absence of any definition of a particular expression in an Act we are to turn to the definition of it in the General Clauses Act X of 1897 There are several terms of frequent or *general* occurrence in several Acts and these are defined in the General Clauses Act British India is one of them and it is defined in that Act (s 3 cl 1) as meaning all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India The words British India therefore exclude the territories of Native States (c) such as the Kathiawar States (d) Territories ceded by Native States not in full sovereignty but for limited purposes such as the establishment of a civil station (e) or for railway administration (f) are not part of British India Aden (g) and British Burma (h) are within British India but not Singapur (i) Acts 14 and 15 of 1874 declare not only Aden but also the Laccadive Andaman and Nicobar Islands and Ajmere and Merwara in Rajputana to be parts of British India. The phrase the whole of British India include the Scheduled Districts (j)

Scheduled Districts—A list of Scheduled Districts is given in Schedule I to the Schedule Districts Act XIV of 1874 The sections of this Code except s 1 and ss 155 to 158 do not extend to any of the Scheduled Districts Section 5 however of the Scheduled Districts Act empowers the Local Government with the sanction of the Governor General in Council to extend to any of the Scheduled Districts any enactments in force in British India and the whole of the Procedure Code has accordingly been extended to several Scheduled Districts including Sind Ajmere Merwara and the Scheduled Districts of the Punjab (k) and also to the Berars (l) and to Jalpaiguri (m)

(w) M ... M ... (1916) 43 Cal 148 ... 33 I C 379 per Jenkins C J
(x) See Pro inci l Insolv ncy Act 19 0 s 5 and Presidency towns Insolvency Act 1909 sec 90
(y) Bombay ... S S Co v Shepherd (1886) 11 Bom 23 40
(z) ... v ... (1 84) 9 Bom 241 ... (1 96) ... L 30
(a) ... v ... (1883) 9 Cal 705 9 I A 1 4
(b) Kassim v Marudi (1888) 13 Bom 5? ... (191) 6 S L R 6 16 I C 6 5
( ) ... v R (1888) P R 191
(f) Hemchand ... lal (1906) 33 I A ... 8 Bom L R 1?9
(i) Emperor v Chu ... (191) 14 Low I R 6 6 37 I C 534 (Wadhw n) Q ... Emp v Abd ... (1886) 10 Bom 186 (Rajkot) Hosai Al v Abid ... (1893) ... Cal 1 7 (Secunderabad)
(j) ... Queen E pre s (190) ... C W N 1
(g) Al n Laws Regulation 1891 sec ?
(h) Mahomed v Coke (1885) 13 Cal ? 1
(i) Straits Settlement Act 1861 sec 1
(j) Coll ct ... v ... (19 0) 5 Mad L J ... A M 1181
(k) See Unrepealed Central Acts, Vol. II p 9 See also Ka hi ... v Bishnoo (1888) 15 Cal 365 ... v ... (190) 24 C ... 5
(l) See ... v ... (1910) 6 Nag L R 49 61 ... 4 9
(m) ... Ka ta v T ... Das (1899) 4 C W N

2 [S 2] In this Act, unless there is anything repugnant in the subject or context,—

Definition

(1) "Code" includes rules

See notes on p 3 para No (11)

(2) "decree" means the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default

Explanation —A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of It is final when such adjudication completely disposes of the suit It may be partly preliminary and partly final

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made

Definition of "decree" in the Code of Civil Procedure 1882—The term "decree" was defined in the Code of 1882 as follows —

"Decree" means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication so far as regards the Court expressing it decides the suit or appeal An order rejecting a plaint or directing accounts to be taken or determining any question mentioned or referred to in section 244 [now s 47] but not specified in section 588 [now s 104 and O 43 r 1] is within this definition an order specified in section 588 is not within this definition

Importance of the definition of decree—The adjudications of a Court of law may be divided into two classes namely (1) decrees and (2) orders Orders again may be sub divided into appealable orders and non appealable orders The expression "order" is defined in cl (14) of the present section as meaning "the formal expression of any decision of a Civil Court which is not a decree"

Where a decision amounts to a decree it is invariably appealable unless it is expressly provided that no appeal shall lie from it (s 96) Further where an appeal is preferred from a decision which amounts to a decree and a decree is passed in appeal an appeal will lie to the High Court from the decree passed in appeal if the case comes within the provisions of s 100 below This is called a second appeal In the case therefore of an adjudication which amounts to a decree the law permits an appeal and in some cases also a second appeal

Where an adjudication amounts to an order no appeal lies from it unless it is enumerated in the list of appealable orders given in s 104 or in the list given in O 43 r 1

We have thus seen that an appeal lies from a decree We have also seen that an appeal lies from an order specified in s 104 or in O 43 r 1 What then is the distinction between a decree and an appealable order The distinction is this—that while in the case of an adjudication which amounts to a decree the law permits a second appeal in some cases no second appeal is allowed at all in the case of an adjudication which amounts to an appealable order That is to say if an appeal is preferred from a decree and a decree is passed in appeal an appeal will in certain cases lie from the decree passed in appeal But if an appeal is preferred from an appealable order and an order is passed in appeal no appeal lies at all from the order passed in appeal [s. 104 sub section (2)] To take an instance A appeals from a decision of a Subordinate Judge to a District Judge The appellate Court decides against A A prefers a second appeal to the High Court from the decision of the District Court If the decision of the Subordinate Judge amounts to a decree a second appeal will lie provided the case comes within s 100 But if the decision amounts to an appealable order no second appeal will lie

The definition of decree is important not only for determining the right of second appeal but for determining whether an appeal lies at all in the first instance If an adjudication is an appealable order there is no difficulty whatever in determining whether an appeal lies from it All that has to be done in such a case is to refer to s 104 and to O 43 r 1 and to ascertain whether the order is enumerated in the list there given. The real difficulty in determining the right of appeal arises when the adjudication from which an appeal is preferred is not an appealable order In such a case the adjudication may be either a decree or a non appealable order and an appeal can lie only if the adjudication amounts to a decree The appellant would in this class of cases endeavour to show that the adjudication appealed from is a *decree* while the respondent would endeavour to show that the adjudication is *merely an order* Instances of this class of cases are given in the next following paragraph

Essential elements of a decree—The term decree is defined in the Code as meaning the formal expression of an adjudication which so far as regards the Court expressing it *conclusively determines* the *rights of the parties* with regard to all or any of the *matters in controversy* in the *suit* The words italicized above indicate the distinguishing marks of a decree To constitute a decision a decree the following conditions must be present —

I —The decision must have been expressed in a suit

II —The decision must have been expressed on the *right* of the parties with regard to all or any of the *matters in controversy* in the suit

III —The decision must be one which *conclusively determines* those right

IV —The decision must have been given formal expression as an adjudication

If all these conditions are fulfilled the decision is a decree if not it is an order or a finding on an issue

I **In a suit.**—Every suit is commenced by a plaint (*n*) and when there is no civil suit there is no decree (*o*) Some proceedings commenced by an application are statutory suits so that the decision is a decree *e g* a contentious probate proceeding (*p*) or an

(*n*) I *alata* v I *Lat ema* (1 99) — M 1 — *I padhya* I *ith S ngh* (1 96) 21 Cal 23 I *m K pal* v I *p Kuari* (1 4) — All —69 — 1 11 I A 3— — 6

(*o*) *M al M* v *S bromany* (1888) 11 Mad —6 3 14 I A 160

(*p*) *L mrao Cha d* v *B d al n Cha d* (189 1 All 4 4

application to file an agreement to refer to arbitration (*q*) The following are instances of orders which are not decrees not having been made in a suit —An order rejecting an application for leave to sue in *forma pauperi* for no suit has till then been filed (*r*) an order refusing leave to institute a suit for accounts of a Religious Endowment (*s*) an order on a petition to appoint a new member on the committee of a Religious Endowment (*t*) an order under the Indian Trusts Act dismissing an application for the removal of a trustee (*u*) an order on a settlement case under sec 104 (–) of the Bengal Tenancy Act 3 of 1898 as the proceeding is instituted not by a plaint but by an application (*v*)

II **Rights of parties as to matters in controversy**—There must have been an adjudication on the rights of the parties (*w*) An order of dismissal for default of appearance is no determination of the rights of the parties and therefore is not a decree (*x*) So also an order under O 9 r 2 dismissing a suit when summons is not served in consequence of plaintiff s failure to pay Court fee (*y*) Special provision is made in the definition of decree for orders of dismissal for default apparently because the previou cases were not consistent An order rejecting an appeal under O 41 r 10 for failure to furnish security is not a decree as it does not determine the rights of the *parties in controversy in the appeal* ( ) *An order granting leave to withdraw* a suit with leave to file a fresh suit is not a decree for the rights of the parties are left open for determination in the subsequent suit (*a*) The right in controversy must be a substantive right and not merely a processual right for a finding on a processual right is only to enable the Court to inquire into the rights in controversy in the suit (*b*) Thus an order that a plaint should be stamped with a higher Court fee is not a decree (*c*)

III **Conclusively determines**—This expression implies that the decision must be one which is complete and final as regards the Court which passed it The decree may conclusively determine the rights of the parties although it does not completely dispose of the suit See note on p 8 Preliminary Decree

IV **Formal expression**—All requirements of form must be complied with Thus if no decree has been drawn up no appeal will lie from the judgment (*d*) Again a finding in an issue cannot be the subject of an appeal until it has been embodied in the judgment and decree This point was overlooked in some Bombay cases (*e*) which have been overruled (*f*)

(*q*) *Guru Cha an* v *Um Ch an* (191) 6 C W N –40 0 I C 985 *Cont a Fajnal* v *Marut* (19 0) – Bom L R 13 59 I C 55 nd *Satischandra* v *Paliram* (19–1) 6 Pat L J 287 61 I C 390—submitted to be incorrect Se Sch II cl 0

(*r*) *Secreta y of State* v *Jillo* (1899) –1 All 133

( ) *Mo affer Al* v *H dayet* (190) 34 Cal 584 *Ka–em Al* v *Azim Al* (1891) 18 Cal –32 *Pratab* v *Brojanath* (189) 19 C l – – 288 Re *Venkateswara* (1886) 10 Mad 93

(*t*) *Minakshi* v *Subramanya* (1888) 11 Mad 26 5 14 I A 160 *Somasundra* v *Vaithi l nga* (1896) 19 Mad 8

(*u*) *Nathu Wils n* v *Mc Af e* (1897) 19 All 131

(*v*) *Upadhya Th k r* v *Pers dh S gh* (1886) –3 Cal 7 3 7 9 *Lola Kirut* v *Palukdhari* (1890) 17 Cal 3 6

(*w*) *Ma Cho* v *Maung My nt* (1927) 5 Rang 838 10 I C 618 (–7) A R 148

(*x*) *Rukhm m n* v *Pa n Chandra* (1912) 9 C I 341 14 I C 8–3 *Shiam Mandal* v *Satinath* (1917) 44 Cal 9 4 38 I C 493 *Gajr j Mati* v *Shami Nath* (1916) –9 All 13 36 I C 307 *Su aj De* v *Part b Rai* (19 3) 2 Pat 739 75 I C 284 (–3) A I 514 cf *Abd l Maj d* v *Jao h* (1914) 36 All 350 23 I C 649 P C

(*y*) *Lachmi Naran n* v *Darbari Lal* (1916) 38 All 357 33 I C 37 *Lucky Churn* v *Budu un issa* (1883) 9 Cal 6

(*z*) *Lekha* v *Bhanna* (1896) 18 All 101 *Romesh* v *M nind a* (19 1) 49 Cal 3 6 I C 51 ( ) A C 246 *Na im* v *Abdul* (19 –) 3 Lah 30 67 I C –56 ( ) A L 8

(*a*) *Genda M l* v *Pirbl u Lal* (1895) 17 All 97 *Jogodind o* v *Saru Sunda i* (1891) 18 Cal 3 *Abd il Hossein* v *Fas Sahu* (1900) –7 Cal 36 See also *Patloji* v *Ganu* (1891) 15 Bom 3 0

(*b*) *D ttat ja* v *I adhabai* (19–1) 4 Bom 6–7 634 60 I C 885

(*c*) *Mir Umar Ali* v *Nasibunnissa* (1911) P R 8 13 I C 800

(*d*) *Ba Divali* v *Shah Vishnu* (1910) 34 Bom 18 4 I C 8 9 *Sakharam* v *Sadashev* (1913) 3 Bom 480 19 I C 894

(*e*) *S dhnath* v *Ganesh* (1913) 37 Bom 60 17 I C 63 *Nara jen* v *Gopal* (1914) 38 Bom 39 –3 I C 889 (limitation and jurisdi tion) *Frishnaji* v *Ma ut* (1910) 1– Bom L R 76 7 I C 966 (status as agriculturist)

(*f*) *Chan al wami* v *Gangadh appa* (1915) 39 Bom 39 26 I C 88 (jurisdiction) *Bhama* v *Bh m garda* (1915) 39 Bom 4 1 –3 I C 461 (res judicata) *Dattat ja* v *I adhab i* (19 1) 45 Bom 6 7 60 I C 885 (status as agriculturist) See also *Kam i D b* v *P omotha* (1914) 19 C W N 755 2 I C 31 (maintainability of suit) *(labchand* v *Balir m* (1915) 39 Bom 4 3 28 I C 589 *I amanach rya* v *Covind* (19–3) –5 Bom L R 8 6 6 I C 1014 (–4) A B 33

Points of distinction between the definition of decree in this Code and that in the Code of 1882 —The definition of decree as it stood in the Code of 1882 has been modified in the following two respects —

1 Under the Code of 1882 no adjudication came within the definition of a decree unless it decided *the suit* Under this Code an adjudication which conclusively (*g*) determines *the rights of the parties* with regard to all or any of the matters in controversy in the suit is a decree *though it does not completely dispose of the suit* But the decree in that case is called a preliminary decree as distinguished from a final decree The present definition is wider than that in the Code of 1882 in that it includes preliminary decrees within its scope the object being to permit an appeal from preliminary decrees See notes below Preliminary decree

2 Under the Code of 1882 there was a conflict of decisions as to whether an order of dismissal for default was a decree The present section expressly declares that an order of dismissal for default is not within the definition of decree the object being to exclude the right of appeal from such order See note below Order of dismissal for default

Two other alterations both of a minor character may also be noted here They are as follows —

(*i*) An adjudication directing accounts to be taken is no longer to be *deemed* to be a decree as under the Code of 1882 it *is* a decree by the very terms of the present definition though a preliminary one Under the Code of 1882 such an adjudication was appealable for it was to be *deemed* to be a decree Under this Code it is appealable for it *is* a decree This distinction however is of no practical importance See notes to s 97 below

(*ii*) The word within has been substituted for mentioned or referred to in with a view to bring within the definition of decree orders against sureties (s 145) and orders as to Court fees in pauper suits (O 33 r 13) and thus providing for appeals therefrom See notes to s 14 and O 33 r 13

The definition of decree is important because it determines the right of appeal Hence every material change made in the definition of that term must be taken to have been made for the purpose either of permitting an appeal from adjudications which were not appealable before or excluding a right of appeal from adjudications from which an appeal was permitted under the old law It is from this standpoint therefore that the new definition has been examined

Preliminary decree —A decree may be preliminary or final or it may be partly preliminary and partly final A decree is preliminary when the adjudication though it conclusively determines the *rights* of the parties with regard to some or one of the matters in controversy in the suit *does not completely dispose of the suit* and further proceedings have to be taken before the suit can be completely disposed of It is final when such adjudication completely disposes of the suit (*h*) As to appeals from decrees see ss 96 and 97

The question whether a decision amounts to a preliminary decree is one of considerable importance in view of the provisions of s 97 by which it is provided that if a party aggrieved by a preliminary decree does not appeal therefrom within the period of limitation allowed for appeals he shall be precluded from disputing its correctness in an appeal from the final decree The High Court of Bombay as already noted at one time treated findings on issues as preliminary decrees but this was set right by the Full Bench in *Chanmalswami* v *Gangadharappa* (*i*) The following are instances of decrees that are final or preliminary or partly final and partly preliminary

(*g*) The addition of the word conclusively is in accordance with the decision in *Lekha* v *Bhauna* (1896) 18 All 101 104

(*h*) *Kh h R m v T l a R m* (191) P R no p at pp 6 39 I C 100

(*i*) (191) 39 Bom 339 6 I C 88

Illustrations

1 *A* sues *B* for cancellation of a document and a decree is passed in the suit This is a final decree for the suit is completely disposed of

2 A suit is brought by one partner against another for a dissolution of partnership and for the taking of partnership accounts Here the Court may pass a *preliminary* decree declaring the proportionate shares of the parties and directing such accounts to be taken as it thinks fit and after the accounts are taken it may pass a *final* decree directing payments of debts due by the partnership and the costs of the suit and directing payment to the parties of the amount found due to them on the taking of accounts See O 20 r 15

3 *A* sues *B* for the recovery of possession of certain immovable property and for mesne profit The Court may pass a decree for possession of the property and direct inquiry as to mesne profits Here the decree is partly final and partly preliminary It is final so far as it directs delivery of possession to *A* It is preliminary so far as it directs an inquiry as to mesne profits After the inquiry is completed the Court has to pass a final decree in respect of mesne profits in accordance with the result of the inquiry See O 20 r 12

The following is a list of suits in which a preliminary decree may be passed under this Code —

1 Suits for recovery of possession of immovable property and for rent or mesne profits (O 20 r 12)
2 Administration suits (O 20 r 13)
3 Suits for pre emption (O 20 r 14)
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7 Suits for foreclosure of a mortgage (O 34 rr 2 3)
8 Suits for sale of mortgaged property (O 34 rr 4 5)
9 Suits for redemption of a mortgage (O 34 rr 7 8)

The above list is not exhaustive and there is nothing to preclude the Courts from passing a preliminary decree in other cases (*j*)

Rejection of plaint —As to an adjudication rejecting a plaint it has been expressly provided by the present clause that it shall be deemed to be a decree Such adjudication therefore is appealable as a decree (*k*) An appeal however is not the only remedy open to a party whose plaint is rejected for he may cure the defect for which the plaint was rejected and present a fresh plaint (O 7 r 13) As to the cases in which a plaint shall be rejected see O 7 r 11

Order returning plaint —A plaint may be returned for amendment (O 6 r 17) or to be presented to the proper Court (O 7 r 10) In either case the decision returning the plaint is an order as distinguished from a decree An order returning a plaint to be presented to the proper Court was appealable under the Code of 1882 [s 588 cl (6)] and it is also appealable under this Code [O 43 r 1 cl (a)] An order returning a plaint for amendment was appealable under the Code of 1882 [s 588 cl (6)] it is no longer appealable under this Code (*l*)

(*j*) *De[illegible]* v *[illegible]* (1901) 4 Bom 6[illegible] 633 60 I C 885 *[illegible]* v *[illegible]* (1923) [illegible] 9 9 99 393 4 I C 3 3 ( ) A C 160 *[illegible]* (1923) 46 M d 148 I C 868 ( ) A M 384 *[illegible]* (19[illegible]) 6 Ran 9 110 I C 41 ( ) A I 168

(*k*) *[illegible]* v *[illegible]* (1914) P P 60 I C 56

(*l*) *[illegible]* v *[illegible]* (1911) P P no. 96 p 3 4 11 I C [illegible]

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(*h*) *[illegible]* v *[illegible]* (1917) P R no [illegible] at pp 6 [illegible] 39 I C 100

(*i*) (191[illegible]) 39 Bom 339 6 I C 88

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The above list is not exhaustive and there is nothing to preclude the Courts from passing a preliminary decree in other cases (*j*)

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(*j*) *D ll t a ja v I dl abni* (19 1) 4 Bom 6 633 60 I C 88 *R ji Fetr Mol n v M tola* (19 3) Cal W N 989 99 393 4 I C 3 3 (4) A C 160 *4bl l Staker v 4bd l I I nn* (19 3) 40 Mad 148 I C 808 (3) A M 84 *U I i J v L I o bet* (19) 6 Ra 9 110 I C 41 (8) A I 168

(*k*) *ad i Ka r v Guta S gh* (1914) P P 80 I C 6

(*l*) *G rd is v Bl g* (1911) P P no 96 p 34 11 I C 31

Rejection of memorandum of appeal—The rejection of a plaint is deemed to be a decree There is no express provision for the rejection of a memorandum of appeal but the Court has the power to do so under sec 107 (2) An order rejecting an appeal as not duly presented (m) or as scandalous (n) or as insufficiently stamped (o) is appealable as a decree A memorandum of appeal which is time barred is dismissed under the Limitation Act and such dismissal disposes of the appeal and is appealable as a decree (p) When an appeal is rejected under O 41 r 10 (2) for failure to furnish security for costs there is no appeal for the order does not determine the rights of the parties (q)

Order returning memorandum of appeal—No appeal lies from an order returning a memorandum of appeal to be presented to the proper Court (r) Nor does an appeal lie from an order returning a memorandum of appeal for amendment

Section 47—Execution proceedings—An execution proceeding though a proceeding in a suit is not a suit (s) An order made in an execution proceeding is not a decree unless it determines a question within sec 47 (t) If it decides a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree it falls within the scope of sec 47 and is a decree—but orders that are merely incidental and refer to the conduct of the proceedings are not within the section (u) Thus a decision refusing to recognize the transferee of a decree (v) or to record an adjustment of a decree (w) falls within sec 47 and is appealable as a decree But an order refusing leave to bid at an execution sale (x) or staying or refusing to stay execution on security being furnished (y) is an interlocutory matter and not appealable

Section 144—Restitution—The determination of a question under sec 144 is a decree and is appealable as such. See note Bar of Suit under sec 144 (2)

Appealable orders—Appealable orders are those specified in sec 104 and O 43 r 1 They are excluded from the definition of decree even though they may fall under sec 47 and would be decrees if the Code had not expressly excluded them e g an order setting aside or refusing to set aside a sale under O 21 r 92 The effect of this exclusion is to do away with the right of second appeal

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(m) *Ajya n* v *Nag bhoo Sh man* (1893) 16 Mad 8

(n) *Zam dar of Tuni* v *Ban ajja* (1899) Mad 155

(o) *P p Singh* v *Mukl aj Singh* (188) All 88 *Mela Mal* v *Ha bhaj* (1884) P I 115

(p) *Gul b Pai* v *Ma gl Lal* (1885) 7 All 4 *Raghun th* v *Nilo* (1885) 9 Bom 5 *Ganga D s* v *Ramjoj* (1 80) 1 C I 30 *Samin thi* v *Verkatasubb a* (1903) 7 Mad 1 *Rakh l* v *Ashutosh* (1913) 17 C W N 807 19 I C 931

(q) *Rakh l* v *Ashuto h* (1913) 1 C W N 807 19 I C 931 *Lekla* v *Bla a* (1896) 18 All 101 *Jo e h* v *M d a* (19 1) 49 Cal 3 5 6 I C 7 1 (2) A C 46

(r) *Raghunath* v *Shamo Koe i* (1904) 31 Cal 344 See *Mal b r* v *Beh* (1891) 13 All 3 0

(s) *Ve kata* v *Ve kata ma* (1898) M d 6 8

(t) *Sar o ti* v *Moti* (1914) 41 Cal 160 I C

( ) *Jogod I y* v *F d sh* (189) 4 Cal 39 *S ag m* v *S b hman a* (1904) 7 Mad 9 F B *D ki* v *Bans* (191) 16 C W N 1 4 10 I C 3 1 *Mukh* v *M ourrah* (191) 34 All 530 16 I C 50 *Srinivas* v *A sho* (1911) 38 Cal 54 9 I C 86 *Sarasi a* v *Moti* (1913) 41 Cal 160 I C 2 *Hus in Bl n* v *Batul Sh h* (19 4) 46 All 33 3 83 I C 1035 (4) A A 808 *Sarla ni* *R m R ttan* (19 0) 2 Lah L J 398 58 I C 603 *S e dra Nath* v *M ti thaj* (19 0) 5 Pat L J 0 56 I C 4

(v) *Bad Na a n* v *J i Kishen* (1894) 16 All 483 *Tame h* v *Thak r* (1903) 5 All 3 *Gang D* v *Ja l ub* (1900) Cal 6 0 *S bbutha am al* v *Chidamb r m* (190) 5 Mad 383 *Ha ditta* v *Nig h a* (19) 4 Lah L J 9 ( ) A L 396 *R Bal d r* v *B j a ji* (19 4) 3 Pat 344 8 I C 40 (5) A 1 16

(w) *Jamna* v *Mallu* (1894) 16 All 1 2 *I j* *Bh j* (188) 11 Bom 57 *Guru ya* v *Nud appa* (189) 18 M d 6 *J l a d n* v *Sh o anlin* (19) 1 L t 644 69 I C 645 ( ) A I 6

(x) *Jodoo ath B j M hun* (1896) 13 Cal 174 *K Tha Ha i n* v *Ma Hn n I* (1911) 38 Cal 71 38 I A 1 0 11 I C 545

(y) *Sar swati* v *Moti* supra *Ja ard n* v *Martand* (19 1) 4 Bom 241 59 I C 3 *H a n Bl i* v *Beltie* (19 4) 46 All 733 83 I C 103 (4) A A 808 *Raj dra K slor* v *Mathu a M han* (1919) C W N 5 55 I C 8

Order of dismissal for default —A suit may be dismissed for default of appearance under O 9 r 8 Such a dismissal is not a decree and is not appealable Under the Code of 1882 there was a conflict of decisions the Madras High Court holding that the order was not appealable ( ) while the other High Courts held that it was appealable (a) An appeal may be dismissed for default of appearance under O 41 r 11 (2) or r 17 Such an order of dismissal is not a decree and is not appealable (b) But an order dismi ing an appeal under O 41 r 11 (1) had been held to be a decree (c)

There may al o be a dismi al for default under O 9 r 3 if neither party appears when the suit is called on for hearing This is al o excluded from the definition of decree

Non appealable orders —Orders that are not appealable are generally speal ing orders that are processual i e interlocutory or incidental orders regulating procedure but *not deciding any of the matters in controversy in the suit Such orders occur both* in suits and in execution proceedings Their number is legion and the following are cited merely by way of illustration In suits — under ec 148 for enlargement of *time* (d) under ec 1. for amendment of a clerical error in a judgment (e) under O 9 r . granting an application for restoration of a suit ( ) under O 9 r 13 granting an application to et aside an ex parte decree (g) under O 14 r 9 refusing to frame an issue (h) In execution proceedings —under O 21 r 40 refusing an application to arrest a judgment debtor (i) under O .1 r 66 settling the terms of a sale proclamation (j) See al o cases cited under note *Section 47—Execution proceedings* p 10

Decree holder —The definition in the Code of 1882 included a transferee of a decree but thi was inconsistent with the provi ions relating to execution whereby an oral transferee has no *locus stan li* the section therefore enacts that a transferee is not a decree holder unless he has been recognised by the Court A decree for specific performance of an agreement for the sale of immovable property may be executed either by the plaintiff or the defendant either party being a decree holder in such a case (k)

(4) district " means the local limits of the jurisdiction of a principal Civil Court of Original jurisdiction (hereinafter called a District Court "), and includes the local limits of the ordinary original civil jurisdiction of a High Court

Following this definition the expression District Court as used in the Inventions and Designs Act 5 of 1888 has been held to include a High Court in the exercise of ordinary original civil juri diction (l)

( ) *Gilki o v Subram i va* (1899) Mad 1

(a) *C st P l y v H i Mohan* (1903) 8 C W N 313 *I mela d a Madlao* (189) 16 Bor 3 *All kl v Bhagi ati* (188) 9 All 4

(b) *Puki man v Ia n Cla dra* (191) 39 Cal 341 14 I C 8 3 *S ujiro v I ntp* (19 3) Pat 39 I C 284 (.3) A P 314

( ) *Ali j Ali v Ja r Ali* (19 6) 30 C W N 334 93 I C 909 (.6) A C 368

(d) *S a ja v Pa b) I* (1913) 35 All 58 1 I C 85

(e) *Val nakst ja v M faksl ar* (1900) 23 Cal 17 *Nara j m v Natesa* (189) 16 Mal 4 4 *Ba Sh i I ktuba v Agar a at* (190) 31 Bom 44 *B ra nih La I nan Si gh* (1911) I R 04 10 I C 8 0

(f) *H d m n v Ji ghoo* (1880) C I 11 *F al v Hasl at* (1916) P R 40 31 I C 914 and un ler O 9 r 4 *Alwar v Ve lamma a* (188) 10 Mad 0 *Wahid n r ssa v J indan Lal* (1913) 3 All 4 91 C 14

(j) *Sl ma Dass v Har uns* (1889) 16 Cal 4 6

(i) *I ljaram v Alagappa* (191) 3 Mad 1 8 I C 340 *Eb al m Fuckru ssa* (18 9) 4 Cal 531

( ) *Lala Das M a Mal* (19) 4 Lah L J 66 (..) A L .59 *Abd l Rah man v Mah med* (1898) 1 Mad 9

(j) *Sitaram v Si b amania* (1904) . Mad . 9 *Ramaratha v le Lata h lam* (19 3) 44 Mad L J 93 I C 8 6 (3) A M 619 *P h v Man* (191) 16 C W N 9 0 1 I C 88

(k) *Bo Fa in b bi v Abderel man* (19) 46 Bom 990 6 I C 66 ( ) A B .6

(l) *Kedar ath v Go eth* (190) 1 C W N 446.

(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor General in Council

Foreign Court—The Privy Council is not within this definition for though it is situate beyond the limits of British India it is invested with judicial authority within it (*m*) But the High Court of Justice in England whether it be the Chancery Division (*n*) or the King's Bench Division (*o*) is a foreign Court The Ceylon Court also is a foreign Court (*p*) and so is the Supreme Court of Mauritius (*q*) and Courts in Native States (*r*) As to suits on judgments of the High Court of Justice in England see notes to s 13 A British Indian Court will not give effect to a foreign judgment etc

(6) "foreign judgment" means the judgment of a foreign Court

(7) "Government Pleader" includes any officer appointed by the local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader

(8) "Judge" means the presiding officer of a Civil Court

No judge can act in any matter in which he has any pecuniary interest nor where he has any interest though not a pecuniary one sufficient to create a real bias (*s*)

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order

Judgment—In England the word judgment is generally used in the same sense as decree in this Code For the meaning of the word in the Letters Patent see Appendix II

(10) "judgment debtor" means any person against whom a decree has been passed or an order capable of execution has been made

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued

Legal representative—The expression legal representative was not defined in the Code of 188 In its strictest sense the term legal representative was limited to

(*m*) *Bowl v Bowles* (1884) 8 Bom 5 1
(*n*) *I d n B k v Horm sji* (18 1) 8 B H C 00
(*o*) See *De p Narans v D t rt* (1904) 31 Cal 4
(*p*) *Sh k 4th v Darud* (1909) 3 M d 469 4 1 3 I C 190
(*q*) *K n Isuf* (1904) 29 Cal 509
( ) *Gu d l v R j of Faridkot* (189) 2 Cal 1 I A 1 1
( ) *Al v Gag b a* (189) 19 Bom 608 See also *F o e U d B weries Co v Bath Justices* [19 6] A C 586

executors and administrators only (t) and in cases under the Indian Succession Act that is still the case (u) But its meaning was extended after many conflicting decisions to include heirs and also persons who without title either as executors administrators or heirs, were in possession of the estate of the deceased All these earlier cases are reviewed in *Dinamoni* v *Elahadut Khan* (v) and the definition settles the meaning of the term as there explained (u) See also notes to sec 50 sec 52 and O 22 r 3 *Party in a representative character* Where a person is a party in a representative character the legal representative is the person who after his death represents the estate that is the subject matter of the suit Thus on the death of a trustee or of a shebait of a mutt his successor in office and not his executor or heir is the legal representative and the suit would be continued by or against the successor under O 22 r 3 or r 4 A reversioner sues in a representative character as representing the reversionary right to the estate of the last male owner The legal representative of such reversioner is the *next* reversioner and a suit by a reversioner to set aside an adoption by a widow may be continued on his death by the next reversioner (x) A suit by a Hindu daughter (y) or by a Hindu widow ( ) to recover the father s or husband s estate is continued after her death by the next heirs entitled to come in after her except in Bombay where the daughter takes an absolute estate It has been held that a coparcener leaves no estate in the coparcenary property at his death and so the surviving coparcener is not his legal representative with reference to that property (a) See note Legal Representative under O 22 r 3 The Official Assignee has been held to be the legal representative of the insolvent judgment debtor within the meaning of O 21 r 22 of the Code (b)

Intermeddles with the estate —One who intermeddles with the estate of a deceased person even though it may be with *part* thereof is a legal representative within the meaning of this clause and is liable to the extent of the property taken possession of by him (c) But it has been held that a mere trespasser is not a legal representative as he has not intermeddled with the intention of representing the estate (d)

(12) ‘mesne profits” of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession

Mesne profits —The Code of 1882 for the first time included interest in the definition of mesne profits The reservation as to profits due to improvements made by the person in wrongful possession is new

See s 144 and notes to O 20 r 12

(t) *Price* v *Strange* (18) 6 Mad 159
(u) *Bhimaj* v *Adarji* (1894) 18 Bom 33 *Barrett Bros* v *Fowle* (19) 3 P L 46 85 I C 3 , (’25) A P 186
(v) (1904) 8 C W N 843
(w) (1904) 8 C W N 843 at p 858
(x) *Venkatanarayana* v *Subbammal* (1915) 38 Mad 406 4 I A 1 9 I C 98
(y) *Mahadeo* v *Sheo I n* (1913) 35 All 481 21 I C 464 *Jadub n* v *Malpal Sing* (1916) 38 All 111 3 I C 104 *Ram Swami* v *Jodim yya* (1916) 39 Mad 39 I C 1001
(z) *Prammoyi* v *Ire th* (1896) 23 Cal 6 6 *Tribhuwan* v *Sri Narain* (1898) 0 All 341 *Rikhai Rai* v *Sheo Iujan* (1910) 33 All 15 I C 9
(a) *Chunilal* v *B Mani* (1918) 4 Bom 504 46 I C 74 *D arka Da* v *K h n* (19 1) 2 Lah 114 61 I C 6 8
(b) *Raghunath Das* v *S d r Das* (1914) 41 I A 1 5 4 Cal 83
( ) *D pd* v *Sada Kuar* (1913) P R no 115 p 436 I C 4 See also *Ram Singh* v *Wa yan S gh* (19 3) 5 Lah L J 459 I C 585 (24) A L 2 1 [no intermeddlin]
(d) *Satya Ranjan* v *Sarat Cha d a* (19 6) 30 C W N 65 96 I C 695 (26) A C 8 5

(13) "movable property" includes growing crops

Growing crops —These are now movable property and cases in which crops were held to be immovable property until reaped are obsolete The definition must be limited to the Code for under sec 3 (26) of the General Clauses Act 1897 standing crops are immovable property

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree

See notes under cl (3) of this section

(15) "pleader" means any person entitled to appear and plead for another in Court and includes an advocate, a vakil and an attorney of a High Court

Pleader —The term pleader is here used in a much larger sense than its ordinary signification as a convenient term to designate all persons who are entitled to *plead* for others in Court Pleader in its ordinary sense is synonymous with vakil (e)

Authority to compromise —An attorney or solicitor is entitled in the exercise of his discretion to enter into a compromise on behalf of his client if he does so in a *bona fide* manner (f) And so is counsel (g) But a pleader cannot enter into a compromise on behalf of his client without his client s *express* authority (h) The reason is that both counsel and solicitor have an *implied* authority to compromise the former by reason of his *retainer* and the latter by virtue of his position of *agent* in relation to his client (i)

The result is that the consent of the client is not needed for a matter which is within the ordinary authority of counsel and if a compromise is entered into by counsel it binds the client though his consent was not taken (j) But what if the authority of counsel has been expressly limited by the client and counsel consents to an order or decree in spite of the dissent of the client or on terms differing from those which the client authorized ? In such a case if the limitation of authority is communicated to the other side consent by counsel outside the limits of his authority is of no effect (k) If the limitation is not communicated to the other side the question arises whether having regard to the fact that the other side entered into the compromise believing that the opponent s counsel had the ordinary unlimited authority the Court has power to interfere It has been recently held by the House of Lords that it has and that it is not prevented by the agreement of counsel from setting aside or refusing to enforce the compromise that it is a matter for the discretion of the Court and that when in the particular circumstances of the case grave injustice would be done by allowing the compromise to stand the compromise may be set aside even although the limitation of counsel s authority was unknown to the other side (l) The authority of counsel and solicitor to compromise a suit is limited to the issues in the suit A compromise will not therefore be binding on

(e) *Pleaders of the High Court in re* (1884) 8 Bom 145

(f) *Fray v Voules* (1859) 1 E & F 839 *Jagannathdas v Ramdas* (18[illegible]0) 7 B H C O C [illegible]9 *Owen in re* (1903) 1 Ch 81 *Little v Spreadbury* (1910) K B 6[illegible]9 [apparent authority but misunderstanding on part of client as to terms of compromise]

(g) *Neale v Gordon Lennox* [190[illegible]] A C 465 *Bahadur v Shankar* (1891) 13 All

(h) *Jagapati v Ekambara* (1898) 21 Mad [illegible]4 *The [illegible] v [illegible] Kl mm [illegible]* (1919) 41 Mad 33 41 I C 4[illegible]9

(i) Counsel is not his client s agent but solicitor is *Matthews v Munster* (1888) [illegible]0 Q B D 141 14[illegible] *Jang Bahadur v Shankar* (1891) 13 All

(j) *Matthews v Munster* (188[illegible]) [illegible]0 Q B D 141 *Jang Bahadur v Shankar* (1891) 13 All [illegible] *Carrison v Rodrigues* (1886) 14 Cal 11[illegible] *Muthu [illegible] Chettiar v Kuppan Chetti* (19[illegible]) 50 Mad 86 10 I C [illegible] ( ) [illegible] M [illegible]

(k) *Strauss v Francis* (1866) L R Q B 379 38[illegible]

(l) *Neale v Gordon Lennox* [190[illegible]] A C 46[illegible] 4[illegible]0 *Shepherd v Robinson* [1919] 1 K B 4[illegible]4 *T[illegible] B la D[illegible]s v Su[illegible]d a Nath* (19[illegible]5) 41 C[illegible] L J 13 18 88 I C 389 ( ) [illegible] C 866 *Ch[illegible] L[illegible] v H[illegible]ra L[illegible]* (1[illegible]) 3[illegible] C W N 44 106 I C 309 ( ) A C 3[illegible]8

a client if it extends to matters *outside* the scope of the particular case in which the counsel or solicitor is retained (*m*) The appointment of a receiver of debutter property in a partition suit is a collateral matter and not within the scope of counsel s authority and an arrangement for the appointment of a party s attorney as r ceiver interrupts the relationship of attorney and client and will be set aside (*n*) A compromise effect ed *out of Court* is also not binding upon the client (*o*) but a compromise entered into by coun el and sanctioned by the Court is not vitiated merely because counsel consi dered the matter in the corridor of the Court or the Bar library (*p*) And since a comprom e i no more than an agreement it can be set aside at the instance of the client if it has been made by the counsel or solicitor under a misrepresentation or mistake (*q*) The application to have the suit restored to the list should be made before the decree is sealed (*r*)

Power to refer to arbitration —The law is the same as regards reference to arbitration Coun el has an *implied* power to consent to a reference and so has a soli citor on the record (*s*) But the authority does not extend to referring the case to arbitration on terms *different* from those which the client has authorised (*t*) A pleader or vakil has no power to refer a case without the expre s authority of his client (*u*) nor to settle a case by the oath of the opposite party (*v*)

Authority to withdraw suit —Counsel has an implied power to withdraw an action (*w*) As regards vakils or pleaders it has been held that a vakalutnama couched in general terms suffices *prima facie* to authorize him to apply on behalf of his client for leave to withdraw a suit and in the absence of anything to show that the vakil had acted contrary to the client s instructions or otherwi e was guilty of mis conduct in making the application the client is bound by the act of his vakil (*x*)

Power to bind client by admission —Counsel (*y*) solicitors ( ) and pleaders or vakils (*a*) have an implied authority to bind their clients by admissions of *fact* pro vided such admissions are made during the actual progress of litigation and not in mere conversation (*b*) A verbal admission by a pleader must be taken as a whole and must not be unduly pressed (*c*) but an admission of liability by a vakil is sufficient to warrant a decree against his client in the suit (*d*) The result is that the client will be bound by the admi sion even though it may be erroneous But counsel solicitor or vakil cannot bind his client by an admission on a point of *law* Hence if the admission be erroneous the client is free to repudiate it (*e*) It may here be observed that the omission

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(*m*) *Nund L l v N starini* (1900) Cal 4 8 *Sw nf n v Lord Chelmsford* (1850) 29 L J (Ex) 38

(*n*) *Johu mull v Ked rnath* (19 7) 55 Cal 113 104 I C 38 ( ) A C 14

(*o*) *Asl ran v E I I y Co* (19 5) 5 Cal 386 88 I C 413 ( ) A C 696

(*p*) *Joh urm ill v K darn th supra*

(*q*) *Hickm n v Be ens* (189) Ch 638 *Wilk j v Sa de son* (189) Ch 634 *Hud de feld B king Co v Li te* (189) 2 Ch 3 *B bee Soloman v Ab lool Azeez* (1881) 6 Cal 687 06 *F jone Hoe Tsee v Kyon So n Sun* (19) 3 Rang 61 ( ) A.R 314

( ) *B rry v Mullen* (18 1) 5 Ir Rep 368 *Ja g L had v Sh kar* (1891) 13 All *C r son v I odri es* (1886) 13 Cal 11

(*s*) *Sm th v T omp* (1840) C B 5 *F n B v Ea te n Count es I y Co* (1848) I x 344

(*t*) *Neale v Gordon Le nox* [1902] A C 46

(*u*) *Thaku P r al v I alla* (18 4) 6 N W P 210

( ) *S dashiv v M ruti* (1890) 14 Bom 4

(*w*) *Chambe s v Mason* (18 8) 5 C B N S 9 *St ss v Franci* (1866) L P 1 Q B 379

(*x*) *Ram C omar v Coll ctor of Beerbhoo* (1866) 5 W R 80

(*y*) *H ller v Worm an* (1860) F & F 16 *Stricy v Blake* (1836) 1 M & W 168

(*z*) *Wag taff v Wat on* (1833) 4 B & Ad 339 *I th v L ion* (1846) 9 Q B 147

(*a*) *Ko r Narain v Sree ith* (1868) 9 W R 48 *Rajunder v B j* (1839) M I A 181 331 *Hingan Lal v Man a Ram* (1896) 18 All 384 *Ve kata v Bhash y ka l* (1899) M 1 538

(*b*) *I y v Wright* (180) 1 Cam 139 *Pa k v Hawksh w* (181) St 239 *Patch v Lyon* (1846) 9 Q B 14

(*c*) *N ll a v Jodha* (1884) 6 All 406

(*d*) *S emutty Dos ee v Pi ambe* (18 4) 21 W R 33

( ) *Dwar buz v Fatil* (1898) 3 C W N 222 (pl ad r) *Ben I er hai v Dudhnath* (1900) Cal 156 26 I A 216 (couns l) *K sh ji v Rajmal* (1 99) 24 Bom 360 363 *N yan v Venkat charya* (1904) 28 Bom 408

of a pleader or counsel to argue a question of law or his abandoning a question of law does not preclude the Court from dealing with the question (*f*)

Power to abandon issue—A pleader's general powers in the conduct of a suit include the power to abandon an issue which in his discretion he thinks it inadvisable to press (*g*)

(16) "prescribed" means prescribed by rules

(17) "public *officer*" means a person falling under any of the following descriptions, namely —

(a) every Judge,

(b) every member of the Indian Civil Service,

(c) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government,

(d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorised by a Court of Justice to perform any of such duties,

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement,

(f) every officer of the Government whose duty it is, as such officer, to prevent offences to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience,

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue process, or to investigate, or to report on, any matter affecting

(*f*) B. P. rsh d v. *Dudhnath* (1900) 27 Cal 1 6

(*g*) ... v. *Bhashy karlu* (190) ... Mad 36 [P C]

the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and

(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty

Public Officer —The definition very nearly corresponds to that of a public servant in the Indian Penal Code but a person may be a public servant and not a public officer *e g* a Municipal Commissioner and Engineer (*h*) The following have been held to be public officers a Collector and Agent for the Court of Wards (*i*) the Official Trustee of Bengal (*j*) an officer of the Indian Staff Corps (*k*) an officer in the Indian Army (*l*) an Official Assignee (*m*) the Administrator General of Bengal (*n*) a Cantonment Committee (*o*) a Receiver in insolvency (*p*)

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125

As to the relation of the body of the Code to Rules see notes to s 1 p 3 para No (11)

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures, or bonds and

(20) "signed," save in the case of a judgment or decree, includes stamped

Signed —The definition is wider than in the General Clauses Act Indians of rank sometimes use a stamp instead of signing and inability to write is not a condition precedent to the use of a stamp (*q*)

3 [S 2] For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court

Subordination of Courts

(*h*) *I g v Na ta ram* (1869) 6 Bom H C P 64 Cri Ca
(*i*) *Collector of B jnor v Muntwa* (1880) 3 All 0 *Nar a v Laksh rao* (18 6) 1 Bom 318 *Blat v Na a* (1 88) 13 Bom 343
(*j*) *S h al e v F ra o* (1881) Cal 499 *Abdul v Do tr* (188) 1 Mad 0
(*k*) *H n v Ll yd* (1901) 5 Mal 40
(*l*) *I e g v Murray* (1919) 4 Bom 16 50 I C 683
(*m*) *J b v Kemp* (190) 28 Bom 609
(*n*) *Bl of am Administ tor General* (1904) 8 C W N 913
( ) *Cecil C a v Ca to e t Committ e* (1910) 34 Bom 593 I C 6 9
(*p*) *Da d v Gon d* (19 0) 44 Bom 89 53 I C 411
(*q*) *M la f Be ares v D bi Dayal* (1881) 3 All 5 5

Subordination of Courts—The High Court with reference to civil proceedings is the highest Court of Appeal in the part of British India in which the Act or Regulation containing the expression operates see sec 3 (24) General Clauses Act 1897 The enumeration of subordinate Courts is not exhaustive and a Collector exercising judicial functions under the Mamlatdars Courts Act is subject to the superintendence and control of the High Court (r)

Different rulings of different High Courts—Where there are different rulings of different High Courts on a particular point a Subordinate Judge should follow the decision in law of a Bench of the High Court to which he is subordinate unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council or unless the law has been altered by a subsequent Act of the Legislature (s)

4 [S 4] (1) Savings In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force

(2) In particular and without prejudice to the generality of the proposition contained in sub section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land

Special or local law—The section does not mean that the Code does not apply to proceedings under special or local laws but only enacts that where there is an inconsistency the rules of the Code do not prevail (t) For instances of such inconsistencies the undermentioned cases (u) may be referred to The Mamlatdars Courts Act enacts its own special procedure which excludes that of the Code (v)

The section gives a local Act local validity and special procedure validity its own sphere No local Legislature can prescribe procedure for any Court beyond its own jurisdiction (w)

Any special form of procedure—It has been held having regard to these words that where two Judges differ in an appeal from the Original Side of the High Court the special procedure laid down in cl 36 of the Letters Patent should be followed and not the rule laid down in s 98 of the Code (x) S 98 (3) which was added by Act 18 of 1928 gives effect to these divisions

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(r) *P r holt m v Mah du* (191) 3 Bom 114 1 I C 6 6

(s) *P ltu l I v I arb t* (191) 4 I A 155 160 37 All 3 9 366 20 I C 617 *K ban Ally v Sharoda Iro h l* (1884) 10 Cal 8 *S eam rao v Kash n th* (1891) 15 Bom 419 *Balaj v S kha a n* (1893) 17 Bom 5 *Kamli Ira a l v Pa l j l m* (1919) 4 Pat L J 56 51 I C 496

(t) *Aga M l m l C len* (188) 3 Cal 1 3

(u) *I lk v Mo d* (1886) 9 Mad 33 *Appa d v S hari* (1890) 16 Mad 4 1 *Ie Latanar imha v S a* (1891) 17 Mad 98

(v) *Kasam v Ma t* (1889) 13 Bom. 5 2

(w) *Chh too Lal v Na a nd s* (19 9) 56 Cal 04

(x) *Bh das v B i G l* (19 1) 48 I A 181 4 Bom 18 60 I C 8 *Su jmal v Hor m n* (1918) 0 Bom L R 18 1 4 I C 419 *Empres v Protab Chandra* (19 4) 51 Cal 504 84 I C 31 (24) A C 668

5 [S 4 A] (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government may, by notification in the local official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government may prescribe

Application of the Code to Revenue Courts.

(2) Revenue Court ' in sub section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a *Civil Court having original jurisdiction under this Code to* try such suits or proceedings as being suits or proceedings of a civil nature

Object of the section —The object of this section is to preserve the summary character of rent litigation under local laws

6 [S 6] Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject matter of which exceeds the precuniary limits (if any) of its ordinary jurisdiction

Pecuniary jurisdiction

Pecuniary limits of jurisdiction —*See notes to s 15 under the head Court of* lowest grade competent to try a suit

Pecuniary jurisdiction in passing decrees —The jurisdiction of a Munsif in Bengal N W P and Assam extends to suits (not otherwise exempted from his cognizance) of which the value does not exceed Rs 1 000 and in the Madras Presidency to suits of which the value does not exceed Rs 2 500 It has been held by the High Courts of Calcutta (*y*) Allahabad (*z*) Madras (*a*) and Patna (*b*) that where a suit is properly brought in the Court of a *Munsif for recovery of possession of land and mesne profits prior to the* date of the suit and there is a prayer also for mesne profits from the institution of the suit which are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif the Munsif has jurisdiction to fix the mesne profits from and after the date of the institution of the suit and pass a decree therefor though the amount may be beyond his pecuniary jurisdiction The value of such a suit for the purposes of jurisdiction is the value of the immovable property plus mesne profits up to the date

(*y*) *B doadh* v *Ma* *dra* (19 8) 53 ( ) 14 89 I C 6 ( ) A C 10 6

(*z*) *S la sh n D* v *Ram Pra ad* (1911) 33 All 9 7 I C 38 *Madho D* v *P* (1894) 16 All 36

(*a*) *Aroga* v *App k* (190) Mad 343 *Kan y* v *Ie Iala* (191) 40 Mad 1 7 8 33 I C 433

(*b*) *Sh kh Mohamm d* v *Mahtab* (191) 2 Pat L J 394 41 I C 231 *D nanath* v *Mu* *M you* (19 1) 6 Pat L J 54 60 I C 346

of the suit Mesne profits after the date of the suit do not form part of the cause of action on which the suit is brought The forum of appeal also is determined by the value of the suit and not by the amount decreed See notes to s 38 Jurisdiction of Court executing decree and notes to s 96 Forum of appeal

A sues *B* for possession of land valued at Rs 686 and for the mesne profits up to the date of the suit valued approximately at Rs 200 and for mesne profits subsequent to the date of the suit not valued at all The suit is brought in the Court of a Munsif whose pecuniary jurisdiction is limited to Rs 1 000 A decree is passed in the suit for the plaintiff for possession and for mesne profits up to the date of the suit Subsequently the plaintiff applies to the Munsif for assessment of mesne profits after the date of the suit claiming Rs 60 000 for such profits The Munsif can pass a decree for Rs 60 000 though the amount exceeds his pecuniary jurisdiction

Provincial Small Cause Courts

7 [S 5] The following provisions shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887 or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

(a) so much of the body of the Code as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes,

(ii) the execution of decrees in such suits,

(iii) the execution of decrees against immoveable property, and

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 *so far as they authorize or relate to*—

(i) *orders for the attachment of immoveable property,*

(ii) *injunctions,*

(iii) *the appointment of a receiver of immoveable property, or*

(iv) *the interlocutory orders referred to in clause* (e) *of section* 94, and

sections 96 to 112 and 115

Changes in the section —The words in italics were substituted by Act I of 1926 for the words so far as they relate to injunctions and interlocutory orders which occurred in cl (b) of the original rule after the words and figures sections 94 and 95

Attachment before judgment by Provincial Small Cause Court —A Provincial Small Cause Court has jurisdiction *to attach* movable property before judgment An attachment before judgment is not one of the interlocutory orders referred to in cl (b) of the section (c)

As regards *immovable* property there were conflicting decisions of the Calcutta High Court on the question whether a Provincial Small Cause Court had jurisdiction to order an attachment of such property before judgment The whole question was considered by a Full Bench of that High Court in the undermentioned case (d) and it was held by a majority that a Court of Small Cause has such jurisdiction but expressed a doubt as to the intention of the Legislature in the matter when the Code was passed in 1908 To resolve that doubt the word in italics were substituted by Act I of 1926 for the words so far as they relate to injunction and interlocutory order which occurred in cl (b) of the original section after the words sections 94 and 95 To make the matter clearer a new rule being rule 13 was added to O 38 by the same Act

8 [S 8] Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay,

Presidency Small Cause Courts

Provided that—

(1) the High Courts of Judicature at Fort William, Madras and Bombay as the case may be may from time to time, by notification in the local official Gazette, direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications and adaptations as may be specified in the notification shall extend to suits or proceedings or any class of suits or proceedings in such Court

(2) All rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act 1882, shall be deemed to have been validly made

The provisoes were inserted in the section by the Code of Civil Procedure Amendment Act I of 1914 s 2

(c) *T mud v Hari* (1919) 46 Cal 1 53 I C 814

(d) *Bar da Ka ta Sata Roy v Sheikh Monjuld* (19) 5 C 1 - 5 8 I C 103 (5) A C 1 (1 B) approving *Sad A Ali v Samed Ali* (19 3) -3 Cal W N 16 80 I C 300 (4) A C 193 and over ruling *Kadarnath v Hem N th* (19) 49 Cal 994 0 I C 841 ( ) A C 1 6

PART I

Suits in General

Jurisdiction of the Courts and Res Judicata

9 [S 11] The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred

Courts to try all civil suits unless barred

Explanation —A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies

Alterations in the section —The word either expressly or impliedly barred have been substituted for the words barred by any enactment for the time being in force which occurred in s 11 of the Code of 1882 The latter words were held to mean *expressly* barred (*e*)

Onus —A party seeking to oust the jurisdiction of ordinary Civil Courts must establish his right to do so (*f*)

Suits of a civil nature —Suits may be divided into two classes—(1) those which are of a civil nature and (2) those which are not of a civil nature It is suits only of a civil nature which a civil Court has jurisdiction to entertain A civil Court has no jurisdiction to try suits which are not of a civil nature The explanation shews that if the principal or only question in the suit is a caste question or a question relating to religious rites or ceremonies the suit is not of a civil nature for it deals not with the rights of the citizen but with matters that are purely social But when (1) a caste question or a question relating to religious rites or ceremonies is not the principal question in the suit but is merely a subsidiary question and (2) *the principal question is of a civil nature* e g a question as to any right to property or to an office or to any other civil right and (3) the principal question which is of a civil nature cannot be determined without deciding the caste question or question relating to religious rites or ceremonies the Court has the power to decide the caste question or question relating to religious rites or ceremonies *to enable it to decide* the principal question (*g*) It is upon this principle that the Explanation to the section is based We may therefore say that a suit is of a civil nature if the *principal* question in the suit relates to a civil right The mere fact that the determination of such a question depends entirely on the decision of caste questions or questions as to religious rites or ceremonies does not take the suit out of the category of suits of a *civil* nature (see the Explanation to the section) We now proceed to consider the leading cases in which the Courts have refused to try suits on the ground either (1) that the principal question in the suit was a caste question or (2) that it related to religious rites or ceremonies

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(*e*) F J M h n v Ch dra Nath (188) 14 C 1 644 648

(*f*) Sr m th J g tha v Ka baraj du (1916) 9 M L 1 I C 801

(*g*) L lj v B lj (191) 19 Bom 50 Iragji Gor d (188) 11 B m 34

Suits in which the principal question is a caste question are not suits of a civil nature.—A caste is any well defined native community (be it Hindu or Mahomedan) governed for certain internal purposes by its own rules and regulations (*h*) A caste question is one which relates to matters affecting the internal autonomy of the caste and its social relations (*i*)

To determine whether or not a question is a caste question the test is—Would the cognizance of the matter in dispute by the Court be an interference with the autonomy of the caste? Would the Court be deciding the question which the caste as a self governing body is entitled to decide for itself If yes the question is a caste question and no civil Court has jurisdiction to entertain it (*j*) Thus a caste may pass a resolution depriving a member of *man pan* invitation or invitation to dinner or to *munj* or other ceremonic for an alleged breach of a caste rule The excluded member has no remedy in law for all that he has lost is a *social* privilege and not a *legal* right and the caste is the only tribunal to which a casteman deprived of that privilege can resort A civil Court has no power by its decree to compel the members of a caste to invite a casteman to dinner or to any ceremony (*k*) Similarly a Court has no power to compel barbers belonging to a certain caste to shave a casteman or to pare his nails though the party aggrieved may allege that he would lose caste by the loss of service at the hands of the barbers (*l*) On the same principle a member of a caste is not entitled to any remedy in law if the other members refuse to go to his house on the occasion of a death in his family and assist him in the removal of the dead body though they may in doing so break a rule of the caste It is not for a Court of law to enforce a caste rule or resolution it is for the caste itself that makes the rule or passes the resolution to do so (*m*) Hence a Court will not compel a defaulting membe to pay to the caste a sum of money which by a resolution of the caste every casteman is liable to pay on the occasion of a marriage in his family (*n*)

Expulsion from caste.—To exclude a member of a caste from invitation to caste dinners or ceremonies is as stated above to deprive him of a *social* privilege But to *expel* him from the caste is to deprive him of a *legal right* which forms part of his *status* Hence a suit will lie for a declaration that the plaintiff is entitled to be re admitted into the caste and also for damages for expulsion from the caste (*o*) But to entitle the plaintiff to a decree it must be shown that his excommunication was wrongful and the Court will in such cases enquire into the validity of the sentence of excommunication Excommunication is wrongful if a member is expelled from the caste without opportunity of explanation being offered to him (*p*) It is also wrongful if a member is expelled for an alleged breach of a caste rule which as a matter of fact he has not broken (*q*) In the mufassal of Bombay however a suit does not lie for *restoration* to caste the cognizance of such a suit being expressly barred by Bombay Regulation II of 1827 s 21 (*r*) But a suit is maintainable for *damages* on account of an alleged injury to the caste and character of the plaintiff arising from some illegal act or unjustifiable conduct of the other party

As to defamation for expulsion from caste see the undermentioned cases (*s*)

(*h*) *Abdul Kadir* v *Dharma* (1896) 20 Bom 190

( ) *Appaya* v *Padappa* (1899) 23 Bom 1? 130 *Jethabhai* v *Chapsey* (1910) 34 Bom 46 4?1 4 I C 10?

(*j*) *M ari* v *Suba* (1??) 6 Bom ? ?27

(*k*) *Raghunath* v *Janardhan* (1891) 15 Bom 599 *S dhiram* v *Sudh rari* (1869) 3 B L R A J 91 *M yash kar* v *Har shank r* (1886) 10 Bom 661

(*l*) *F j I u to* v *b ee* (1?64) 1 W R 3 1

( ) *Ka ji* v *Arj n* (1894) 18 Bom 115

( ) *Abdul Kadir* v *Dharma* (1896) 0 Bom 190

(*o*) *Jajj in th* v *Akali* (1?94) 1 Cal 463

(*p*) *App* ? v *Padappa* (1899) ?3 Bom 1 ? *Keshavl l* v *B G rja* (1900) 4 Bom 13 3 *Hall bl a* v *Madhusudanan* (1889) 1 Mad 49 *G napati* v *Bh ali* (1894) 1 Mad

(*q*) *Kr hnas mi* v *? a n* (188) 10 Mad 133

(*r*) *? ll* v *Fe hanj* (190) ?6 Bom 1 4

(*s*) (1891) 15 Bom 599 *s p a* (190) 6 Bom 1 4 *s p a* *Gob d Da* v *B shambar D s* (191) 44 I A 19 9 All 561 [uit for d fam tion for publicati n of caste re olution—occa ion of publication held to be privile d]

Suits in which the principal question relates to religious rites or ceremonies are not suits of a civil nature—Thus a suit will not lie to establish a right to parade bullocks on certain days (*t*) or to compel *punjaris* to adorn an idol at certain seasons (*u*) or to instal it in a particular temple instead of in another (*v*) There is no right of a civil nature involved in these cases and the Court will not pronounce on any religious doctrine unless it is necessary to do so in order to determine rights of property (*w*)

Suits for vindication of a mere dignity attached to an office are not suits of a civil nature—A claim by a *Swami* (arch priest) that he is entitled to be carried on the high road of a town or village in a palanquin on ceremonial occasions will not be entertained by a civil Court (*x*) What is claimed by the plaintiff in such a case is a mere mark of *honour* appended to the office of a *Swami* Civil Courts should discourage as much as possible claims of so unsubstantial and objectionable a nature and they ought not to be involved in the determination of trivial questions of dignity and privilege although connected with an office For the same reason a suit will not lie for a declaration that the plaintiff as *gurukkal* or spiritual leader is entitled to be received at a pagoda by the wardens of the pagoda with the honours and emoluments due to his rank on the occasion of the annual festival of the pagoda The duty of individuals to submit to and perform certain religious observances in accordance with the ritual or conventional practices of their race or sect is in the absence of express legal recognition and provision an imperfect obligation of a *moral* and *not a civil* nature Of such obligations the present civil Court cannot take cognizance (*y*) Following this rule the Courts have declined to entertain claims made by holders of religious office to precedence in worship such as a claim to be the first to worship the deity and to receive gifts of rice and cocoanuts on certain public religious ceremonies ( ) They have likewise declined to decide disputes as to precedence or privilege between purely religious functionaries (*a*) It is important to note that the suit in each of the above cases was not to establish a right to an *office* but for a declaration that the plaintiff was *by virtue of his office* entitled to certain tokens of *dignity* or to *votive offerings* In other word the suit was not for a claim to an *office* but to vindicate an alleged *dignity attached to an office* A suit for an office is of a civil nature but a suit for vindication of a mere dignity though connected with an office is not But if honours be attached to an office *by way of remuneration* in other words *as part of its emoluments* a civil Court can entertain a suit for such honours (*b*)

Office—Suits in which the principal question is as to a *civil* or *legal* right are suits of a civil nature The right to an office is a right of a civil nature Therefore suits in which the principal question relates to the right to an office are suits of a civil nature and they are not the less so because the right claimed may depend on the decision of caste questions or questions as to religious rites or ceremonies or even religious tenets (*c*) See the Explanation to the section

Suits for secular office—When no remuneration attaches to the office of the secretary of an Association (registered under Act 21 of 1860) a suit for a declaration that the plaintiff is the secretary of the Association and that his dismissal from the office

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(*t*) *P* v *Sh* *m* (188) 8 Bom 116
( ) *a* *lee* v *an* *dji* (1881) Bom 80
(*v*) *Loke Nath* v *Dasarath* (190) 3 Cal 10
(*w*) *Id* *or* *le* *Ge* *ral* *of* *Bomb* v *1* *f* *Ali* (19) 94 Bom I R 1060 84 I C 59
(*x*) *Sri S* *la* v *S* *d* *a* (1843) 3 M I A 198 at 1 5 *I* *ra* v *H* *n* (18 8) Bom 4 0 *A* *d* *we* *lol* *I* *ea* (19 1) 45 Bom 530 5 96 60 I C 90
(*y*) *Strim n S d* *pa* v *Kri* *tna* (156) 1 Mad H C 301
(*z*) *Na* *Trial* (1886) 10 Bom 33 *I* *aruppa* v *I* *la* *tha* *n* (1884) 7 Mad 91 *Sa* *g* v (*p* (18 8) Bom 4 6 *B* *it* v *Ti* *kra* (19 1) 41 Mad I J 3 63 I C 115
(*a*) *Math* *it* v *Stank* *a* *hary* (1909) 33 B 9 I I C 331
(*b*) *I* *gih* *r* *R* *g* *n* (1909) 3 Mad 31 3 I C 831
(*c*) *I* *r* *m* v *K* *h* *amn* *larynr* (188) 5 M I 313 *S* *rasa* v *Ti* *ure* *gada* (1) 11 Mad 4 0

was not justified by the rules of the Association is not maintainable in a civil Court *especially if the Association has the power to alter its rules from time to time* The reason is that in such a case no decree which a civil Court may pass in plaintiff s favour could prevent the As ociation from altering its rules and then dispensing with the plaintiff s services and employing some one else (*d*)

Suits for religious office —*Quaere whether every suit for a religious office is a suit of a civil nature?* The Explanation to the section assumes that a suit in which the right to an office is contested is a suit of a civil nature Now an office may be either secular or religious in its character We are here principally concerned with an office of a religious character for the que tion as to *religious* rites and ceremonies contemplated by the Explanation *can only ari e when the right to a religious office is contested* Religious offices may be divided into two classes namely —

I —Those to which *fee* are appurtenant as of right such as the office of the *Ka i* of Bombay or of the *Joshi* of a village or the *Upadhayaya* of a caste

II —Those to which no fees are attached but which entitle the holder thereof to receive such *gratuities* as may be paid to him such as the office of *pujari* or of an officiating priest in a temple or of the *Aya* of a *math*

Fees are to be distinguished from *gratuities* When fees are attached to an office the holder of the office is entitled on performance of the services to the stipulated or customary fees Thus a *Ka i* or *Joshi* is entitled on performing a marriage ceremony to the marriage fee and if the fee is not paid to him he may enforce payment by a suit In fact a fee is a sum which the holder of an office is entitled to demand as payment for the execution of functions attached to the office Be ides the fee paid to a *Kazi* or to a *Joshi* on the occasion of a marriage there may be gratuities paid to him which are entirely voluntary in their character If a person invites a *Joshi* for performing a marriage ceremony at his place and pays him the fee but no gratuity a suit will not lie at the in tance of the *Jo hi* for payment to him of any um by way of gratuity though it may be u ual to pay gratuities on such occasions the reason is that there is no *obligation in law* on the part of the person inviting a *Joshi* to make any payment by way of *gratuity* (*e*) The same remark applies to holders of religious offices referred to in class II above

The que tion which concerns us at present is whether a suit will lie at the instance of the holder of a *religious office* for disturbing him in the exercise of his *office*? If the office is wrongfully usurped can the person claiming to be the rightful holder of the office sue the intruder in a civil Court for a declaration that he is entitled to the office? Will a civil Court entertain such a suit? To answer these questions we must deal with the two classes of religious offices separately

As regards religious offices of the first class that is offices to which fees are attached there is no doubt that a suit will lie against an intruder for a declaration that the office is vested in the plaintiff Such a suit is a suit of a civil nature (*f*)

Turning now to religious offices of the second class the question that faces us i whether a suit will lie for an office to which no fees are attached? Different views have been held on this point by different Courts It has been held by the High Court of Calcutta that a suit by a person claiming to be entitled to a religious office against a usurper for a declaration of the plaintiff s right to the office is a suit of a civil nature

(*d*) *Mah raj N ra n v Sl astri* (1915) 3 All 331 —9 I C 53

(*e*) *M h mmad v S y d Ahmed* (1861) 1 Bom H C App p xviii

(*f*) *Muhamm d v Sajad Ahmed* (1861) 1 B H C App p xviii [Kazi Joshi] *Ghelabhai v Hargo an* (191) 36 Bom 94 1 I C 9 8 (ja) I r v *M ldhar* (19 1) 4 Bom 34 9 I C — I [I pa th s sa inju ction granted a ain t I anch of th ca t on the ground that th hereditary office of a p i t I in the nature of writts or immovabl property]

and will therefore be entertained by a civil Court though no emoluments are attached to the office This conclusion is based upon the reasoning that a religious office though no fees are attached to it is an office within the meaning of the Explanation to this section and that the section assumes that a suit for an office is a suit of a civil nature The office in that case was that of musicians who chanted holy songs in a *satra* at a certain village (*g*) In another case the office was that of a *shebait* and the suit was by one member of a family against another for a declaration of a hereditary right to officiate as *shebait* at the worship performed by votaries at the foot of a certain tree It was held that the suit was maintainable In this case also there were no *fees* attached to the office but voluntary offerings were made by the votaries (*h*) In a third case the right claimed by the plaintiff was the right of worship of Saradiya Haragouri Thakurani and to make certain offerings to the image installed in the place of worship and it was held that the plaintiff was entitled to maintain a suit against a usurper (*i*) It is worthy of note that in all these cases the office was one attached to a *place* as distinguished from an *absolutely personal* office

On the other hand it has been held by the High Court of Madras that a suit does not lie for a religious office to which no fees are attached According to that Court a religious office to which no fees are attached is not an office within the meaning of this section (*j*) The office in one of these cases was that of the priest of Samayacharm whose duty was to exercise spiritual and moral supervision over a certain class of persons

As regards Bombay decisions if we are to reconcile them all we must divide them into two classes namely (1) those in which the religious office is attached to a temple shrine or sacred spot and (2) those in which the office is entirely personal in its character And it may be safely said that a suit will lie for a religious office which is attached to a place though no fees are appurtenant to it such as the office of an officiating priest in a temple or of the *Aya* of a *math* (*k*) But a suit will not lie for an office to which no fees are attached if the office be personal in its character such as the office of *Chaluadi* (*l*) [bearer on public occasions of the insignia of a caste] or the office of *Guru* (*m*) The distinction between offices that are attached to a place such as a temple or a *math* and offices that are in their nature personal is our own and it must be said that none of the Bombay decisions turns expressly on any such distinction This distinction has been devised to harmonize what would otherwise be a mass of conflicting decisions though it must be observed that even then there remains one Bombay decision in which the office was a personal one and there were no fees attached to the office and yet it was held that a suit would lie for the office The distinction suggested above was approved by the High Court of Bombay in a recent case where it was held that a right to perform Urus ceremonies and to collect offerings at the shrine of a saint appertains to a religious office and can be enforced by a suit (*n*) The principal question in that case was whether a suit lies for the office of *Khatib* (preacher) *regard being had to the fact that no fees were attached to the office* and it was held that it does The Court said Had it been the intention of the Legislature that such a suit should not lie the same would have been clearly provided for (*o*) But if it is a question of the intention of the Legislature it may be said that the Explanation to the section which did not occur in the Code of 1877 appears to have been suggested directly by a passage in a judgment in

(*g*) *M at P m v B pu P m* (1888) 15 C 1 159
(*h*) *Dino Nath v Pratap Chandra* (1900) 27 C 1 30
(*i*) *Debendra v Satya Ch* (19) 54 Cal 614 10 I C 188 ( ) A C 83
(*j*) *Thol pp l v Venkata* (1896) 19 Mad 6 *Subba yya v Vedantachariar* (190) 8 Mad 23
(*k*) *L ma v I ma* (1889) 13 Bom 548 *Gu g ya v Tama* (189) 16 Bom 281
(*l*) *Sh k a v H nm* (19 8) Bom 470
(*m*) *M r v Suba* (188) 6 Bom 5 *Gad gey Ba aya* (1910) 34 Bom 455 6 I C 519
(*n*) *K m Kh v K ji Isib* (19 6) 50 Bom 148 93 I C 1 (6) A B 161 See also *D b n l v Satya Ch ra* (19 7) 54 Cal 614 6 3 10 I C 188 (7) A C 83
(*o*) *S vad H sl m v Huste ha* (1889) 13 Bom 4 9

a Madras case decided in 1871 (p) which was approved in a subsequent case by the Privy Council (q) and the religious office in both those cases was one *to which fees were attached*

The High Court of Allahabad has held that a mere right to perform *Ram Lila* (religious pageants) which does not carry with it any right to emoluments nor is attached to a shrine or temple or secret spot cannot be enforced in a Court of law (r)

The Patna High Court has held that a right to officiate at funeral ceremonies performed upon the banks of the Ganges between certain points which did not carry any fees with it but merely gratuities cannot be enforced in a Civil Court (s)

Suits for recovery of fees attached to an office are suits of a civil nature but not suits for recovery of gratuities—It is settled law that if a person usurps an office to which another person is entitled and receives the fees of the office he is bound to account to the rightful owner for them and the rightful owner may sue the *usurper* to recover the *fees* properly payable to him But the case is different where the payments are merely *voluntary* and a suit will not lie to recover *voluntary gratuities* that may have been received by the usurper (t) The reason is that where *voluntary* offerings are made they must be taken to have been intended for the very person who was then *actually* performing the ceremony whether rightfully or wrongfully and further that it is quite possible that no gratuities would have been given at all if the rightful owner officiated at the ceremony instead of the usurper (u) The same principles apply when a suit is brought by the lawful holder of an office against a *member* of the caste for employing the usurper for performing ceremonies which the rightful holder was entitled to perform Thus a village priest may be entitled by hereditary right to officiate and take fees in the families of a particular caste in the village and if a member of the caste employs an intruder in the office to perform the ceremonies the village priest is entitled to recover from the casteman the *fees* which would properly be payable to him if he had been employed to perform those ceremonies (v) But a suit will not lie against a casteman for a *gratuity* which the party might have refused to give if he had pleased (w) If for determining the plaintiff's right to the *fees* claimed it becomes necessary to determine incidentally the right to perform the ceremonies the Courts should try and decide that right (x) The above principles have been held to apply to Watandar barbers who are entitled to render services as barbers on ceremonial occasions and to receive the customary fees (y)

The cases in which a suit by the rightful owner of a religious office against a *usurper* for recovery of voluntary gratuities has been held not to be maintainable must be distinguished from those where a suit is brought by a sharer in a religious office against his *co sharers* for recovery of his share of the voluntary gratuities In the latter class of cases it has been held that a suit will lie for the basis of the claim in such cases is an *agreement* expressed or implied that all the sharers should have a share in the gratuities (z)

Dues paid by *taggals* and shopkeepers to *choudhris* of *bazars* are in the nature of *voluntary* payments hence a suit will not lie to recover such dues or for a declaration

(p) Vasimma v Krishna (1871) 6 M H C 449

(q) Krishnama v Krishnasami (1879) 2 Mad 6 6 6 I A 1 0

(r) Chunnu Dat v Babu Nandan (1910) 3 All 5 6 I C 2 3

(s) H a v Bachu (1916) 1 Pat L J 381 3 I C 34 Lutan v Prayag (1919) 4 Pat L J 53

(t) Si am Bhat v Sitar m (a e h (1869) 6 B H C 0 Iaji Lalad v Krishnabh t (18 9) 3 Bom 3 Hair v Bachu (1916) 1 Pat L J 381 35 I C 34 Chi u v B bu (1910) 3 All 5 6 I C 3

(u) Kashi Chandr v Kailash Chand a (1899) 6 Cal 356

(v) Dina ji v Sadashiv (18 9) 3 Bom 9 Ghe l bhai v Harg wan (191) 36 Bom 94 1 I C 9 8 Lali K ta v G (1890) 1 Cal 906

(w) M ri v Suba (188) 6 Bom [suit by a g u to recover gr tuiti s f om his di ciples] Dhadphle G e (188) 6 Bom 1

(x) K ish ma v Krish as (18 9) Mad 6 6 I A 1 0

(y) Bhagoji v B bu (19 0) 44 Bom 33 5 I C 13

(z) Di o Nath v Pratab Ch d a (1900) C 1 30 Bheema Cha yal v Koth Iota (190) 1 M L J 493 Di gi Cha n v Lajbal (1906) 4 C L J 469

of the right to recover them (a) A woman is not disqualified from enforcing such an agreement (b)

Where the question at issue is not a matter relating to the internal administration and affairs of a caste but to the property of the caste the civil Court has jurisdiction to interfere although there has been a division of opinion in the caste (c)

Suits relating to caste property—Suppose that a caste is divided into two factions *F1* and *F2* and that *F1* owns certain property which stands in the names of some of its members If these members secede from faction *F1* and go over to faction *F2* a suit will lie to recover the property from them at the instance of faction *F1* (d) Here the subject matter of the suit is property belonging to *one section* of the caste and the claim is against persons *outside* that section Suppose next that a caste owns a property purchased out of the *caste* funds and that it is *subsequently* divided into two factions *F1* and *F2* If faction *F2* happens at the time of the division to be in possession of the caste property faction *F1* cannot maintain a suit against faction *F2* for recovery of one half of the caste property or its value (e) Here the subject matter of the suit is *caste* property and the claim is not against an outsider but against *another section of the caste*

As regards user of caste property it has been laid down that a majority of a caste has the right to regulate the use of the property and the minority is bound by the resolution of the majority provided the resolution is not so subversive of the interests of the minority as to amount to a complete denial of their rights Thus if the majority of a caste passes a resolution that the caste cart should not be used for feasting any Brahmans and the minority invites Brahmans to a feast in the cart a suit will lie to restrain the minority from using the cart in contravention of the resolution (f)

Suits for inspection of accounts of caste property—Such a suit relates purely to a caste question and it cannot therefore be entertained by a civil Court (g)

Interference with temple property—Removal or alteration of namams or religious marks in a temple which are recognized as the badges of a particular religious denomination amounts to an interference with *property* and is a ground of action in civil Courts (h)

Interference with right of worship—Suits for a declaration of the right to worship or to offer prayers at a certain place are suits of a civil nature It often happens that the members of a particular class are alone entitled to worship in the sanctuary of a temple and to perform certain portions of the religious worship Such a right is one of a civil nature and it may be enforced by a suit in a civil Court (i)

Right of burial—The right of burial is a civil right and it has accordingly been held that an interference with the rights of the relatives of a deceased Mahomedan to recite prayers over his body before burial in front of a particular mosque being an invasion of a civil right may be enforced by suit (j)

Religious processions—Members of a religious body possess the right to conduct a religious procession with its appropriate observances along a highway and a

(a) *Bar ati v Ch mru* (190) 9 All 683
(b) *K i j Behari v Mst Vara m* (19 3) 45 All 43 1 I C 10 6 (3) A A 4 5
( ) *Fulchand v H rl l* (19 6) 50 Bom 1 4 9 I C 549 (6) A B 69
(d) *Mehta J th l l v Jamiat am* (1888) 1 Bom 5 *Pragji v Gori d* (1887) 11 Bom 534
(e) *G dh r v K lya* (1881) 5 Bom 83 *Nem h d v S racha d* (1866) 5 Bom 84 (foot note)
(f) *Lalj v H alji* (189) 19 Bom 507
(g) *etaabh i v Ch p ey* (1909) 34 Bom 46 4 I C 108
(h) *Tr h a ami v Samaram* (1907) 30 Mad 158
(i) *A l ao v Sh la* (1883) Bom 3 3 *Ar h asimi v Krish ma* (188) 5 Mad 313 *e amulu v I a d ene a* (1883) 6 Mad 1 1 *e latacl lapat v Sub ba i d* (1890) 13 M d 93 *Kalidas v Cor I rja am* (1891) 15 Bom 309
(j) *Koont U ra v Mahomed* (1907) 30 Mad 15 *I am J o v Rustumkhan* (190) 6 Bom 198

suit will lie against those who prevent the procession with its observances The worshippers in a mosque or temple which abut on a high road could not compel the processionists to intermit their worship while passing the mosque or temple on the ground that there was continuous worship there But no one sect can claim the exclusive use of the highway for their worship (k)

Suit to set aside election of directors —Such a suit is of a civil nature and the Court is entitled to take cognizance of it The matters involved in such a suit are not matters of internal management of the company (l)

Suit for administration of estate of a living Hindu debtor —Such a suit is not cognizable by a civil Court (m)

Suits expressly barred —The general rule of law is that when a legal right and an infringement thereof are alleged a cause of action is disclosed and unless there is a bar to the entertainment of a suit the ordinary civil Courts are bound to entertain the claim (n) This is in substance the rule laid down in the present section which provides that suits though of a *civil* nature are not triable by civil Courts if the cognizance of such suits is *expressly* or *impliedly* barred By expressly barred is meant barred by any enactment for the time being in force Thus section 11 provides that no Court shall try a suit in which the matter in issue is *res judicata* and section 47 bars a decree holder from filing a suit when he can take execution proceedings Section 39 of the Income Tax Act provides that *no suit shall lie* in any civil Court to set aside or modify any assessment made under that Act (o) Similarly the Pensions Act 23 of 1871 s 4 enacts that except as provided by that Act no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government (p) The cognizance of a suit by a civil Court may also be *impliedly* barred Thus a suit by a proclaimed person whose property has been attached and sold under ss 87 and 88 of the Criminal Procedure Code 1898 against the auction purchaser for its restoration is *impliedly* barred by the provisions of that Code the remedies of the proclaimed person being limited to those provided for in the Code (q) The mere fact however that an enactment provides a summary remedy in certain cases does not constitute a bar to a regular suit Thus the provisions of Act 1 of 1871 do not bar a suit for compensation for wrongful seizure of cattle (r) Again a guardian may apply to the Court for possession of his ward under sec 25 of the Act but this does not exclude a suit for that purpose (s) Another instance is O 21 r 95 (Code of 1882 s 318) That rule provides a summary remedy to which a purchaser at a sale in execution of a decree may resort to recover possession from a judgment debtor But it does not say that no *suit shall lie* to recover possession The purchaser may therefore resort to the remedy provided by that section or he may at his option bring a regular suit (t) Further the jurisdiction of a civil Court is not excluded unless the cognizance of the entire suit as brought is barred (u) The general rule is that statutes affecting the jurisdiction of Courts are to be construed so far as

(k) *Ma i Ha an M hammad Zam i* (19 5) _ I A 61 4 All 151 86 I C 36 (5) A PC 36 in app from (19 1) 43 All 69 *Sund am* *The Queen* (1883) 6 Mad 03 [F B] *Partha r d* v *Chinn kri h a* (188) 5 Mad 304 *Sadagopacha iar* v *Pama Rao* (1903) _6 Mad 3 6 *Moha d Abd il Hafiz* v *Latif Husein* (189) 4 Cal 4 *Ba h gappa* v *Dharmappa* (1910) 34 Bom 5 1 7 I C 663 *Rama i* *Balu* (19 0) 44 Bom 410 56 I C 419

(l) *So at Chandra* v *Ta ak Chandra* (19 4) 1 Cal 916 8_ I C 40 (4) A C 98

( ) *Ga garan* v *Nag nd* (1908) 3? Bom 381

( ) *Tall* v *Corp rat on of Mad as* (1915) 38 Mad 41 16 I C 971

(o) *Fo b s* v *Secret y of State* (1915) 4 Cal 151 0 I C 893

(p) *B lk isl a* v *D ttatraya* (1918) 4 Bom ?57 4 I C 590

(q) *D ra S gh* v *Faz l Dad* (19 9) 10 Lab 338 111 I C 08 (8) A L 6?

(r) *Shutt ugho i* v *Hokua* (1890) 16 Cal

(s) *Sl if* v *Munekha* (1901) 5 Bom 57

(t) *K shor* v *Ch nd r N th* (188) 14 644 See also *Nag lal* v *Officia* (1911) 35 Bom 4 3 1_ I C 391 *Cl and* v *Muhammad* (191) P _ P 83 40 I C 2 0 [suit Official Assignee] Contrast *Laon ja* (1889) 13 Bom 83 *Bl* (1901) 5 Bom 186 (19) 47 Bom 95 68 I C B 410 [cases under sec 18 Offices Act 3 of 18 4]

(u) *Antu* v *Ghulam* (1884) 6 All

possible to avoid the effect of transferring the determination of rights and liabilities from the ordinary Courts to executive officers (t) It is for the party who seeks to oust the jurisdiction of a civil Court to establish his contention (w)

The bar is generally in matters affecting the Government revenue but it has been held by the High Court of Bombay that the jurisdiction of civil Courts to try suits brought by superior holders to recover their dues from inferior holders is not barred by s 85 of the Bombay Land Revenue Code [Act 5 of 1879] (x) The same Court has held that s 4 (c) of the Bombay Revenue Jurisdiction Act is not a bar to a suit in which there is a claim arising out of the alleged illegality of proceedings taken for the realization of land revenue (y) Some Municipal Acts expressly bar suits relating to the assessment and levy of municipal rates and taxes but the civil Courts have nevertheless jurisdiction to entertain such suits if it is shewn that the assessment is mala fide or perverse ( ) or made on a wrong basis and ultra vires (a) or that the procedure enjoined by the Act has not been followed (b)

Suits impliedly barred—Besides suits of which the cognizance is expressly barred there are suits which are barred by general principles of law such as suits relating to acts of State and public policy A civil Court has no jurisdiction to entertain suits in respect of act of State (c) As to suits against the Secretary of State for India see note under sec 79 Act of State No suit will lie to recover costs incurred in a criminal Court (d) Again a suit will not lie for damages for defamatory statements made in the course of a judicial proceeding by a party or by a witness The ground of this principle is that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury (e)

Criminal Procedure Code 1898—An order made by a magistrate under section 13? of the Criminal Procedure Code cannot be called into question in a civil Court but a suit will lie for a declaration of exclusive ownership of land which a magistrate has declared to be a public highway (f) but not a suit to close the road (g) No suit lie by a proclaimed person against an auction purchaser to recover from him property sold under ss 87 and 88 of the Code of Criminal Procedure (h) But a suit will lie to set aside an irregular sale under section 88 (i) and a civil Court has jurisdiction to entertain a suit for the recovery from Government of the proceeds of the sale of property attached and sold under ss 523 and 524 of the Criminal Procedure Code (j)

( ) See H t te v Att rney Gene l (19 5) L R I C 380
(w) Al M h mmad v H h (19 8) 9 Lah 504 108 I C 48 (28) A L 1 l [Punjab A t 5 of 191?]
(x) Fash e th v Ko l ji (1918) 4 Bom 49 43 I C 99
(y) G g m v D nkar (1913) 3 Bom 54 0 I C 5 6
(z) K a di v A R l (190) 6 Bom 94
(a) Cl rma C ntu M c p l ty v S t h Ch dra (1910) 3 Cal 8 9 D b Na v Ch rm I u p (1914) 41 Cal 168 20 I C 64 Cl m M icipalit Ch pra v Ra deo (191) 3 Cal 3?4 I C 3 1 S t ry of St te v H gles (1914) 38 Bom 93 3 I C 779
(b) M rpl C ncil of Ta jor v I ma l (19 0) 3 Mal 3 Jo hi v D k r (1883) 7 Bom 399
( ) P t O S S C v Secret ry of St t (1861) 5 Bom H C App 1 approved in Secre t ry of St te v Mo nt (1913) 40 Cal 391 40 I A 48 18 I C J hang v S cr tary of St t (1903) 27 Bom 189 Shi abl j n v Secreta y of State (1904) 28 Bom 314 Ro v Sec tary of State (1916) 39 Mad 81 31 I C 9 4 McI rn v S tary of State (1911) 38 Cal 9 11 I C 3 0 S cr ta y of St te v Cockcraft (1916) 39 Mad 351 ? I C 3
(d) F l Iman v I as l (1890) 1 All 166 M hom l l v Bijamma (189) 16 Bom 100 Ch r mo v B dja Nath (190) 3 Cal 4 9
(e) Babo G h D tt v M g eeram (18 3) 11 B L R 3 1 M g ee l a n v (esh (186) 5 W R 134 Chid mb a v Th ma (1887) 10 Mad 8 N thuji v L l bha (1890) 14 Bom 9 T pl ton v J me (1901) Bom 230 D n S gh v Mahip S gh (1888) 10 All 4 Bh k mbe v P h m (1888) 15 C l 64
(f) Ch Lal v I m h h n (1888) 15 Cal 460
(g) I oope Py Lal (1 69) 16 W R 434
(h) Det a S ngh v F l D d (19 9) 10 Lah 338 111 I C 508 (28) A I 56
( ) Mian Ja v Abd l (190) 27 All 5
(j) Q Empre v Tr th a (1885) 9 Bom 131 Wa ppa v Secret ry of State (1916) 40 Bom 200 31 I C 498

Political questions —The Courts of Briti h India may determine the title of property situated within their juri diction belonging to a Native Prince though a political question is involved (*k*) But where the real object of the suit is to settle the right of succe sion to the throne and the property right involved is only contingent the Court should decline juri diction (*l*)

10 [S 12] No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a pre viously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor-General in Council and having like jurisdiction, or before His Majesty in Council

Stay of suit

Explanation —The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action

Alterations in the section —The words proceed with the trial have been substituted for the word try The words except where a suit has been stayed under section 20 which occurred at the commencement of the corre ponding section of the Code of 1882 the words for the same relief which occurred after the words previously instituted suit and the words whether superior or inferior which occurred after the words any other Court have been omitted The words litigating under the ame title are new

Scope and object of the section —The pre ent section provides that where a suit is instituted in a Court to which the Code applie the Court shall not proceed with the trial of the suit if—

first the matter in issue in the suit is al o directly and substantially in issue in a previou ly instituted suit between the same parties

secondly the previously instituted suit is pending—

- (a) in the same Court in which the subsequent suit is brought *or*
- (b) in any other Court in Briti h India (whether superior inferior or co ordinate) *or*
- (c) in any Court beyond the limits of British India e tablished or continued by the Governor General in Council *or*
- (d) before His Majesty in Council and

thirdly where the previously instituted suit is pending in any of the Courts men tioned in cl (b) or cl (c) such Court is a Court of jurisdiction competent to grant the relief claimed in the subsequent suit (*m*)

The object of the section is to prevent Courts of concurrent juri diction from *simul taneously* trying two parallel suits in respect of the same matter in i sue *B* re iding in

(*k*) N l *Kristo D b* v *Beer Chandra* (1869) 1 M I A 3
(*l*) *Sa re dra* v *B en l a* (1908) 1 C W N
(*m*) *I a a Mal* v *Ra) ara* (1919) P R no 114 p 98 53 I C 46 *Troylokh ath M leod* (1900) 8 C 1 8 34

Calcutta has an agent A at Calicut employed to sell his goods there *A* sues *B* in Calicut claiming a balance due upon an account in respect of dealings between him and *B* During the pendency of the suit in the Calicut Court *B* institutes a suit against *A* in Calcutta for an account and for damages caused by *A*'s alleged negligence Here the matter in issue in *B*'s suit is directly and substantially in issue in *A*'s suit further both the suits are between the same parties therefore if the Court at Calicut is a Court of jurisdiction competent to grant the relief claimed in *B*'s suit the Calcutta Court must not proceed with the trial of *B*'s suit and the suit in the Calicut Court being the one instituted *prior in point of time* should alone be proceeded with (*n*) But if A was *B*'s agent at Pondicherry instead of at Calicut and the suit was brought by him in the Pondicherry Court the Calcutta Court would not be precluded from proceeding with the trial of *B*'s suit the Pondicherry Court being a foreign Court See the Explanation to the section

The section does not of course empower one Court to stay the proceedings of another Court A district Court exercising insolvency jurisdiction under the Provincial Insolvency Act 5 of 1920 cannot under this section stay a suit pending against the insolvent in a subordinate Court (*o*)

Whether the subject matter of both suits must be the same—S 12 of the Code of 1882 contained the words for the same relief after the words previously instituted suit Hence it was necessary for the application of the section not only that the matter in issue in the second suit should also be directly and substantially in issue in the first suit but that the second suit must be *for the same relief* as that claimed in the first suit (*p*) The words for the same relief have been omitted in the present section The omission of these words however does not alter the law as it stood under the old section It does not follow because the words the same relief are no longer in the section that sec 10 is applicable to suits for recovery of successive rents It is necessary for the application of the decision that the *subject matter* of both suits must be the same (*q*) A suit could not be stayed even if the main issue in both the suits was the same if the subject matter of the second suit was different from that of the first suit (*r*) A previous suit for rent or for pension or for any other recurring liability for a particular year is no bar to the trial of a subsequent suit for rent or for pension or other recurring liability for a subsequent year It is however different if the first suit is for dissolution of partnership and for accounts and the subsequent suit is by one of the partners for the return of a deposit In such a case the second suit is barred (*s*)

Previously instituted suit—Note that it is the pendency of the previously instituted *suit* that constitutes a bar to the trial of the subsequent suit The word suit includes appeal It also includes an appeal to His Majesty in Council (*t*) But it does not include an *application for leave to appeal* to His Majesty in Council for the application may not be granted at all and if granted the applicant may not prefer any appeal (*u*) It seems that it does not also include applications under s 47 (*v*)

( ) *P i t ns e v Lalha* (1916) 43 C 1 144 33 I C 44 *Me kye v K sowj* (18 J) 4 C I R 8

( ) *Tl Offi il Rec ee v Palaniswam* (19) 48 Ma 1 50 84 I C 034 ( ) A M 10 1

(*p*) *Balkish K ha Lal* (1880) 11 All 14 *I l ga I g tha* (189) 0 M 1 418 4 0 *I se r v (p t* (1880) 8 C I R 113 *I ja R i g t S njha v Bh mb tti* (1900) C W N

(*q*) *Chowdl ry Jam i Nath v M t p Zem d ru ((19 3)* 7 Cal W N 74 I C 31 (3) A C 16 *B p n v Jog dra* (1916) 4 Cal L J 14 35 I C 611 *M ha aja K sh Pra ad v Sita N ri* (1910) 4 Cal L J 1 I C 36 [I n l n] *M Kho (M g B Se n* (10 8) 6 R n 115 I C 66 (J) A R 6 *D ha v (al t n* (19) 9 Bom L R 8 10 I C J ( ) A B 4

( ) *K bera v Koma* (19) 49 M I J 1 84 I C 4 1 ( ) A M 74

( ) *M h t v (j thir* (191) 16 C W N 89 16 I C 4

(*t*) C W N I C 31 (3) A C 716 *pra*

( ) *N pp v (h damba am* (1894) 21 Mad 18

( ) *Venk ta v Venk tarama* (1899) 2 Mad 6

Shall not proceed with the trial—These words indicate the action to be taken by the Court under this section The second suit is not to be *dismissed* as barred it s only the *trial* of the suit that is not to be proceeded with That may render the institution of a subsequent suit unneces ary in many cases but the section is *no bar to the institution of such suit* Nay there are cases in which it is necessary for a party to institute a regular suit to establish a right claimed by him and failure to institute the suit within the period of limitation may preclude the party from asserting the right in any other suit or proceeding Suits referred to in O 21 r 63 (Code of 1882 s 283) are suits of this character This section does not dispense with the necessity of instituting such suits (*w*) A suit may be stayed under this section even after the hearing has commenced (*x*)

Between the same parties—The mere fact that the first suit is between *Z* and *J* as plaintiffs and *W* *X* and *Y* as defendants and the second suit is between *W* as plaintiff and *Z* *J* and *S* (not a party to the first suit) as defendants will not take the case out of the operation of this section if the other conditions of the section are satisfied (*y*)

Interlocutory orders pending stay—A stay order under this section does not take away the power of the Court in the stayed suit to make interlocutory orders such as orders for a receiver or an injunction or an attachment before judgment ( )

Contract providing for place of suing—There is nothing in this section to prevent the Court from giving effect to an agreement that suits in respect of transactions between the parties to the agreement should be brought in the High Court or Small Cause Court of Bombay (*a*)

Revision—The Madras and Lahore High Courts hold that an order under this section is open to revision (*b*) but not so the Allahabad High Court (*c*) The High Court can interfere under sec 15 of the Charter (*d*)

Inherent power to grant stay—See notes to O 39 r 1

11 [S 13] No Court shall try any suit (*p* 35) or issue in which the matter directly and substantially in issue (*pp* 38 42) has been directly and substantially in issue in a former suit (*p* 36) between the same parties (*p* 55), or between parties under whom they or any of them claim (*p* 56), litigating under the same title (*p* 62), in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised (*p* 63), and has been heard and finally decided (*p* 69) by such Court

Res judicata

Explanation I—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto (*p* 36)

(*w*) *Nemag da* v *Paresha* (1898) Bom 640
(*x*) *Wahid un Nis a* v *Zamin* (19 0) 42 All 290 55 I C 89 ( ) A B 76
(*y*) *Wahid un Nissa* v *Zamin* (19 0) 4 All 90 55 I C 89 See also *M lchand* v *Gill & Co* (1919) 21 Bom L R 963
(*z*) *Sennaj* v *Pannaji* (19) 46 Bom. 431 64 I C 580 ( ) A B 76
(*a*) *Tulakram* v *Kod mal* (19 8) 30 Bom L R 546 110 I C 7 7 (8) A B 175
(*b*) *Ramachandram* v *Neelambai* (19 3) 0 I C 5 (3) A M 88 *Bishen* v *Bishen* (19 1) 61 I C 830
(*c*) *Sultanat J han* v *Sunder Lal* (19 0) 4 All 409 8 I C 90
(*d*) *S va Prosad* v *Tricomdas* (1915) 4 Cal. 9 6 7 I C 91

Explanation II—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court (p 68)

Explanation III—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other (p 38)

Explanation IV—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit (p 44)

Explanation V—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section be deemed to have been refused (p 74)

Explanation VI—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating (p 58)

Alterations in the section—

1 Explanation I is new See notes under the head Former suit p 36 below

2 Explanation II is also new See note p 68 below

3 Explanation IV to s 13 of the Code of 1882 has been omitted The reason of the omission is stated to be that it was liable to misconstruction and that the law was well established apart from the Explanation The words of the Explanation if literally interpreted would relieve parties from the bar of res judicata whenever there existed a latent power of alteration sec s 149 O 20 r 3 and O 20 r 11

4 The words public right have been added into Explanation VI in view of the provisions of section 91 relating to public nuisances

Res judicata—The present section deals with the doctrine of res judicata The leading case on the subject is the *Duchess of Kingstone's* case (e) and the following classic passage from the judgment of Sir William de Grey is a statement of the leading principles of res judicata —

From the variety of cases relative to judgment being given in evidence in civil suits these two deductions seem to follow as generally true *first* that a judgment of a Court of concurrent jurisdiction directly speaking on the point is as a plea a bar or as evidence conclusive between the same parties upon the same matter directly in question in another Court *secondly* that the judgment of a Court of exclusive jurisdiction directly on the point is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another Court for a different purpose

(e) 2 Smith's L C 731

But neither the judgment of a Court of concurrent or exclusive juri diction is evidence of any matter which came collaterally in question though within their jurisdiction nor of any matter incidentally cognizable nor of any matter to be inferred by argument from the judgment

This passage summarizes the law enacted in this ection The rule of res judicata is readily distinguished from the rule in section 10 for the latter relates to a res sub judice that is a matter which is pending judicial inquiry while the rule in the present section relates to res judicata that i a matter adjudicated upon or a matter on which judgment has been pronounced Section 10 bars the trial of a *suit* in which the matter directly and substantially in i sue is *pending* adjudication in a previous suit The present section bars the trial of a suit or an i sue in which the matter directly and substantially in issue *has already been* adjudicated upon in a previous suit Thus if *A* sues *B* for damages for breach of contract and the suit is dismissed a subsequent suit by *A* against *B* for damages for breach of the same contract is barred This is the rule of res judicata stated in its simplest form The question of *A* s right to claim damages from *B* having been *decided* in the previous suit it becomes res judicata and it cannot therefore be tried in another suit It would be useless and vexatious to subject *B* to another suit for the same cau e Moreover public policy requires that there should be an end of litigation The question whether the decision is correct or erroneous has no bearing on the question whether it operates or does not operate as res judicata (*f*) otherwise every decision would be impugned as erroneous and there would be no finality (*g*) The rule of res judi cata may thus be put upon two grounds—the one the hardship to the *individual* that he should be vexed twice for the same cause and the other public policy that it is in the interest of the State that there should be an end of litigation (*h*) Putting it in another form it may be said that every suit must be sustained by a cause of action and there is no cause of action to sustain the second suit of *A* it being *merged* in the judg ment in the first (*i*)

Res judicata and estoppel—Pes judicata is sometimes treated as part of the doctrine of estoppel but the two are essentially different Estoppel is part of the law of evidence and prevents a man from saying one thing one time and the opposite thing at another time while res judicata precludes a man from avowing the same thing in successive litigations (*j*) Mahmud J in *Sita Ram* v *Amir Begum* (*k*) said — Perhaps the shortest way to describe the difference between the two is to say that while the plea of res judicata prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon an estoppel prohibits a party after an inquiry has been entered upon from proving anything which would contradict his own previou declaration or acts to the prejudice of another party who relying upon these declarations and acts ha altered his *position* *In other* words res judicata prohibits an inquiry in limine while estoppel is only a piece of evidence

Suit—Section 11 applies in terms to cases where the matter in issue in a subse quent suit was in i sue in a former suit A suit is a proceeding which is com menced by a plaint (s 26) The section is not exhaustive and the doctrine of res judicata has been extended to adjudications in proceedings other than suits see note section not exhaustive on p 76 below Some cases extending the doctrine beyond the limits of the Code have given a more extensive meaning to the word suit Thus when probate

(*f*) *T r Cha a Kedar Nath* (19 8) 33 C W N 1 6 (8) A C 7 (F B)

(*g*) *Beh v M n l* (1901) 24 All 138 *Pl do v Ja gi Nath* (1893) 1 All 3 *Go ho v 4 dl Koer* (1884) 10 Cal 1087 *Moh l en v Sy d O ar* (1918) M W N 90 49 I C 369 7 *v Ta a ch d* (1918) 1 I 8 4 I C 3 3

(*h*) *Lock y r v Fer y an* (18) L R 4 C 19

( ) *K ng Hoa e* (1844) 13 M & W 494 504 *I ntal Ha ll* (18 9) L R 4 A C 04 5 6

(*j*) *Ca all Carri nbhoy* (1911) 36 B 14 1 1 C *Bh g r th v Bal hw* (1913) 41 Cal 69 19 I C 656

(*k*) (18 6) 8 All 3 4

was refused after a contentious proceeding the judgment was held to operate as re judicata for sec 29ɔ of the Indian Succession Act 1925 requires the proceeding to take the form as far as possible of a suit (*l*) On the other hand although an application to file a private award is required by Sch II para. 20 to be numbered and registered as a suit a refusal to file a private award has been held not to operate as res judicata (*m*) In a case decided under s 10 of the Code it was said suit is a very comprehensive term It includes any proceeding in a Court of Justice by which the party pursues the remedy which the law gives him If a right is litigated between parties in a Court of Justice the proceeding by which the decision of the Court is sought is a suit (*n*)

Former suit —The expression former suit means a previou ly decided suit and the same interpretation applies to appeals Explanation I confirms previous decisions to the same effect (*o*) It matters not that the previously decided suit was instituted subsequently (*p*)

Suits tried together—one judgment —There is a conflict of decisions as to whether if two suits involving common issues are disposed of in one judgment and an appeal is fil d against the decree in one and not in the other the matter decided in the latter suit becomes res judicata so that it cannot be reopened in the appeal It has been held in Allahabad (*q*) Calcutta (*r*) Patna (*s*) and Rangoon (*t*) that the rule of res judicata applies while in Madras (*u*) and Lahore (*v*) that it does not In *Zaharia* v *Debia* (*w*) two rival suits for pre emption in respect of the same sale were brought by two claimants *A* and *B* each of whom asserted as against the other that he had a paramount title to pre empt *A* was made a party defendant in *B* s suit and *B* was made a party defendant in *A* s suit *A* s suit was decreed and *B* s suit was dismissed *B* appealed from the decree in his own suit but he did not prefer any appeal from the decree in *A* s suit The Allahabad High Court held that *B* having failed to appeal from the decision in *A* s suit the decision had become final and operated as res judicata and could not be retried in *B* s appeal with the possible result that there might be two in consistent decrees on the files of the Court The contrary view was at one time taken by the Cal utta High Court (*x*) and in one case (*y*) it was said that the two suits being tried together neither could be said to be the former suit in relation to the other In one of these cases ( ) *A* sued *B* for possession alleging *B* to be a monthly tenant while *B* sued *A* for a declaration that he held under a lease for a term of which two years were still to run Both suits were tried together and one judgment was given finding *B* to be a monthly tenant there were two decrees one in *A* s suit for pos ession and the other in *B* s suit dismissing it *B* appealed in *A* s suit but not in his own suit *A* contended that *B* s appeal was barred by the decree in his own suit from which he had not appealed but the Court held that the decree did not operate as res judicata These decisions

(*l*) *K la h n l* v *Su lal* (1914) 38 Bom 309 23 I C 3 *Ve kata at a* v *I a a ma dari* (19 4) 46 M d L J 383 9 I C 44 (24) A M 5 8

(*m*) *Fajm l* v *Mari t* (19 1) 4 Bom 3 9 60 I C 7 *Abd l Azi* v *Cha li* (19) 7 Bom L R 65 89 I C 63 ( ) A B 418 But see *G ru Charan* v *Uma Charan* (19 1) 6 C W N 940 0 I C 98

( ) *Ve kata* v *Venkatarama* (1899) Mad. 56

(*o*) *Balkishen* v *Kish n Lal* (1889) 11 All. 148 *I m Lal* v *Chab N th* (1890) 1 All 5 8 *Be i Madho* v *Indar S h* (1909) 3 All 6 3 I C 70 *U rujammah* v *Venk ta* (1901) 4 All 3 0

(*p*) *Ie p Ali* v *Gour Chandra* (1923) 3 C. L J 194 4 I C 591 ('23) A C 496

(*q*) *Zah ria* v *Debia* (1911) 33 All 51 7 I C 156 *Dakh l D n* v *Syed Al* (1910) 33 All 151 7 I C 909 *Anant Das* *dat Jha* (1913) 35 All 13 19 I C 6 *I im Faq r* v *B nd hri* (1919) 41 All 54 47 I C 837 *Mst Ch inmaun* v *Jagolbali* (19 7) 101 I C 518 (7) A A 40

(*r*) *Isr f Ali* v *G r* (19 3) 37 C l L J 184 74 I C 591 (3) A C 496

(*s*) *Dha Si gh* v *ri Chandra* (19 3) 75 I C 570

(*t*) *A ca Ali* v *Ameer Ali* (19 5) 2 Rang 633 84 I C 891

( ) *P ncha li* v *thi tha* (1906) 9 Mad 333 *I masami* v *Karupp n* (1915) M d L J 216 *Sinnana* v *M* I C 3 ('6) A M

( ) *Lacchm* Lah 331 104 I C B l

(*w*) (1911) 3

(*x*) *Abd l M* 16 Cal 33 3 (1906) 33 Cal 11

(*y*) (1906) 3

(*z*) (1889) 16

were dissented from in a later case and it was held that the rule of res judicata applies so as to bar the appeal (a) It is submitted that the Madras and Lahore decisions are correct

In *Damodhar Das* v *Sheo Ram Das* (b) there was one original suit for an account and cross appeals from the decree in that suit which resulted in two appellate decrees The plaintiff filed a second appeal from the decree in his appeal but not from the decree in the defendant s appeal A preliminary objection was raised that the decree in defendant s appeal having become final the plaintiff s appeal was barred by res judicata The Allahabad High Court overruled the objection on the ground that the two decrees were substantially one decree The same question came before a Full Bench of the same Court in *Ghansham Singh* v *Bhola Singh* (c) There was a preliminary decree for sale in a suit on a mortgage which disallowed plaintiff s costs and also disallowed defendant s claim that the interest was excessive Both parties appealed and both appeals were allowed in one judgment and two decrees The plaintiff filed a second appeal against the decree allowing interest in defendant s appeal but as the decree in his own appeal was in his favour he filed no appeal against it The Court held that the decree that was not appealed against did not operate as res judicata The ratio decidendi was that a party is not bound to appeal from a decision which is not prejudicial to him The Full Bench said that *Zaharia Debia* (d) was correctly decided on its own facts In a still later case on the same point a Division Bench of the same High Court reverted to the reason given in *Damodhar Das* v *Sheo Ram* that decrees in cross appeals in the same suit are substantially one decree (e)

Suits tried together—separate judgments —If two cross suits are tried together and the same issue is tried and disposed of in two separate judgments the omission to appeal from the decree in one suit will make the decree in the other res judicata so as to bar the appeal (f)

Conditions of res judicata —It is not every matter decided in a former suit that can be pleaded as res judicata in a subsequent suit To constitute a matter res judicata the following conditions must concur

I —The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was *directly and substantially in issue* either actually (*Explanation III*) or constructively (*Explanation IV*) in the former suit (*pp* 38 55)

II —The former suit must have been a suit between *the same parties or between parties under whom they or any of them claim* *Explanation VI* is to be read with this Condition (*pp* 55 61)

III —The parties as aforesaid must have *litigated under the same title* in the *former suit* (*pp* 62 63)

IV —The Court which decided the former suit must have been a Court *competent to try the subsequent suit* or the suit in which such issue is subsequently raised *Explanation II* is to be read with this Condition (*pp* 63 69)

V —The matter directly and substantially in issue in the subsequent suit must have been *heard and finally decided* by the Court in the first suit *Explanation V* is to be read with this Condition (*pp* 69 76)

The above Conditions are considered in order

(a) *Isup Al* v *Gour* (19 3) 37 C L J 184 74 I C 591 (‥3) A C 496

(b) (1907) 9 All 30

(c) (19 3) 4 All ‥06 4 I C 411 (3) A A 490

(d) (1911) 33 All 51 7 I C 1‥

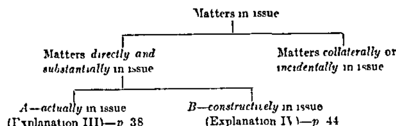
(e) *Va nu* *Va* (19 9) 0 All ‥1 (8) A A 4

(f) *Gangadhar* v *Sek l* (19 1) 34 Cal L J ‥31 64 I C 574 See also *Abdul Bari* v *Ashfaq* (1908) ‥8 All W N 11 913 and *Lacchmi* v *Bhulli* (19‥8) 8 Lah 394 401-404 104 I C 849 (7) A L ‥89

CONDITION I

Matter directly and substantially in issue

Matters in issue may be classified as follows —



A Matter actually in issue

Cause of action distinguished from matter directly and substantially in issue—The expression used in s 2 of the Code of 1859 was cause of action As to that expression their Lordships of the Privy Council said in *Krishna Behari Roy* v *Brojeswari Choudranee* (*g*) The expression cannot be taken in its literal and most restricted sense but however that may be by the general law where a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the status of one of them in relation to the other it cannot in their opinion be tried again in another suit between them The expression matter directly and substantially in issue was first introduced in the corresponding section (s 13) of the Code of 1877

Matter directly and substantially in issue Explanation III—It is not enough to constitute a matter res judicata that *it was in issue* in the former suit It is further necessary that it must have been in issue *directly and substantially* A matter cannot be said to have been directly and substantially in issue in a suit unless it was *alleged* by one party *and denied or admitted* either expressly or by necessary implication by the other It is not enough that the matter was *alleged* by one party (*h*) At the same time it is not necessary to constitute a matter directly and substantially in issue that a distinct issue should have been raised upon it it is sufficient if the matter was in issue *in substance* (*i*) The application of the rule [of res judicata] by the Courts in India should be influenced by no technical considerations of form but by *matter of substance* within the limits allowed by law (*j*) Thus if there is a mutual account between *A* and *B* and *A* sues *B* and obtains a decree on the account a subsequent suit *by B against A on the same account for the same year though beginning* and ending about a month earlier will be barred as res judicata (*k*) On the same principle an issue will be res judicata if the judgment of an appellate Court shows that the issue was treated as material and was decided although the decree passed merely affirms the decree of the lower Court which did not deal with the issue (*l*)

Matter collaterally or incidentally in issue—Every suit *must* involve a matter directly and substantially in issue It *may* also involve a matter collaterally

(*g*) (187) I A 283 28 1 Cal 144 146 See also *Soorjomonee Dayee* v *Suddanund* (18 3) I A Sup Vol 1 18 1 Beng L R 304

(*h*) *Sheo* ... *Sheo Sahai* (1884) 6 All 358 36 *Shama* ... *v Pros o* (1 1) C L R 231

(*i*) ... *onjomoni* v *Sadi* ... (18 4) 1 B L R 304 315 S p ... I A 21 *Lilabati* v *Bish Chobey* (190) 6 C L J 6 1

(*j*) *Sha pa* v *J m lan* (1916) 43 I A 91 99 43 C 1 691 06 33 I C 914

(*k*) ... *m* ... *D* v *Ahm d* (19_8) 50 All ... 103 I C 36 (7) A A 799

(*l*) *M* ... *p Z m* ... *y Co Ltd* v ... (19 4) 51 I A 293 1 Cal 631 80 I C 8 (4) A I C 144

or incidentally in issue To constitute a matter res judicata it is necessary that it must be in issue *directly* and *substantially* in the *suit under trial* and that it must have been in issue also directly and substantially as distinguished from collaterally or incidentally in a former suit

All matters involved in a suit may be directly and substantially in issue but they cannot all be collaterally or incidentally in issue A *collateral* or *incidental* issue is one that is ancillary to a *direct and substantive* issue the former is an *auxiliary* issue the latter the *principal* issue The expression collaterally or incidentally in issue implies that there is another matter which is directly and substantially in issue

Distinction between matter directly and substantially in issue and matter collaterally or incidentally in issue—The leading case on the subject is *Barrs* v *Jackson* (m) Every suit *must* involve a matter or matters in respect of which relief is claimed by the plaintiff It *may* also involve matters which though there is no relief claimed in respect of them are brought in issue for the purpose of deciding matters in respect of which relief is claimed

Matter directly and substantially in issue—Every matter in respect of which relief is claimed in a suit is necessarily a matter directly and substantially in issue

Illustrations

1 *A* sues *B* for the rent due for the year 1907 The defence is that no rent is due Here the claim for rent is the matter in respect of which relief is claimed This therefore is a matter directly and substantially in issue

2 *A* sues *B* (1) for a declaration of title to certain land and (2) for the rent of those lands *B* denies *A* s title to the lands and contends that no rent is due Here there are two matters in respect of which relief is claimed namely (1) the matter of title and (2) the claim for rent Both these are matters directly and substantially in issue

Matter collaterally or incidentally in issue—A matter in respect of which no relief is claimed but which is put in issue for the purpose of enabling the Court to adjudicate on a matter in respect of which relief is claimed may be directly and substantially in issue or it may be in issue collaterally or incidentally It would be a matter directly and substantially in issue if it was necessary to decide it to adjudicate on the principal issue and if it was decided in fact the judgment was based upon that decision otherwise it would be a matter collaterally or incidentally in issue A matter cannot be directly and substantially in issue if the judgment would be correct whether that matter exists or not

Illustration

A sues *B* for rent *B* pleads abatement of rent on the ground that the area is less than that entered in the lease The Court finds that the area is greater than that shewn in the lease The finding as to the excess area is not res judicata for it is only ancillary to the direct and substantial issue whether the area is equal to that shewn in the lease or less (n)

Examination of pleadings and judgment—Whether a matter was directly and substantially in issue in a former suit is to be determined by a reference to the plaint the written statement the issues and judgment The decree may also be referred to but it is not enough to refer to the decree *without* the judgment for a decree states merely how a suit is disposed of and it is in the judgment that the findings on the issues are

(m) (184) 1 Y & C Ch Cas 86 | ( ) *Et m* v *Holodh r* (18 3) Cal -71

recorded (*o*) The judgment is admissible under s 40 of the Evidence Act See O 20 rr 5 and 6

Suits for rent or other recurring liability—The distinction between a matter directly and substantially in issue and a matter collaterally in issue is well illustrated by suits for rent or for other recurring liability These may be divided into three classes namely —

A —Where the first suit is for *rent* and the subsequent suit is for *title*

B —Where both suits are for *rent* or other recurring liability

C —Where both suits relate to *rate* of rent or to the *area* for which rent is payable

A First suit for rent subsequent suit for title —In this class of cases it is clear that the subsequent suit being one for *title* the question of title is a matter directly and substantially in issue in that suit Whichever party therefore raises the plea of res judicata in that suit must show that the question of *title* was also directly and substantially in issue in the former suit that is in the previously decided suit If the question of title was in issue *in its entirety* in the former suit it would be a matter that was directly and substantially in issue in that suit But if the issue in the former suit did not cover the *entire* question of title in other words if it fell short of *going to the very root of the title* and was confined only to some of the *incidents* of title the question of title would be a matter which was collaterally or incidentally in issue in the former suit (*p*).

In the following illustrations it is assumed that the other conditions of res judicata are fulfilled

Illustrations

(a) *A* claiming to be the *chela* and heir of a deceased *mohunt* sues *B* for *rent* of certain lands forming part of the estate of the *mohunt*. *C* claims that he and not *A* is the *chela* and heir of the deceased and that he is entitled to the rent *C* is thereupon joined as a defendant to the suit The issues raised are—

1 Whether *A* or *C* is the *chela* and heir of the *mohunt* ?

2 Whether any and if so what rent is due from *B* ?

The Court finds that *A* is the *chela* and heir of the *mohunt* It also finds Rs 2 ,00 due by *B* for rent and *A*'s claim is decreed

Subsequently *C* sues *A* for a declaration that he is the *chela* and heir of the *mohunt* and claims that as such he is entitled to the *whole* of the property left by the *mohunt* *A* contends that the question who is the *chela* and heir of the deceased is res judicata Is the question res judicata ? The answer is that it is for though the former suit was for rent the entire question of *title* to the property of the deceased was directly and substantially in issue in that suit and it was decided against *C* *Toponidhee* v *Sreeputty* (1880) 5 Cal 832 See also *Gobind* v *Taruck* (1878) 3 Cal 145

(b) *A* a Hindu dies leaving a widow and a brother *C* The widow sues *B* for rent of certain property forming part of the estate of her husband *C* claims the rent on the ground that it was the *joint* property of himself and his deceased brother and that he

(*o*) *Kali Krishna* v *Secretary of State* (1889) 16 Cal 173 183 15 I A 186 193 *R n Bahad r's cas* (1885) 11 Cal 301 310 1 I A 23 *Soorjomone* v *S ddanund* (18) 1 Beng L R 304 *Girdhar* v *D yabh i* (1884) 8 Bom. 1 4 190 *Ghela* v *S nkal hand* (1894) 18 Bom. 597 601 *Amrites wari* v *Secretary of State* (1897) 4 Cal ,04 519 I A 33 *Jalaram* v *Bommade va a* (1906) 2 Mad 4 *Kurrutulain* v *Nusbat ud Dowla* (1906) 33 Cal 116 3 I A 244 *Mula Lodda* v *Jad b Cha dra* (1917) * Pat L J 159 33 I C 11 *Raja Sashik nta* v *Raja Sarat Chandra* (19 1) 34 Cal L J 415

(*p*) *Gobind* v *Taru k* (18 8) 3 Cal 145 *Radha* v *M noh r* (18 9) 15 Cal 756 15 I A 97 *Karuna* v *Mohend a N th* (1899) 25 Cal 136 *Dwa ka ath* v *Ramchand* (1899) 26 Cal 4 8 *Keram t* v *Kuma Krishna* (19 9) 47 C L J 636 97 I C ,91 (926 A C 1 9

became entitled to it by survivorship C is thereupon joined as a defendant to the suit The issues are—

1 Whether the deceased alone received the whole rent of the property in his lifetime or whether the rent was received by him jointly with C ?

2 Whether any and what rent is due by B ?

The finding on the first issue is that the decea ed alone received the whole rent n his lifetime (The finding on the second issue is unnecessary for our present purposes)

Subsequently C sues the widow for a declaration that he and his brother were joint and claims the said property by right of survivorship The question whether the decea ed and C were joint or separate is not res judicata for it was not directly and substantially in issue in the former suit It was in issue in that suit only collaterally or incidentally for it will be seen on referring to the first issue in that suit that it did not cover the *entire* question of C s *title* but related merely to the joint or separate receipt of *rent* *Run Bahadur* v *Lucho Koer* (1885) 11 Cal 301 12 I A 23 *Srihari* v *Khitish Chandara* (1897) 24 Cal 569

B *Both suits for rent or other recurring liability* —The rules which apply to the preceding class of cases apply also to this class Thus where A sues B for rent due for a *particular period* and the defence is that A has no title to the land of which the rent is claimed then if a *direct* issue is raised and decided on the question of title the decision will operate as res judicata in a subsequent suit by A against B for the rent for a *subsequent period* either of the same (q) or other (r) property held under the same title But if there is no *direct* issue raised on the question of title and the finding falls short of going to the *very root of the title* upon which the claim for rent is based it will not have the effect of res judicata If the question of title is gone into in the previous suit as if the right of rent were sought to be established not *for one particular year* but *once for all* it will be said to have been *directly and substantially* in issue But if the question of title is gone into in the previous suit as if the right of rent were sought to be established not *once for all* but for one particular year it will be said to have been in issue *collaterally or incidentally* The same principles apply to other cases of recurring liability such as malikana (s) maintenance (t) interest (u) annuity (v) &c

Illustration

A sues B for rent due for the year 1903 The defence is that the land is rent free An issue is raised whether the land is rent free The Court finds that the land is rent free and A s suit is dismissed Subsequently A sues B claiming rent for the year 1904 B again sets up the same defence namely that the land is rent free Here the question of A s right to recover the rent having been *directly and substantially* in issue in the previous suit the suit for the rent for 1904 is barred as res judicata *Rakhal Doss* v *Heera* (1874) 22 W R 282 *Venkatachalapati* v *Krishna* (1890) 13 Mad 287 *Vishnu* v *Ramling* (1902) 26 Bom 25 *Natesa* v *Venkatarama* (1907) 30 Mad 510 *Dwarka Das* v *Akhay Singh* (1908) 30 All 470

It may here be observed that each year s rent is in itself a separate and entire cause of action and where a suit is brought for the rent due for a particular year a judgment obtained in that suit whatever the defence may have been would seem only *to extend to the subject matter of the suit* and hence the landlord is at liberty to bring another suit for the *next y ar s* rent and the tenant is at liberty to set up *to that suit* any defence he thinks proper The above proposition however is subject to this and here comes in the doctrine of res judicata that neither party is at liberty to re open in the suit for rent

(q) *Nobo* v *Foy bux* (1876) 1 Cal 20 *Gnanada* v *Val ni* (19 6) 43 C L J 146 *G pi Nath* v *Bhugwant* (1884) 10 Cal 69

(r) *Chandi Pras d* v *Mah nd a* (190) 24 All 112

(s) *Balkishan* v *K shan Lal* (1889) 11 All 148

(t) *Bhikabhai* v *Ba Bh ri* (1903) Bom 418

(u) *Pahlwa* v *I ual* (188) 4 All 55

( ) *Dwarka Das* v *Akhay S gh* (1908) 0 All 470

for the next year any question that was substantially and necessarily tried and determined between them in the suit for rent for the *previous year* (w) For the essence of the doctrine of res judicata is that where a *material issue* has been tried and determined between the same parties in a proper suit and in a competent Court as to the *status* of one of them in relation to the other or as to a *right* or *title* claimed by either of them against the other it cannot again be tried in another suit between them (x)

Maintenance — As regards maintenance it is to be noted that a decree for maintenance at a particular rate is no bar to a sub equent suit for maintenance at an *enhanced* rate on the ground of altered circumstances for the rate of maintenance is a variable quantity changing from time to time according to the circumstances of the parties affected by the decree (y) But a right to maintenance may be barred by res judicata ( )

C —Rate of rent or area for which rent is payable —In this class of cases also both suits are for rent the first suit being for rent for a particular period and the second for rent for a subsequent period The matter which is pleaded as res judicata is not the plaintiff s *title* to the land of which the rent is claimed but the *rate* of rent or the *area* for which rent is payable If the Court in the first suit tries and determines the issue what is the proper rate of rent or what is the proper area for which rent is payable the issue relates not merely to the rent for a particular period but to the rent payable for the full term of the lease and the question as to the rate of rent or the area as the ca e may be will be res judicata in subsequent suits for rent for the remaining period of the lease (a)

Ex parte decree —Ex parte decrees operate to render the matter decided res judicata (b) and the defendant s failure to appear will not deprive the plaintiff of the full benefit of his decree (c) But in the case of a suit in which a decree is pa sed ex parte [see O 9 r 6 Code of 1882 s 100] the only matter that can be directly and substantially in i sue is the matter in respect of which relief has been claimed by the plaintiff in the plaint A matter in re pect of which no relief is claimed cannot be directly and sub tantially in i sue in a suit in which a decree is pa ed ex parte though the Court may have gone out of its way and declared the plaintiff to be entitled to relief in respect of such matter

Illustration

A sues *B* to recover Rs 500 being the rent due for the year 1906 at the rate of Rs 2 per square yard *A does not pray for a declaration in the suit that the rate of rent is Rs 2 per square yard* *B* does not appear and a decree *ex parte* is pa ed against him for Rs 500 Sub equently A sues *B* for rent due for the year 1907 also at the same rate *B* appears at the hearing and contends that the rate is Re 1 per square yard *B* is not precluded from raising that contention for the question of *rate* was not directly and substantially in issue between *A* and *B* in the former suit and it cannot therefore be res judicata. Even if the Court in the former suit had declared that A was

(w) *Nobo* ... (1876) 1 C 1 0
(x) *Krishn* v *B* ... (18 4) 1 Cal 144 I A 83
(y) *B* ... v ... (1899) ... M 1 1
( ) *D* ... (1911) 16 C W N 603 14 I C 46 [suit for declaration of charge on property for maintenance]
( ) ... (1 13) ... Md ... v ... (1 34) ... 976 ... *Chowbey* (1909) 6 C W N 589 ... (1913) 1 C W N 6 16 I C ... v ... (1914) 3 M 1 0 1 I C 44 [2 B] ... (191) Pat L J 1 38 I

C 11 [1 11 ...] ... (19 6) 4 ... L J 13 9 I C 130 (6) ... 6 8 ... (19 1) 4 ... 14 63 I C 0

(b) *H* ... (1911) 13 ... L J 38 6 I C 860 ... (191) 1 C W N 6 16 I C 011 ... (1913) 18 C W N 33 I C 383 ... v *Lakh* (19) ... C W N 3 8 I C I J (3) ... C 4

( ) *B* ... v *Ch* ... (1901) C W N 8

entitled to rent at the rate of Rs 2 per square yard the question of rate would not be res judicata for *A* had not asked for a declaration in that suit in respect of the *rate* of rent *A* s claim in the former suit was merely for arrears of rent amounting to Rs 500 and the decree in that suit has no greater effect than evidence that Rs 500 was due when the decree was passed Had *A* in the former suit al o prayed for a declaration in respect of the *rate* of rent as part of the substantive relief and had the Court then declared that the rate of rent was Rs 2 the question of rate would have been res judicata though the decree was pas ed ex parte for it would then have been a matter directly and substantially in issue *Modhusudun* v *Brae* (1889) 16 Cal 300

A suit to set aside an ex parte decree on the ground that it was obtained by fraud may be barred by res judicata if an application to set it aside on the same ground has been dismissed under O 9 r 13 See note under that rule Ex parte decree obtained by fraud.

Decree for injunction and res judicata—*A* sues *B* for an injunction restraining *B* from doing certain act The injunction is granted *B* repeats the acts complained of in the suit *A* again sues *B* for an injunction The suit i barred as res judicata for the relief claimed is covered by the injunction granted in the former suit and *A* s remedy i to proceed against *B* in execution of the decree [O 21 r 32] Where the decree is pa sed by a chartered High Court *A* may proceed against *B* for contempt (*d*) See notes to s 50 below

Decree for restitution of conjugal rights and res judicata—*A* sues *B* his wife for restitution of conjugal rights Restitution is granted and *B* goes and lives with *A* (that is to say the decree is sati fied) *B* again leaves *A* and *A* again sues *B* for the same relief The suit is not barred as res judicata (*e*) The distinction between this and the case of an injunction is that while in a suit for injunction the defendant is *for ever* restrained from doing the acts complained of the wife cannot be directed in a suit for restitution of conjugal rights to live with her husband *for the rest of her life* for many things may occur entitling her to leave him *e g* gross cruelty

Decree for possession conditional on payment of dower—Where in a suit by the heirs of a Mahomedan against his widow in possession of his estate in lieu of her dower a decree is passed against her that they should have possession of their shares of the e tate upon payment of a proportionate part of the dower debt within six months and that upon failure to pay their suit should be dismissed and the plaintiffs fail to pay within six months the decree is no bar to a subsequent suit for immediate possession by the same plaintiffs against the widow on the ground that the dower debt had in the meantime been satisfied out of the income of the estate in the hands of the widow (*f*)

Subject matter of suits may be different — As the test of res judicata is the matter directly and sub tantially in issue it follows that the subject matter of the econd suit may be entirely different Thus if *A* claims certain property as the adopted son of *X* and the defendant denies the adoption a finding in *A* s favour on the is ue as to adoption will be binding on the defendant as res judicata in a subsequent suit by *A* against the same defendant to recover *another property* claimed under the *same title* (*g*) It is not open to the defendant to contend that the propertie claimed in the two suits being

(*d*) *P m Sa n* v *Ch tar S gh* (1901) 3 All 46

(*e*) *K shati* v *Parrat* (1894) 18 Bom 3 7

(*f*) *Ma a B* v *Cla d* (19) I A 14 4 All 0 86 I C 0 ( ) A I C 63 affirming (1919) 41 All 38 51 I C 4 *a B jam* v *D lfaro Bej n* (19 6) 48 All 803 98 I C 9 8 ( ) A 39 Comp re *H* *I as* (19) 99 I C 4 8 ( ) A O 60

(*g*) *P tt p r Ra* *B* (1 8) 8 M 1 1 I A 18 *K* *B* *L I* (18 6) 1 Cal 144 I A 43 *I dh I r ls* *L I* (1891) 13 All 53 6 1 1 1 0 *B R ha K* *L I* (1881) 11 All 148 1 48 *ta D* *oll* (18 J) 13 B n *Cha d P* *d M* *ja Mal* (1J0) 4 All 11 *Su ath* v *B* (1 00) C L J 40 *Dea I D* *All S gh* (1908) 30 All 4 0

different the decision on the question of *A* s adoption in the first suit cannot operate as res judicata in the second On the same principle where in a suit brought by A against *B* for po ession of one of two properties compri ed in a sale deed pa sed by *B* to *A* *B* contends that the deed is fictitious and the Court finds that the deed is fictitious the finding that the sale deed is invalid will operate as res judicata in a subsequent suit by *A* against *B* to recover the other property under the same sale deed (*h*) Similarly in the illustration cited under class B of rent suits (p 41 above) it is no answer to the plea of res judicata that the subject matters of the two suits are different The reason is that the matter directly and substantially in issue in both the suits is the same namely whether the particular land of which the rent is claimed is rent free and the decision therefore on that is uo in the first suit operates as res judicata in the subsequent suit But the deci ion cannot apply to *other lands* unless they form part of the *same tenure* (*i*)

From the same fundamental principle that the matter directly and sub tantially in i sue and not the subject matter constitutes the test of res judicata it also follows that where a matter directly and substantially in issue in a suit is not the same as that in a previously decided suit the trial of that matter will *not* be barred as res judicata though the subject matter of the two suits may be the same (*j*)

Where both the matter directly and substantially in issue and the subject matter are the same in both the suits the matter in i sue will be res judicata not because of the identity of the subject matter but because of the identity of the matter directly and substantially in issue (*k*) Where the matter directly and substantially in issue and the subject matter are both different in the two suits the matter in issue is not res ju licata not because the subject matters are different but becau e the matters directly and substantially in issue in the two suits are different (*l*)

B *Matter which might and ought to have been made ground of attack or defence*

Matter constructively in issue Explanation IV—A matter which might and ought to have been made a ground of attack or defence is a matter which is constructively in issue In the cases cited in the note under A—actually in issue Explanation III the matters were actually in issue for they were actually alleged by one party and denied by the other It often happens however that a matter which *might and ought* to have been made *ground of attack* by the plaintiff to substantiate the relief claimed by him in the suit is not alleged by him as a ground of attack and also that a matter which *might and ought* to have been made a *ground of defence* by the defendant is not set up as a ground of defence A matter which *might and ought* to have been made ground of attack or defence in the former suit but which has not been alleged as a ground of attack or defence will be deemed to have been a matter directly and substantially in issue in such suit (Explanation IV) that is to say though it has not been *actually* in issue directly and substantially it will be regarded as having been *constructively* in issue directly and substantially This section draws no distinction between the claim that was *actually* made in a suit and the claim that *might and ought* to have been made If the parties had an opportunity of controverting it that is the same thing as if the matter had been actually controverted and decided (*m*) The plea of res judicata applies except in special cases not only to points on whi h the Court was actually required by the parties to form an opinion and to pronounce judgment but to every point which properly

(*h*) *Ked e N th v Sheo Sha ka* (19^3) 45 All. 15 6 I C 3 0 (3) A A 613
(*i*) *F m Ch nder v Math* (18 6) 1 Cal. 484 1 I \ 1 8
(*j*) *J yalju v Saral ju* (1909) 19 Cal 1 9 1 19 I A 16 1 6
(*k*) *Tri l Pertab* (188) 15 Cal 809 I I A 13
(*l*) *Z mindar f I ll ge m v Pr p (re of K l aki* (13 4) 31 1 3 I A 06
(*m*) *Newi gton v Le y* (1870) L R 6 C P 180

belonged to the subject of the litigation and which the parties exercising reasonable diligence might have brought forward at the time (n)

Where a matter has been *actually* in issue it is necessary to constitute the matter res judicata that it should have been *heard and finally decided* But where a matter has been *constructively* in issue it could not from the very nature of the case be heard and decided and it will be *deemed* to have been heard and decided against the party omitting to allege it This is in accordance with the view of the section taken by the High Courts of Allahabad and Bombay (o) In *Kailash Mondal* v *Baroda Sundari Dasi* (p) Banerjee J observed that though a matter which might and ought to have been made ground of attack or defence should be *deemed* as provided by Explanation IV to have been *directly and substantially* in issue yet it could not be deemed to have been heard and finally decided as there was nothing in Explanation IV to suggest that such matter should *also* be deemed to have been *heard and finally decided* This view was followed in a subsequent case (q) but it is obviously incorrect and it was rejected by the same Court in later cases (r) and it has been dissented from by the High Court of Lahore (s) Moreover in a recent case the Judicial Committee took exception to the language in which the observations of Banerjee J were couched saying that the language was not so careful as it might have been (t) The Privy Council case illustrates the rigidity with which the principle laid down in Explanation IV is to be applied In that case it was held that where a matter which might and ought to have been made a ground of attack is not raised in the plaint and an application is afterwards made to amend the plaint but it is refused the matter will be deemed to have been directly and substantially in issue in that suit See ill 4 below

Illustrations

1 *X* a Hindu dies leaving a widow The widow makes a gift to her brother *B* of certain property belonging to her husband After the death of the widow *A* alleging that he and *X* were members of a joint family sues *B* for a declaration that he is entitled to the property by right of *survivorship* The Court finds that *A* and *X* were separate and *A*'s suit is dismissed Subsequently *A* sues *B* for the recovery of the same property alleging that as the nearest reversionary heir of *X* he became entitled to the property on the death of the widow and that the alienation made by her in favour of *B* was not binding upon him The suit is barred as res judicata *A might and ought* to have set up the title by *heirship* as a *ground of attack* in the former suit It will therefore be *deemed* to have been directly and substantially *in issue in that suit* and it will also be deemed to have been heard and finally decided against *A* *Guddapa* v *Tirkappa* (1901) 25 Bom 189 [The Bombay ruling was dissented from in *Ramasvami* v *Vythinatha* (1903) 26 Mad 760 a case on different facts altogether The grounds of dissent it is submitted are not satisfactory See also *Masilamania* v *Thiruvengadam* (1908) 31 Mad 385 being ill (3) below]

2 *A* a Hindu dies leaving a widow and a brother *B* The widow sues *B* for recovery of certain property alleging that it was the self acquired property of her husband and that a will alleged to have been executed by her husband and relied on by

(n) *V na L* v *D ttatry* (190) 6 Bom 661 667 See also *Sahib ali* v *Mohammad* (19 7) 8 Lah 1 17 96 I C 100 (26) A L 603

(o) *Sri G pal* v *P rtl Singh* (1898) 0 All 110 113 confirmed on appeal (190) 4 All 4 9 [I C] *Guddappa* v *Tirkappa* (1901) Bom 189 at pp 19 and 197

(p) (1) 4 Cal 11

(q) *Hoomesh* v *B rada* (1901) 8 Cal 1

(r) *Ja tar Singh* v *Ser d i n* (1908) 3 Cal 9 9 *M h n Ch dr* *in l* (1903) 13 C W N 13 15 1 I C 68 *Shib Ch d a* v *L kh Pri* (19 4) 40 Cal L J 07 511 8 I C 1 3 ( ) A C 4 7 See also *P uyan Na l* v *Su yana ay a* (1914) 3 Mad 0 74 1 I C 445 *M g* v *Ma j Po* (19 3) 1 Pan 363 365 66 6 I C 61 (3) A P 39

( ) *G b dl l* v *E Uco S gh* (1915) P P No 1 p 69 4 I C 931 *Muhammad* v *Ghula B* (1929) 11 Lah L J 9

(t) *Fat h S gh* v *J g th Bak h S gh* (19 5) I A 100 4 All 158 ( ) A PC 55

B is a forgery *B* alleges that the property was joint family property and that on the death of *A* he became entitled thereto by *right of survivorship* but he does not claim any title to the property under the will The Court finds that the property was the self acquired property of *A* and decrees the widow s claim Subsequently *B* sues the widow to recover the same property from her now claiming the same *as a devisee* under *A* s will The suit is barred as res judicata *B might and ought* to have set up the claim *under the will as a ground of defence* in the former suit When a plaintiff claims an estate and defendant being in possession resists that claim he is bound to resist it upon *all the grounds* that is possible for him according to his knowledge then to bring forward *Srimut Rajah* v *Katama Natchiar* (1866) 11 M I A 50 *Doorga Persad* v *Doorga Konwari* (1879) 4 Cal 190 5 I A 149

3 *A* sues *B* to recover certain property belonging to the estate of *C* alleging that his father had been adopted by *C* s brother *D* to whom the property descended on *C* s death The suit is dismissed on the ground that the adoption is not proved *A* then sues *B* to recover the same property claiming it as *C* s bandhu The suit is barred as res judicata *A* ought to have claimed the property in the first suit in the alternative as *C* s bandhu *Vasilamania* v *Thiruvengadam* (1908) 31 Mad 385

4 *A* claiming as the next reversioner of a deceased Hindu sued his widow for a *declaration* that a gift by her to *D* of property inherited by her from her husband was void *D* was joined as a party defendant and so also *G* who claimed to be a reversioner nearer than *A* As to *G* *A* alleged that he was colluding with the widow and the donee *D* The defence was that *G* was the nearest reversioner and the only person entitled to dispute the gift In this state of pleadings the widow died On the death of the widow the question of collusion became comparatively unimportant for if *G* was the nearest heir *A* could get no title to the property *A* then applied for leave to amend the plaint by setting forth the death of the widow and claiming that he had become entitled to institute a suit for *possession* and by setting up a family custom that he was equal in degree with *G* The application was rejected on the ground that it was an attempt to introduce a new case The question then arose whether it was worth while contesting the suit *A* s counsel admitted that apart from custom *A* was one degree more remote than *G* and that if *A* could not make out the case of a family custom the suit must fail The trial judge thereupon dismissed the suit with costs but gave liberty to *A* to bring a fresh suit for possession Subsequently *A* sued *D* and *G* for *possession of one half* of the property founding his title on family custom The Privy Council held that the second suit was barred for *A* might and ought to have alleged the family custom in the first suit it being clearly a ground of attack in that suit *A* the first suit was dismissed and not withdrawn under O 23 the trial judge had no power to grant leave to bring a fresh suit *Fateh Singh* v *Jagannath Bakhsh Singh* (1925) 52 I A 100 47 All 558 (25) A I C 55

5 *A* sues *B* *C* *D* and *F* as joint tenants for rent on the basis of a pottah The property in respect of which the rent is claimed consists of 25 kittas of land None of the defendants appears in the suit and a decree is passed against them ex parte Subsequently *A* sues *B* *C* *D* and *E* for rent for a subsequent period *B* appears and contends that he does not hold the land jointly with *C* *D* and *F* and that he is liable only for one fourth rent for one fourth of the whole area *B* is precluded from setting up the case of separate tenancy because he might and ought to have set up that case in the previous suit It is immaterial that the decree in the previous suit was passed ex parte *Saroj* v *Lakhi Priya* (1924) 29 C W N 2 3 85 I C 123 (25) A C 42

Test.—The question whether a matter *might* have been made a ground of attack or defence in the former suit rarely presents any difficulty Whether it *ought* to have been made a ground of attack or defence depends on the facts of each case As a general rule every ground of attack with reference to the title sued on must be

pleaded if necessary in the alternative (*u*) for the plaintiff will not be allowed to make out a fresh case afterwards Thus if a plaintiff sues for possession on the ground of ownership and his suit is dismissed he cannot afterwards claim possession as mortgagee for it was an alternative ground of attack which he did not raise in the first suit (*v*) If the matter raised as a defence would have defeated varied or in any way affected the decree in the previous suit it ought to have been raised (*w*) Conversely if the decree in the previous suit is inconsistent with a defence which ought to have been raised that defence must be deemed to have been raised and finally decided and is barred by res judicata (*x*) If a matter could have been set up as a ground of attack or defence in the former suit *and* if its introduction into that suit was *necessary* for a complete and final decision of the right claimed by the plaintiff therein it will be deemed to be a matter which *ought* to have been made a ground of attack or defence in that suit *unless* the matters in that and the subsequent suit are so dissimilar that their union might lead to confusion (*y*) Thus in ill (1) on page 45 the title by heirship *could* have been made a ground of attack *in the alternative* in the first suit it was *necessary* to do so for the complete and final disposal of all questions as to *A* s right to the property and it was not forbidden by any rule of pleading and further the question in both suits being the same namely whether *A* was entitled to the property *or B* the title by *survivorship* and the title by *heirship* could not be said to be so dissimilar that their union might lead to confusion It may appear at first sight that the two matters are dissimilar for the title by survivorship and the title by heirship have to be supported by *different evidence* But the test of *evidence* which was relied on in some old cases ( ) is not a satisfactory test and though it was advanced in argument in two cases before the Judicial Committee of the Privy Council no notice was taken of it in the judgments (*a*) The reason is when a plaintiff sets up *alternative* ground of attack or when a defendant sets up *alternative* grounds of defence the evidence in support of such alternative grounds would in most cases be different But it has been said where the evidence in support of one ground is such as might be destructive of the other ground the two grounds need not be set up in the same suit The reason given is that the test of determining whether both the grounds ought to have been set up in the same suit is afforded by the provision of O 2 r 1 and the provisions of that rule as to the framing of suits are only to be applied as far as practicable (*b*)

It is clear that it cannot be said of any matter that it *ought* to have been set up as a ground of attack in a former suit if its introduction would have been *incongruous* to the matter of that suit (*c*) Thus a person claiming property on the allegation that it is wakf property and that he is the manager thereof is not bound to claim the same property in the same suit alternatively in his own right in the event of its being held that the property was not wakf property Having asserted that the property was wakf property [he] could not have consistently claimed the same property as [his] personal property except possibly in an alternative form [He was] however not under

(*u*) *All* v *F* *j sl n* (1884) 7 Mad 264
(*v*) *I iam Kl n* v *4j b I l a* (189) 19 All 5 7
(*w*) *Sl ib Cha I a* *Lal l i* (19) 9 C W N 3 8 I C 123 ( ) A C 4 *Gop L il* v *B na i I r t ad* (1906) 31 C I 4 8
(*x*) *M I m* v *4 i l B nd* (190) 13 C W N 13 1 I C 86 *Ma* *No* *M* *j Po* (19 3) 1 Ran 363 6 I C 61 (3) A R 33
(*y*) *F* *I jk ar* (1893) 0 Cal 9 8 19 I A 3 *Mo* v *Fb h* (1913) 40 Cal 1 39 I A 37 16 I C 0 *Guld p* *Tirk pp* (1901) B m 189 19 *S m t R j h* v *I* *a* *N tel ar* (1866) I M I A 0 3 *H oo* *lara* v *L n o poorna* (18 3) 11 Beng I R 1 8 16 *dl a* *Lal* v *L n la j n* (19 1) 3 Lab L J 15 1 63 I C 1

( ) *M tt* *(l tt* *M tta* *(l tt* (188) 4 M I 96 33 *N* v *I* *dra* (1883) 13 B m 3 6 3
(*a*) 11 M I A 0 13 11 Beng L R 1 8 *p*
(*b*) *Ma I* *a* *Tl* *g l* (1308) 31 M 1 38 306 *I* *I jtl natha* (1303) 6 M d 60 *I* *j* *j* *tppas* *a* *i* (1316) M W N 86 34 I C 4 6 *I i* *B ch i* (19 1) 3 Lab L J 15 63 I C 17
(*c*) *D p ty Co* *i s o* *f Kl r* v *I l at ja* *N jl* (190) 3 All 331 34 I A *Lala* *So i I* v *I a l* *y* (1913) 40 I A 4 1 C W N 60 13 I C 31 [I C] *D wan* *Ch t* *Ham Cha I* (1914) P I No 10 p 383 4 I C 636 *Iu lan* v *M lam* *id* (1916) 1 R No 94 p 3 I C 119

an obligation to adopt the latter course The mere fact that he could have claimed the property *in the alternative* as his own property is no ground for saying that he *ought* to have done so (*d*) Where a person who is joined as a defendant in a mortgage suit as being interested in the equity of redemption is entitled to the property by a paramount title but his title is not disputed in the plaint he is not bound to set it up as a ground of defence in that suit (*e*) See note to O 34 r 1 Persons having an interest either in the mortgage security or in the right of redemption

The decisions bearing on this branch of the subject are numerous An examination of these decisions leads to the following four Rules

Rule I —Where the *right claimed* in both suits is the *same* the subsequent suit will be barred as res judicata though the right in the sub equent suit is sought to be established by a *title different* from that in the first suit

The dismissal however of a plaintiff s suit for the recovery of land based on an alleged lease is no bar to a subsequent suit for the recovery of the same land on the strength of his general title the reason given being that the *legal relation* put forward in the sub sequent suit is *different* from that in the former suit [see ill. (5)]

In the following illustrations it is assumed that the other conditions of res judicata are fulfilled.

Illustrations of Rule I

1 *Guddappa* v *Tirkappa* (1901) 25 Bom 189 ill (1) on p 45 above *Masilamania* v *Thiruvengadam* (1908) 31 Mad 385 ill (3) on p 46 above and *Fateh Singh* v *Jagan nath Baksh Singh* (1925) 52 I A 100 47 All 158 (925) A P C 55 ill (4) on p 46 above are cases under this Rule

2 A Hindu *H* dies leaving a widow *W* and a son in law *S* the husband of a predeceased daughter *D* *W* sues *S* *as the heir of her husband H* to recover certain pro perty alleging that it forms part of the estate of *H* The defence is that *H* had made a gift of the property to his daughter *D* and that on *D* s death *S* as *D* s husband became entitled to the property as *D* s heir *W* alleges that the deed of gift relied upon by *S* is a forgery The Court finds that the deed of gift is genuine and the suit is dis missed *W* then sues *S* to recover the same property alleging that as it has been found that the property belonged to *D* she is entitled to the property *as the heir of her daughter D* The suit is barred as res judicata Here the right claimed in both the suits is the same namely the right to the property in question In the first suit it was claimed by *W* as her *hu band s heir* In the second suit it is sought to be established by her by a different title namely as her *daughter s heir* *W* might and ought to have claimed in *the alternative* as her *daughter s heir* in the former suit Having failed to do so her title as her daughter s heir will be deemed to have been directly and sub tantially in issue in the former suit and it will also be deemed to have been heard and finally decided against her in that suit *Deno undhoo* v *Kristomonee Dossee* (1877) 2 Cal 15 The Calcutta decision has been dissented from in *Ummatta* v *Cherva* (1882) 4 Mad 308 but the Madras case falls within the *Exception* rather than the *Rule* See ill. (4) below

3 *A* lends Rs 50 000 to a Hindu widow on a mortgage of her husband property The widow then surrenders the property to *B* the reversionary heir of her husband on *B* agreeing to pay all her debts *A* sues *B* and the widow to recover Rs 50 000 by *sale* of the mortgaged property *A* also asks for a *personal* decree against the widow *but he*

(*d*) *Kanhe ya Lal* v *Ashraf Kh n* (1924) 46 All 30 84 I C 407 (924) A A 3 *Dola* v *Palya* (19) 46 Bom. 803 66 I C. 615 ( ) A B

( ) *Armatulla* v *Gami* (1929) 33 C W N 659 (929) A C 67 *Lama na* v *Venkata narayana* (1927) 5 Mad L J 5 99 I C 463 (927) A M 301

does not ask for a personal decree against B B is joined as a defendant on the ground that the mortgaged property formed part of the property transferred by the widow to him The Court finds that the mortgage is not binding upon the husband s estate and the suit against *B* is accordingly dismissed As against the widow a personal decree is passed for the amount of the loan *A* realises Rs 5 000 only from the widow and after her death he sues *B* for the balance of the money due under the decree (that is to say *A* asks for a *personal* decree against *B* for the balance) alleging that *B* was *personally* liable under the agreement with the widow to pay her debts The suit is barred as res judicata for *A* might and ought to have alleged in the former suit that if the mortgage was not binding on the estate *B* was at all events *personally* liable to pay the debt in consequence of the *agreement* which he (*B*) had entered into with the widow *Kameswar Pershad* v *Rajkumari* (1893) 20 Cal 79 19 I A 234

Note —Suppose that in the above illustration *A* had applied in the first suit for amendment of the plaint by adding a claim for relief against *B* personally but the application was refused In such a case it has been held that the subsequent suit would not be barred *Alagirisami* v *Sundaresuara* (1898) 21 Mad 278 *Thakore* v *Thakore* (1890) 14 Bom. 31 But these decisions it is submitted are not correct *Fateh Singh* v *Jagannath Bakhsh* (1925) 52 I A. 100 47 All. 158 (25) A P C 5ა

4 *A* alleging that he is the *kritima* adopted son of *B* claims the whole estate of *B* and sues for the administration of *B* s estate *A* fails to prove the adoption and the suit is dismissed. *A* afterwards sues for administration of the same estate claiming one half of the estate as the *apatitha* adopted son of *B* The suit is barred as res judicata *Maung Ba Thein* v *Ma Jhan Myint* (1927) 5 Rang 565 105 I C 586 (28) A R 9

5 *A* sues *B* to recover certain lands from him alleging that *B* held the lands under a *lease* and that the lease had expired The lease is not proved and the suit is dismissed. Subsequently *A* sues *B* to recover the same land on the strength of his general *title*. The suit is not barred as res judicata *Zamorin of Calicut* v *Narayanan* (1899) 22 Mad. 323 *Kutti Ali* v *Chindan* (1900) 23 Mad 629 *Kandunni* v *Katiamma* (1886) 9 Mad. 251 *Ummatha* v *Cheria* (1882) 4 Mad 308 *Girdhar* v *Dayabhai* (1884) 8 Bom. 174

For other cases under this Rule see foot note (*f*)

Rule II —If a matter which forms a ground of attack in the subsequent suit could have been alleged as a ground of defence in the former suit but was omitted to be so alleged in that suit it will be *deemed* to have been directly and substantially in issue in that suit within the meaning of Explanation IV

This rule contemplates cases in which the plaintiff in the sub equent suit was defendant in the former suit Thus a claim which might have been pleaded by way of set off (*g*) or counter claim (*h*) to a previous suit will not be barred

Illustrations

1 *Srimut Rajah* v *Katama Natchiar* (1866) 11 M A I 50 which is ill (2) on p 45 above *Doorga Persad* v *Konuari* (1879) 4 Cal 190 5 I A 149 cited in that illustration and *Sarojini* v *Lakhi Priya* (1925) 29 C W N 2ა3 8ა I C 123 (25) A C 427 which is ill (5) on p 46 above belong to this class

(*f*) *Virman* v *Phulman* (1881) 4 All 6 *H r govan* v *Mulji* (1903) 11 Bom L R 9 1 4 I C 241 *Akayi* v *Ayissa* (1903) 6 Mad 645 *Imam Khan* v *Ayub Khan* (1897) 19 All 517 *Haji Has m* v *Manclaram* (18 9) 3 Bom 137 *Woomatara* v *Unnopoorna* (1873) 11 B L R 158 (P C) *Kesa S ngh* v *Asa Si gh* (1913) P.R no 86 p 305 20 I C 890 *Muhammad* v *Abd l* (19 3) 46 Mad 135 I C 0 (3) A M 57 C i *Ve til* (1919) M W N 6 7 I C 735 *K ppusw mi* v *S bba* (19 1) 6 I C 501 *M ll ja* v *P nammamal* (19 4) 47 Mad 4 6 I C 6_8 (24) A M 608

(*g*) *Amritsar National Bank ng Co* v *Fa al Ilah* (1919) P R 74 5 I C 850.

(*h*) *Pich* v *S bba vya* (1915) 28 Mad L J 513 ²9 I C 34

2. *A* and *B* two Hindu brothers divide the whole of the joint family property except a garden. *A* dies leaving a widow who sells *A*'s half share in the garden to *C*. After the death of the widow *C* sues *B* for partition of the garden and an ex parte decree is passed under which he (*C*) enters into possession of a moiety of the garden. *B* then sues *C* to recover possession of the moiety sold by *A*'s widow to *C* alleging that the sale was made by the widow without legal necessity and that on the death of the widow he became entitled to the moiety as the reversionary heir of *A*. The suit is barred as res judicata. *B* might and ought to have raised the question of the validity of the sale as a ground of defence in the former suit. *Shyama Charan* v *Mrinmayi Debi* (1904) 31 Cal. 49

3. A mortgagee who holds the mortgaged property also as lessee from the mortgagor sues the mortgagor to recover Rs 3 000 being the amount of the mortgage debt. At the date of the suit the mortgagee owes Rs 4 000 to the mortgagor for rent under the lease and this sum the mortgagor claims to set off against the mortgage debt under an *express agreement* in that behalf. The agreement is not proved and a decree is passed against the mortgagor for Rs 3 000. The property is sold in execution of the decree and it is purchased by the mortgagee with the leave of the Court. The mortgagor then sues the mortgagee to have the sale set aside and for a declaration that the mortgage debt is extinguished now claiming that a *general account* may be taken as between him and the mortgagee and that in taking such account the rent due to him may be set off against the mortgage debt. The suit is barred for the mortgagor might and ought to have set up that claim in the alternative in the former suit. *Mahabir Pershad* v *Macnaghten* (1889) 16 Cal 682 16 I A 107

4. *A* who owns a share in a village mortgages it to *B* and sells it subsequently to *C*. *C* sues *B* for redemption of the mortgage and obtains a decree. Subsequently *B* sues *C* for pre emption of the share sold by *A* to *C* alleging that he is a co sharer in the village and entitled as such to pre emption. The suit is not barred. The right of pre emption not being a vested and ascertained right when *B* filed his written statement in the former suit it could not have been properly pleaded by *B* as an answer to the claim for redemption in that suit. *Ram Chand* v *Durga Prasad* (1904) 26 All 61

For other cases under this rule see foot note (*t*)

Rule III—Where the right claimed in the subsequent suit is *different* from that in the former suit and it is claimed under a *different title* the subsequent suit is not barred as res judicata

Illustrations

1. *A* sues *B for possession* of certain lands alleged to have come to his share on a *partition* of joint family property with *B*. The defence is that the family property has not yet been divided and the suit is dismissed on a finding to that effect. A subsequent suit by *A* against *B* for *partition* of the family property is not barred. *Shivram* v *Narayan* (1881) 5 Bom 27 *Konerrav* v *Gurrav* (1881) 5 Bom 589 *Nilo* v *Gopal* (1886) 10 Bom 24 *Gondri Bhella* v *Khugjo* (1878) 3 Cal 23 which was dissented from in *Ummatha* v *Cherria* (1889) 4 Mad 308

2. *A* alleging that *B* held certain lands from him under a lease and that the lease had expired sues *B* to recover Rs 400 for *use and occupation* of the land by *B* after expiration of the lease. The defence is that the lease is a subsisting lease and the suit is dismissed on a finding to that effect. A subsequent suit by *A* to recover Rs 400 as *rent* payable under the lease is not barred. *Watson* v *Dhonendra* (1878) 3 Cal 6

(*t*) *M H m* v *Im m* (1 3) 10 B H C ⁿ11 *Dat M K mal* v *dul B j m* (1 8) ⁿ0 All 81 *H t a pat* (1883) 7 Bom *J pa* v *th* v *Fallum* (1 0) All W v *M g* v *M g* *I* (1 3) I B ng 363 6 I C 61 (3) [illegible]

[*Note the peculiar character of the cases cited above*—In all (1) *A* suing on the basis of a partition the Court finding that there was no partition and *A* subsequently suing for a partition in all (2) *A* suing on the basis that the lease has expired the Court finding that the lease has not expired and *A* subsequently suing on the basis that the lease is a subsisting lease For other cases of this class see foot note (*j*)]

3 *A* sues *B* in 1869 to recover a talukdari estate from him The suit is dismissed on a finding that the estate had become the absolute property of *B* under a conditional sale made by *A* to *B* in 1853 *A* then sues *B* in 1875 for redemption of the same property alleging that he had mortgaged the property as absolute owner thereof to *B* in 1854 The suit is not barred It may be difficult to reconcile the position of [*B*] as mortgagee in 1854 with his position as absolute owner in 1853 But if it be established that [*A*] was mortgagor in 1854 why should he be debarred of his right [of redemption] merely because at a certain date [*i e* in 1853] he may have had no right to the property at all? *Amanat Bibi* v *Imdad Husain* (1888) 15 Cal 800 15 I A 106 *Balthaddar* v *Ram Lal* (1904) 26 All 501

4 *A* sues *B* for redemption of a mortgage alleged to have been executed in 1856 of 50 cawnies of land *B* denies the genuineness of the mortgage and alleges that 14 out of the 50 cawnies were mortgaged to him in 1853 and that the 14 and the remaining 36 cawnies were sold to him by *A* in 1855 The mortgage is not proved and the suit is dismissed *A* then sues *B* to redeem the 14 cawnies on the footing of the mortgage of 1853 The suit is not barred *Ramasuami* v *Vythinatha* (1903) 26 Mad 760 *Veerana* v *Muthu Kumara* (1924) 27 Mad 102 *Parambath* v *Puthengattil* (1905) 28 Mad 406 *Thrikaikat* v *Thiruthiyal* (1906) 29 Mad 153 *Mahabir* v *Purbhoo Nath* (1907) 12 C W N 292 *Ram Sahai* v *Ahmadi Begam* (1911) 33 All 302 9 I C 53

5 *A* alleging that he mortgaged certain lands to *B* with possession sues *B* for *redemption* the suit being brought by him as *mortgagor* The mortgage is not proved and the suit is dismissed *A* then sues *B* for possession of the same lands claiming them as *absolute owner* thereof The suit is not barred *Mahomed Ibrahim* v *Sheik Hamja* (1911) 35 Bom 507 12 I C 387

For other cases under this rule see foot note (*k*)

Rule IV—It cannot be said of a relief which if claimed in the first suit would have made that suit bad for multifariousness that it ought to have been made a ground of attack in that suit (*l*)

Suits on mortgage—If a mortgagee in a suit for redemption against him by the mortgagor *omits to obtain an order for sale* of the mortgaged property on failure of payment by the mortgagor of the mortgage debt within the time allowed for redemption he will be precluded from bringing a separate suit for sale in default of payment by the mortgagor within that time The mortgagee might and ought to have claimed the right of sale in the suit for redemption brought against him (*m*) So also if the mortgagee omits to ask for a personal decree against the mortgagor he cannot do so in a subsequent suit on the same mortgage (*n*)

(*j*) *Sirdar* ... *Naraja* (18 4) 11 B H C 4 ... *Vathiyi* ... v *K* ... (188) 10 Mad 10 ... (1889) 8 All 306 ... *Nissa* v *Raja* (190) All 14

(*k*) *Th* ... (189) 1 Mad 336 ... (1897) 4 Cal 83 *Nath* v *Bidhi* (1894) 18 Bom ... *Nao* v *Ia* ... *Chand* (1899) 13 Bom 3 6 *Sh* *R* ... (1884) 6 All 3 8 *R* *D* ... (1916) 40 Bom 614 36 I C 564 ... v *Hiri* (1913) 1 R no 8 p 08 18 ... (1918) ... 119 ... (1913) 4 M L J 41 18 I C 9 3 ... (19) 46 Bom 803 66 I C 81 ... (19 3) 4 All ... 6

(*l*) ... (191) I L R ... 68 p ... 31 I C 1 9

(*m*) ... v ... (18 9) 13 Bom 6

(*n*) ... v *Hari* ... (19) Pat 13 5 I A 418 91 I C 1033 ... I C 50

A prior mortgagee who is made a party to a suit brought by a subsequent mortgagee on his mortgage is not bound to set up his claim under his prior mortgage unless his mortgage is impugned or unless it is sought to be postponed to the subsequent mortgage. If the prior mortgage is not attacked or sought to be postponed to the subsequent mortgage the prior mortgagee is outside the controversy of the suit and he is entitled to bring a suit for sale on his own mortgage even though he may not have appeared in the suit that was brought by the subsequent mortgagee. As regards a subsequent mortgagee the rule is that if he is made a party to a suit on a mortgage prior to his own he *ought to claim his right to redeem the prior mortgage* and if he omits to do so he cannot afterwards sue for redemption of the mortgage he omitted to plead in that suit (o).

If a mortgagee has successive mortgages of the same property from the same person there is a conflict of decisions whether he can obtain an order for sale on one alone. The Bombay High Court has held that if a mortgagee sues on a subsequent mortgage without reference to a prior mortgage he is barred by Explanation IV as he might and ought to have included the prior mortgage in his suit (p). Similarly the Madras High Court has held that a suit on a prior mortgage bars a suit on a subsequent mortgage of the same property (q). But it was held that a mortgagee might sue on a later mortgage reserving his rights on a prior mortgage (r). In Madras there was a conflict of decisions at one time which was set at rest by a decision of the Full Bench in *Subramania* v *Balasubramania* (s) which adopted the above view. In doing so the Full Bench followed the decision of the Allahabad High Court in *Sundar Singh* v *Bholu* (t) which held that the two mortgages constituted different causes of action. This view is correct and has been generally followed (u). But as it is a hardship on the mortgagor that his property should be sold twice it is now provided by the Transfer of Property Amendment Act that a mortgagee having several mortgages of the same property from the same person must sell all or none.

In suits for redemption foreclosure or sale there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee right up to the time of actual redemption foreclosure or sale as the case may be (v). A mortgagor therefore who has obtained a decree for redemption against a mortgagee in possession and paid what was due according to the decree and obtained possession cannot afterwards sue for profits realized by the mortgagee for a period prior to the delivery of possession. Such profits might and ought to have been taken into account at the time of passing the decree (w). Similarly where a mortgagor deposits the mortgage money in Court under sec 83 of the Transfer of Property Act and obtains a decree for possession from a usufructuary mortgagee under sec 62 he cannot subsequently sue for

(o) *[illegible]* v *[illegible]* (19[illegible]0) 47 I A [illegible] 47 C[illegible] 66 [illegible] I C [illegible] [1st mortg[illegible] not attacked]; *Gopal* v *[illegible]* (190[illegible]) [illegible] All 4[illegible] [illegible] I A 119; *Gopal* v *[illegible]* (1904) 31 Cal [illegible]; *Ayudhia* v *Inayat Ullah* (1913) 35 All 111 18 I C [illegible] [prior mortgage admitted]; *Mahomed Ibrahim* v *Ambika [illegible]* (191[illegible]) 39 C[illegible] [illegible] 39 I A 68 14 I C 490; *C[illegible]* v *Bh[illegible]* (191[illegible]) 34 All [illegible] 16 I C 8[illegible]; *[illegible]* v *[illegible]* (1914) 19 C W N [illegible] [illegible] I C 6[illegible] [prior mortgage admitted]; *Abdul [illegible]* v *Shek [illegible]* (19[illegible]9) 4 Luck [illegible] 115 I C [illegible] (19[illegible]) A O 46

(p) *Dhondi* v *[illegible]* (191[illegible]) [illegible] Bom 1[illegible] [illegible] I C 100; *[illegible]* v *Kh[illegible]ma* (1[illegible]1) [illegible] [illegible] I C 317

(q) *[illegible]* v *[illegible]* (190[illegible]) [illegible] Mad [illegible] [dissented from *Sundar Singh* v *Bholu* (1[illegible]) [illegible] All 3[illegible]]

(r) *Subramania* v *Balasubramania* (191[illegible]) 39 Mad 9[illegible] [illegible] I C 317; *Dhondi* v *[illegible]* (191[illegible]) [illegible] Bom 13[illegible] 14[illegible] I C 100; *Jagannath* v *Mohan[illegible]* (1916) [illegible] L J 118 39 I C [illegible]; *[illegible]* v *Subbay[illegible]* (190[illegible]) 30 Mad 40[illegible]; *[illegible]* v *[illegible]* (1908) 31 Mad [illegible]; *[illegible]* v *[illegible]* (1901) [illegible] All 313 28 I A [illegible]

(s) (191[illegible]) 38 Mad 9[illegible] 30 I C 31

(t) (18[illegible]) [illegible] All [illegible]; *[illegible] Prasad* v *Jam[illegible] Prasad* (190[illegible]) [illegible] All 233; *[illegible]* v *[illegible]* (19[illegible]) 100 I C [illegible] (19[illegible]) A A 3[illegible]

(u) *[illegible]* v *[illegible]* (19[illegible]1) 40 Mad L J [illegible] [illegible] I C [illegible]; *[illegible]* v *[illegible]* (19[illegible]4) [illegible] 80 I C 34 (19[illegible]) A [illegible]; *[illegible]* v *[illegible] Singh* (1910) [illegible] I C 40[illegible]; *[illegible]* v *[illegible]* (1910) 3[illegible] [illegible] 60 [illegible] I C 330; *[illegible]* v *[illegible]* (19[illegible]0) [illegible] C W N [illegible] 60 I C 80[illegible]

(v) *M[illegible] Per[illegible]* v *Mac[illegible]ghten* (1889) 16 Cal 6[illegible] 16 I A 10[illegible]; *[illegible]* v *[illegible]* (190[illegible]) [illegible] Bom 6[illegible]1

(w) *[illegible]* v *[illegible]* (1908) [illegible]0 All 36

profits realized by the mortgagee from the date of the deposit to the date of the delivery of possession (x) See notes Finality of decree in redemption suits on p 72 below

Suits for partition —If in a previous suit for partition some of the properties are left out by mistake or with the consent of the parties a subsequent suit *for partition* of those properties is not barred but it will be barred if they were excluded by the Court from partition after a contest between the parties on the ground that they are incapable of partition (y)

Subject-matter may be different —It is not necessary for Explanation IV to be applicable that both the issue and the subject matter of the two suits should be the same It is enough if the matters in issue are the same otherwise in suits for arrears of rent *there could be no res judicata at all for the subject matters of successive suits for arrears* of rent are necessarily different (z) See note under the same heading at page 43 supra

Issue of law —This section provides that no Court shall try any suit or issue etc Issues are of three kinds (1) issues of fact (2) issues of law and (3) mixed issues of law and fact An issue of fact may be res judicata A mixed issue of law and fact may also be res judicata (a) An issue of law it has been held may or may not be res judicata The law on the subject may be summarized as follows —

(1) A decision on an issue of law operates as res judicata if the cause of action in the subsequent suit is the same as that in the first suit (b) It is immaterial that the decision was erroneous in law (c) See ill (1) below

(2) There is a conflict of decisions whether if the causes of action in the two suits are different an erroneous decision on a question of law operates as res judicata It has been held in some cases that it does not (d) [ill (2)] and in some that it does (e) [ill (3)] *The latter view was adopted by a Full Bench of the Calcutta High Court in Tarini Charan* v *Kedar Nath* (f) The judgment proceeded on the broad ground that the correctness or otherwise of a judicial decision has no bearing upon the question whether it does or does not operate as res judicata It was also pointed out that it was the identity of the matter directly and substantially in issue that was the test of res judicata and not the identity of the cause of action It was contended in that case that the law had been altered by judicial decisions since the judgment in the first suit and reliance was placed upon the judgment of Maclean C J in *Alimunnissa* v *Shama Charan* (g) where it was said Cases must be decided upon the law as it stands when judgment is pronounced and not upon what it was at the date of the previous suit the

(x) *P[illegible]khm[illegible]ba* v *Ve[illegible]katesh* (190[illegible]) 31 Bom [illegible] *Satyabadi* v *Harabati* (1907) 34 Cal [illegible] Ma Nyo v Maung Hla B (19[illegible]4) [illegible] Rang 38 84 I C 39 ([illegible]) A P 13

(y) *Sas[illegible] [illegible]han* v *Hari Nath* (19[illegible]9) 3[illegible] C W N 10[illegible]3 110 I C 60 ([illegible]8) A C 459 See also *M[illegible]ll[illegible]* v *V[illegible]na[illegible]ak* (19[illegible]9) 31 Bom L R 640 ([illegible]) A B 3[illegible]3

(z) *Jam[illegible]da S[illegible]gh* v *[illegible]e[illegible]an[illegible]d[illegible]n* (1908) 3[illegible] Cal [illegible]9[illegible]9 *Saroj[illegible]* v *Lakh[illegible] P[illegible]y[illegible]* (19[illegible]) [illegible] C W N [illegible]3[illegible] [illegible]8 I C [illegible]1[illegible]3 ([illegible]) A C 4[illegible]7

(a) *B[illegible]un I[illegible]ja* v *B[illegible]aba S[illegible]nd[illegible]r* (1901) 8 C[illegible] 318 *Koy[illegible]a* v *Do[illegible]s[illegible]* (1906) [illegible] Mad

(b) *G[illegible]r [illegible]* v *[illegible]lh F[illegible]* (1884) 10 Cal 1087 *Phu[illegible]o* v *J[illegible]g[illegible] Nat[illegible]* (1893) 1[illegible] All 3[illegible]7 *[illegible]* v *[illegible] Ram* (1903) 6 Mad 104 *[illegible]aman* v *Hari* (190[illegible]) 31 Bom 1[illegible]

(c) *Go[illegible] Ko[illegible]* v *[illegible]dh F[illegible]* (1884) 10 Cal 1087 approved in *Tarini Ch[illegible]an* v *Keda[illegible] [illegible]th* (19[illegible]9) 6[illegible] Cal [illegible]3[illegible] 3[illegible] ([illegible]) A C 777

(d) *Al[illegible]m[illegible]a* v *S[illegible]ama Cha[illegible]an* (190[illegible]) 3[illegible] Cal [illegible]49 *Bai[illegible] Nath* v *Padn[illegible]a[illegible]nd* (19[illegible]) [illegible]9 Cal 848 14 I C 1[illegible]4 *Ch[illegible]ma[illegible]lal* v *Bap[illegible]bha[illegible]* (1898) [illegible] Bom 669 *[illegible]ishn[illegible]* v *[illegible]a[illegible]l[illegible]q* (190[illegible]) 6 Bom [illegible] *Parth[illegible]s[illegible]rat[illegible]* v *C[illegible]inna* (188[illegible]) [illegible] Mad 304 *[illegible]enk[illegible]* v *Mahali[illegible]g* (1888) 11 Mad 393 395 396 *G[illegible]p[illegible]* v *Sami* (190[illegible]) 8 Mad 517 *Ma[illegible]q[illegible]l[illegible]tham[illegible]al* v *[illegible]ay[illegible]su[illegible]m* (190[illegible]) 30 Mad 461 *[illegible]imma* v *[illegible]a[illegible]a[illegible]a* (190[illegible]) 30 Mad [illegible]04 *Kupp[illegible]na* v *Kuma[illegible]a* (1911) 34 Mad 450 [illegible] I C 418 *Aghore [illegible]am* (1909) 11 C L J 461 6 I C 5[illegible]4 *P[illegible]na* v *Rasik* (1911) 13 C L J 119 9 I C [illegible]68

(e) *Venkata* v *A[illegible]da[illegible]* (1917) 3 Mad L J 63 37 I C 8[illegible]7 *[illegible]tara* v *Laxma[illegible]* (19[illegible]1) 45 Bom 1[illegible]60 64 I C 16 *[illegible]a[illegible]* v *D[illegible]othari[illegible]a* (19[illegible]3) [illegible] Pat 771 74 I C 781 *Hub L[illegible]* v *G[illegible] Lal* (19[illegible]7) 49 All [illegible]5[illegible]3 100 I C 601 ([illegible]7) A A [illegible]9 *[illegible]aja[illegible]a* v *Central Ba[illegible]k [illegible] I[illegible]dia* (19[illegible]) [illegible] Bom L R [illegible]8[illegible]9 98 I C 341 ([illegible]6) A L 481 *[illegible]yeto[illegible]* v *Amjad Ali* (19[illegible]) 3[illegible] C W N [illegible]8[illegible] *T[illegible]n[illegible] Cha[illegible]an* v *Ke[illegible]* *[illegible]* (19[illegible]9) 56 Cal [illegible]3 ([illegible]) A C [illegible] [F B]

(f) (19[illegible]9) 56 Cal [illegible]3 ([illegible]) A C

(g) (1[illegible]0[illegible]) 3[illegible] Cal [illegible]

law having been altered in the meantime It has been conceded that if the law had been altered in the meantime by statute the objection [of res judicata] could not prevail it is difficult to see why it should prevail because the law has been since determined to be otherwise by judicial decisions. Referring to this passage Rankin C J observed in the Full Bench case that the reasoning in *Alumunnissa s case* was erroneous The learned Judge said The legislature by statute may alter the rights of parties and when it does so it makes such provision as it thinks proper to prevent injustice Courts of law are in no way authorized to alter the rights of parties They propose at all events to ascertain the law and if the binding character of a decision upon a concrete question as to the terms of a particular holding is to fluctuate with every alteration in the current of authority the Court will become an instrument for the unsettlement of rights rather than for the ascertainment thereof The principle relied upon is abhorrent to section 11 of the Civil Procedure Code and to the general intention of the doctrine of res judicata At the same time the learned Judge observed that when a plea of res judicata is raised with reference to a point of law which concerns questions of jurisdiction (*h*) or procedure or limitation and in which besides the parties the Courts and the public have an interest it was at least a question whether special considerations should not apply

(3) There is no doubt as observed by Rankin C J that if the law is altered by the passing of a new Act after a decision in a case the decision cannot operate as res judicata Thus in *Lakshmi* v *Atal* (*i*) after a preliminary decree for sale had been passed on a mortgage and before a final decree was made the Chota Nagpur Tenancy Act 1908 was extended to the district in which the property was situate That Act provided that no decree shall be passed for the sale of the right of a raiyat in his holding and that such right shall not be sold in execution of a decree It was held that the preliminary decree did not operate as res judicata and that the Court had no power to pass a final decree for sale [see also ill (2) above] This rule as stated above does not apply to a case where the law has been altered by subsequent judicial decisions (*j*)

Illustrations

(1) *Same cause of action decision though erroneous held to operate as res judicata* — A sells certain property to B At the time of sale the property was in the possession of *B* who claimed it adversely to A A sues *B* in the High Court of Calcutta to recover possession of the property as purchaser from A An issue is raised in the suit and it is an *issue of law* namely whether a person who is not in possession of property at the time of sale is competent to convey it The issue is found in the negative and A s suit is dismissed Afterwards it is decided by a Full Bench of the same High Court in another case between different parties altogether that although a person may not be in possession of a property he is competent to convey it After the decision of the Full Bench A again sues *B* to recover possession of the *same property* under the *same deed of sale* and asks for a decision in his favour on the strength of the Full Bench ruling on the point of law which was decided against him in the former suit Here the cause of action in the subsequent suit is the *same* as that in the former suit The Court is therefore precluded from re trying the same question of law in the subsequent suit in other words the issue of law is res judicata It is immaterial that the decision on the question of law in the first suit was erroneous *Courri Koer* v *Audh Koer* (1884) 10 Cal. 1087 *Jaidat* v *Deodhari Lal* (1923) 2 Pat 7 1 74 I C 781 (1) A I 2(5) *Dorairaj* v *Gurulasamy* (1921) 40 Mad L J 56 67 I C. 181

(*h*) See 41 Bom L. R 8 9 94 I C 31 ('36) A B 4 1

(*i*) (1913) 40 Cal 538

(*j*) 23 Bom L. R 879 94 I C 341 (6) A B 491

(2) *Different causes of action decision held not to operate as res judicata* —*A* sues *B* in 1874 to recover 12 years arrears of his share of a certain Government allowance received by *B* *B* contends that *A* is not entitled to recover more than 3 years allowance *A* s claim beyond that period being barred by the law of limitation The Court allows *A* s claim in its entirety In 1894 *A* sues *B* for *further* arrears for 11 years from 1882 to 1893 *B* raises the same point of law that was raised by him in the former suit *Held* that the decision in the former suit does not operate as res judicata in the subsequent suit Here the cause of action in the subsequent suit is *different* from that in the former suit for the claim in the subsequent suit is for arrears which had accrued due after the institution of the former suit The Court therefore is not precluded from re trying the same question of law and if it finds that the question of law was wrongly decided in the former suit it may decide the suit on what it considers is the correct interpretation of the law The Court said It appears to us that a point of law can never be res judicata The judgment also proceeded on the ground that the first suit was decided under the Indian Limitation Act 1871 while the second suit had to be decided under the Indian Limitation Act 1877 and that the law had been altered by the Act of 1877 *Chamanlal* v *Bapubhai* (1898) 22 Bom 669

(3) *Different causes of action decision though erroneous held to operate as res judicata* — *A* executes a kabuliat in 1880 in favour of *B* The kabuliat contains a stipulation for payment of interest on arrears of rent at the rate of 75 per cent per annum In 1898 the holding is sold in execution of a decree for rent obtained by *A* against *B* and it is purchased by *C* In 1915 *A* sues *C* for arrears of rent and interest on arrears at 75 per cent per annum The defence is that *C* being an auction purchaser is not bound to pay interest at the rate stipulated in the kabuliat and that it is in the nature of a penalty This contention is not upheld and a decree is passed in favour of *A* with interest at 75 per cent per annum In 1924 *A* brings another suit against *C* for arrears for a subsequent period and interest at 75 per cent per annum *C* raises the same defence and also contends that the decision in the previous suit was erroneous *Held* by a Full Bench of the Calcutta High Court that the decision in the previous suit even if erroneous operated as res judicata *Tarini Charan* v *Kedar Nath* (1929) 56 Cal 723 (28) A C 777 *Chandi Prasad* v *Maharaji Mahendra* (1901) 23 All 5 at pp 10 13

In the cases in which it was held that an erroneous decision on a point of law where the causes of action were different does not operate as res judicata the Courts were influenced by the consideration that they would be perpetuating an injustice for all time if they were to hold that an erroneous decision on a point of law in a former suit was binding upon the parties in a subsequent suit instituted upon a *new* cause of action It must however be recognized as stated by Mookerjee J in *Aghore Nath* v *Kamini Debi* (*k*) that *the effect of this is to substitute in the present section the expression cause of action* for the matter in issue In *Venkata* v *Andaiolu* (*l*) Napier J took the extreme view that where a decision on a point of law whether it be on the construction of a document or of a statute or on common law or on customary law once settles a question that arises directly out of conflicting views as to the rights of the parties it is res judicata A similar opinion was expressed by Shah J and Fawcett J in *Sitaram* v *Laxman* (*m*) and by Das J in *Ramlal* v *Deodhari Rai* (*n*) To get over the difficulties which might arise from this extreme view some judges have suggested a distinction between a decision on an abstract question of law such as a question of limitation and a decision on a concrete question such as the construction of a document entered into between the parties to a suit the latter question being treated as one to which the rule of res judicata applies and

(*k*) (1910) 11 Cal L J 461 4 I 6 I C 4
(*l*) (191) 3 Mad L J 63 66 0 S I C 8
(*m*) (19 1) 4 Bom 1 60 1 81 1 8 1 84 1 8
(*n*) (19 3) 2 Pat 1 3 74 I C 81 (4) 64 I C 16 A I 265

the former as one to which the principle of *stare decisis* applies (o) It is difficult to see what the principle of *stare decisis* has to do with the rule of res judicata (p) In *Tarini Charan v Kedar Nath* (q) Rankin C. J said that whether a decision was correct or erroneous it had no bearing on the question of res judicata and that what was res judicata between the parties to a suit was not the reasoning or any principle of law but the actual decision declaring the rights of the parties

In this connection it is interesting to note the recent decision of the Privy Council in *Broken Hill Proprietary Co v Broken Hill Municipal Council* (r) The appeal was from a judgment of the Supreme Court of New South Wales The question for determination was as to the correct method of ascertaining the annual value of a mine for rating purposes for the years 1919 1920 and 1921 That question turned upon the construction of s. 153 (3) of the Local Government Act 1919 of New South Wales The company was assessed for the years 1917 1918 and 1919 by the Council on a particular construction of the section and that construction was upheld by the High Court of Australia The Council adopted the same method for assessment for the years 1919 1920 and 1921 and it was upheld by the Supreme Court The company appealed to the Privy Council. It was contended on behalf of the Council that the question as to the matter of valuation was res judicata but this contention was overruled and the appeal was allowed As to the plea of res judicata their Lordships said There is no substance however in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year and no doubt as regards that year the decision could not be disputed The present case relates to a new question—namely the valuation for a different year and the liability for that year It is not eadem questio and therefore the principle of res judicata cannot apply This case shows that according to the English law an erroneous decision on a question at least of the interpretation of a statute does not operate as res judicata If a decision of every question of law were res judicata a decision that one of several co sharers may alone maintain a suit for rent of the entire holding though in contravention of the express provisions of s 194 of the Agra Tenancy Act 1901 would operate as res judicata in a subsequent suit between the same parties so as to preclude the tenant from raising the same defence in that suit but is has been rightly decided that such a decision has not the effect of res judicata (s)

Estoppel against a statute —Whether or not a finding on a point of law can be res judicata it is a settled principle that there can be no estoppel against a statute for estoppel cannot supersede the law of the land (t) Thus in *Woomesh v Barada* (u) where a previous rent suit had been decreed at a rate which included illegal cesses the defendant was not precluded from questioning the legality of the claim The Bombay High Court has allowed the plea of res judicata to sanction what is prohibited by law This was in a case (v) where a mortgagor lessee of a portion of a bhag which was inalienable under the Bombay Bhagdari Act 5 of 1862 when sued for rent was not allowed to plead that the bhag was inalienable because he had omitted to do so in a previous ex parte rent suit In a more recent case (w) the Allahabad High Court dismissed a suit by a single co sharer for rent because that form of suit was forbidden by section 194 of the Agra Tenancy Act It was objected that the defendants had not raised this plea in previous rent suits and as to this the Court said that where the law forbids a certain

(o) (1921) 45 Bom 1 60 1 8 64 I C 16 per Macleod C J (1913) 3 Mad L J 63 37 I C 85 per Sadasiva Aiyar J
(p) As to stare decisis see Tricomdas v Gopinath (1917) 44 I A 65 70 44 Cal 9 39 I C 1 6 and Tate v Tate [1915] 4 C 1100
(q) (1929) 56 Cal 3 (29) A C 7
( ) [19 6] A C 94
(s) Mohan Lal v Baldeo Singh (19) 49 All. 919 103 I C 3 9 ( ) A A 605
(t) H t W Wimbled Local Board (1878) 4 Q B D 45 54 B e v I shaj (1914) 38 Bom 0 9 I C 134
(u) (1900) 9 Cal 1
(v) Chhaganlal v B H Lha (1909) 33 Bom 4 9 I C 630
(w) Mohar v Baldeo (1927) 49 All 919 1 C 3 9 ( ) A A 60

thing being done in a suit no amount of failure by a defendant in previous suits to plead the positive bar created by legislature will prevent its being taken up in a subsequent suit

CONDITION II

The same parties or parties under whom any of them claim

This condition is the principle that judgments and decrees bind only parties and privies (*z*)* A privy is a convenient term of English Law to describe a person who claims under a party Latham J, in a Bombay case (*y*) classified persons other than parties as (1) privies (2) persons not claiming under parties but represented by them and (3) strangers A privy who claims under a party is bound for he who takes the advantage must bear the burden—*qui sentit commodum debet et sentire onus* Persons represented are in fact parties through their representatives—Explanation VI In the absence of fraud an adjudication is binding on the first two classes for as to strangers the maxim applies that *res inter alios acta noceri non debet*

Same parties—Parties are persons whose names are on the record at the time of the decision and he may be a person who has intervened in the suit (*z*) A party who withdraws or whose name is struck off ceases to be a party (*a*) A party who dies during the pendency of the suit but whose name erroneously remains on the record is not a party (*b*) If the parties are different there is no res judicata (*c*) Thus *A* sues *B* for rent The defence is that *C* and not *A* is the landlord *A* fails to prove his title and the suit is dismissed. *A* then sues *B* and *C* for a declaration of his title to the property The suit is not barred for the parties to the two suits are not the same *C* not having been a party to the former suit (*d*)

Res judicata between co defendants—As a matter may be res judicata between a plaintiff and a defendant so it may be res judicata as between co plaintiffs or as between co defendants First as to res judicata between co defendants if in a suit by *A* against *B* and *C* there is a matter directly and substantially in issue between *B* and *C* *and* an adjudication upon that matter is *necessary* to the determination of the suit the adjudication may operate as res judicata in a subsequent suit between *B* and *C* in which either of them is plaintiff and the other defendant (*e*) In other words if a plaintiff cannot get at his right without trying and deciding a case between co defendants the Court will try and decide the case and the co defendants will be bound But if the relief given to the plaintiff does not require or involve a decision of any case between co defendants the co defendants will not be bound as between each other by any proceeding which may be necessary only to the decree which the plaintiff

(*x*) *Mohunt Das* v *Nil Komul* (1899) 4 C W N 283

(*y*) *Ahmedbhoy* v *Vullebhoy* (188) 6 Bom 703 09

( ) *C b ad* v *Taruck* (18 8) 3 Cal 145

(*a*) *Kalee Coom r* v *Pran Kishoree* (187) 18 W R 29

(*b*) *Bep n B h ry* v *B ojo Nath* (188) 8 Cal 3 7

(*c*) *Radha Bi ole* v *Sr Sri Gopal* (19 7) 4 Cal 7 0 54 I A 238 101 I C 873 (7) A PC 1 8

(*d*) *Dwarkanath* v *Ram Chand* (1899) 6 Cal 428 4

(*e*) *Ramchandra* v *Narayan* (1887) 11 Bom 216 *Mag ram* v *Mehd Hos e n* (1904) 31 Cal. 9 *Chajj* v *Umrao* (1900) 2 All 386 *Balambh t* v *Naraya bhat* (1901) 2 Bom. 74 *B pu* v *Bhara i* (1898) 22 Bom 245 *Muh mmad* v *Viswanath* (1903) 6 Mad 337 *Ka divi* v *Z morin of Calicut* (1906) 29 M d 515 *Ius f* v *D ji* (1907) 30 Mad 447 *Gurdeo S ngh* v *Chandrikah S ngh* (1909) 36 Cal 193 1 I C 913 *Hari Annaji* v *Vas dev* (1914) 38 Bom 438 3 I C 944 *G garam* v *Vasudeo* (19 3) 47 Bom 534 3 I C 91 (3) A B 203 *Rajendra* v *Buncar p* (19) 3 Cal L J 1 3 64 I C 603 *V nkoba chari* v *Radhab yamma* (19 4) 47 Mad L J 612 (4) A M 858 *Muhammad Ahmad* v *Zahur* (19) 44 All 334 338 67 I C 5 3 (2) A A 19 *Mehra* v *Devi Ditta Mal* (19 1) 2 Lah. 83 6 I C 66 *Mau g Thwe* v *Ma Shwe* (19 4) 8 I C 4 3 (4) A R 9 *Ram Prasad* v *Mahab r* (19 4) 46 All. 0 9 I C 803 (4) A A 310 *Mahip Na ain* v *M n u S gh* (19) 47 All 78 83 I C 130 (25) A A 546 *Dewan S ng* v *Gokul* (19 1) 3 Lah L J 295 *Prat pa* v *Sim* (19 6) 51 Mad L J 65 98 I C 44 (2) A M 0 *Ma Pan Nynn* v *Maung Sit Phaung* (19 8) 6 Ran 5 5 (28) A R 315

obtains (*f*) These are the limits within which the doctrine of res judicata should be applied as between co defendants (*g*) Three conditions to be fulfilled are (1) a conflict of interest between the co defendants (2) the necessity to decide that conflict in order to give the plaintiff appropriate relief and (3) a decision of the question between the co defendants (*h*)

A Hindu *H* dies leaving two daughters *D*1 and *D*2 and a nephew N *D*1 sues *D*2 and N to recover certain property under an oral will of *H* *D*2 claims the property under a will in writing executed by *H* N claims the property as undivided nephew of *H* The Court finds that *H* and N were divided that the will in writing is the valid will and dismisses *D*1 s suit Subsequently *D*2 sues N to recover the property under the written will N contends that he and *H* were joint and that he became entitled to the property by right of survivorship The question whether *H* and N were joint is res judicata That question was directly and substantially in issue in the first suit and it was necessary to decide it in that suit to adjudicate upon *D*1 s claim and it was decided against N (*i*) Another type of cases in which a question between co defendants may become res judicata is where a suit is brought against two or more defendants and a will has to be construed by the Court to adjudicate upon the plaintiff s claim which is founded on the will In such cases the decision with regard to the construction of the will on the rival contentions of the defendants may be res judicata in a sub equent suit by some or one of them against the rest (*j*) but not if no rival contentions were raised at all (*k*) A decree for partition is in favour of each party to whom a share is awarded (*l*) and is res judicata not only as against the plaintiff (*m*) but as between the co defendants

Res judicata as between co plaintiffs —Next as to res judicata between co plaintiffs As a matter may be res judicata between co defendant so it may be res judicata between co plaintiffs subject to the same conditions which apply to the case of co defendants (*n*)

Pro forma defendant —A party may be joined as a defendant in a suit merely because his presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved see O 1 r 10 (2) and sec 32 of the Code of 1882 In such a ca e no relief is sought against him and the matter in i sue in the suit is not in issue between him and any other party and cannot therefore be res judicata against him For instance *A* claiming to be entitled to posses ion of a tank as tenant of *X* sues *B* for possession Y is joined as pro forma defendant and no relief is claimed against him The suit is dismis ed on a finding that *B* is the owner Y then sues *B* for possession and *B* contends that the issue of ownership is res judicata This contention must fail for the issue was decided in the former suit between *A* and *B* and not between Y and *B* for Y was only a pro forma defendant (*o*) Another instance is the case of *Radha Kishan* v *Khursid Hossein* (*p*) where a prior mortgagee who was a pro forma defendant in a puisne mortgagee s suit for sale was not barred from subsequently enforcing his own security See the note on this case under O 34 r 1 below

Parties in subsequent suit claiming under parties in former suit —Res judicata not only affects parties but their privies i e persons claiming under them

(*f*) *Coll ngl n* v *E rl of Sl reu bt ,* (1843) 3 Har 6 638
(*g*) *Fak rcl ar l* v *Nagi I d* (1916) 40 Bom 10 16 33 I C 4 3
(*h*) *J dav* v *Ka la h* (1916) ? C L J 3 34 I C 9 9 *Sukh D l* v *Bh p* (19 3) 71 I C 481 (3) A L 186 *Ma Tok* v *V M I n* (19 5) 3 Rang 77 79 *Ma Sh n* v *M q H n* (19 9) 7 Rang 80 83 117 I C 587 (9) A R 16
(*i*) *Venka ij i* v *Nara a ma* (1888) 11 Mad 204
(*j*) *I a I asad* v *Mahab r* (19 4) 46 All 0 9 I C 803 (4) A A 310
(*k*) *Ga jap o d* v *I uladananda* (19 5) 30 C W N 415 94 I C 3 (26) A C 568
(*l*) *Sheikh Kl o shel* v *N bbe* (1887) 3 C 1 551
(*m*) *Ca dl rp* v *Nirn l* (19 0) 4 I C 3 5
( ) *Kri l n* v *Ka* (1898) 1 Ma 1 8 *Rukh-mi i Dl o do* (191) 6 Bom 07 14 I C 466
(*o*) *B j Bel ri* v *Keda Nath* (1896) 1 C 1 580 *R n l* v *I az rsal eb* (1901) 2 B m 89 *Malhi* v *Ima ud-d n* (190) All 59
(*p* (19 0) 4 I A 11 4 C 1 66 5 I C 9 9

and each privy stands in the shoes of the party under whom he claims If the decree in the first suit is between A and B then the finding is res judicata in the subsequent suit if the plaintiff claims under A and the defendant under B or vice versa or if the plaintiff is A and the defendant claims under B or vice versa If however the second suit is between parties claiming under A alone or under B alone there is of course no bar (q)

Illustrations

1 A sues B for a declaration of title to land and obtains a decree A then sues C for possession C contends that B is owner and that he is in possession as B s tenant The defence is barred

2 A sues B for a declaration of his right to a share in the rents of a bazaar and obtains a decree C a tenant of A then sues D another tenant of A for a stall in A s part of the bazaar No finding in the first suit is res judicata (r)

Whether one person is bound because he claims under another is a question of substantive law The following are some instances of cases decided on this point with reference to the rule of res judicata —

(1) A *lessee* claims under his lessor but a lessor does not claim under his lessee and so the dismissal of the lessees ejectment suit against a trespasser does not bar a similar suit by the lessor (s)

(2) A *purchaser at an execution sale* acquires the right title and interest of the judgment debtor in the land sold and is bound by a decision between his landlord the decree holder and the judgment debtor as to its area (t) But where mortgaged property is sold in execution of a mortgage decree and it is purchased by the mortgagee a decision between the landlord and the mortgagor as to the rate of rent is not binding on the purchaser (u)

(3) A *purchaser at a revenue sale* does not claim under the defaulting proprietor and is not bound by a decree against him (v)

(4) A *son in a joint and undivided Hindu family* does not claim under his father (w) but a son claiming under a custom of primogeniture claims under his father (x)

(5) A *remainderman* does not claim under the life tenant and a remainderman under a will is not bound by a decree against a widow who has a life estate under the will (y)

The title by which the parties in the subsequent suit claim must have arisen subsequently to the commencement of the former suit —In order that a decision in a suit between A and B may operate as res judicata in a subsequent suit between A and C it is necessary to show that C claims under B by a title arising *subsequently* to the commencement of the first suit Thus a purchaser mortgagee lessee or donee of a property is not estopped by a decree obtained in a suit against the vendor mortgagor lessor or donor commenced *after* the date of the purchase mortgage lease or gift (z)

(q) *Angla* v *Mal m l* (1903) 30 C l 6 *ythil ga* v *l j jatha n al* (188) 6 M d 43
(r) *A gl a* v *Malom d* supra
(s) *Ra nb ohmo* v *B nsi* (188) 11 C L R 12
(t) *K l Da jal* v *U e h Pra ad* (19) 1 Pat 1 4 67 I C 266 ( ) A I 63
(u) *Mohammad* v *I ghunath* (19 6) 1 Luck 5 91 I C 1015 (6) A O 1
(v) *Gadadl ar* v *R lhacl a* (190) 34 Cal 868
(w) *S nder* v *Chhatar* (1906) 29 All 1 *Ra* *Na n* v *Bish h r* (1884) 10 All 411
( ) *Kal Charan* v *Sh B ksh* (191) 16 C W N 81 1 I C 6
(y) *Achl b* *H rgobi d* (1919) I C 84
(z) *S t Ra* v *A r* (1886) 8 All 3 4 *J y Cha d a* v *See* *tl* (1905) 3 C l 3 7 (vendor and purchaser) *Mu an* v *Thara a* (19 1) 41 Mad L J 33 6 I C 9 9 (le and l e) *Broj* v *Keda* (1886) 1 Cal 80 [F B] *Sh padbhat* v *J ma* (19) 9 Bom L R 4 101 I C 340 (7) A B 0 (lessor and lessee) *Na Ilah* v *Na r* (1893) 15 All 108 *Abd l Alli* v *M tkha* (1911) 3 Bom 9 10 I C 890 (don r and d nee) *R m ch dra* v *M llapa* (1916) 40 Bom 6 9 36 I C 443 *D hami* *Ad m th* (19 4) 4 Mad L J 84 I C 995 ( ) A M 358 (vendor and purchaser)

See notes below under the head Condition III Litigating under the same title

Representative suit—Explanation VI—This section deals with representative suits that is suits instituted by or against a person in his representative as distinguished from individual character Suits brought or defended by one or more persons on behalf of themselves and others with the leave of the Court under O 1 r 8 are common instances of this class Explanation VI provides that where persons litigate bona fide in respect of a public right or a private right claimed in common for themselves and others all persons interested in such right shall for the purposes of this section be deemed to claim under the persons so litigating It refers to cases in which a decision in a suit may operate as res judicata against persons *not expressly named* as parties to the suit as where a suit is instituted by *A* and *B* on behalf of them elves *and others* or where it is instituted against *A* and *B* on behalf of themselves *and others* The conditions under which the decision in such a suit may constitute res judicata against the parties not expressly named in the suit are—

(1) that there must be a *right claimed* by one or more persons *in common* for themselves and others not expressly named in the suit

(2) that the parties not expressly named in the suit must be *interested in such right* and

(3) that the litigation must have been conducted bona fide on behalf of all parties interested (*a*)

Where a person claims a right *for himself* which happens to be common to him and others he cannot be said to be litigating on behalf of the others and the Explanation does not apply (*b*)

Illustrations

(1) A decree in a suit against certain members of a sect alleged to be wrongdoers in their *individual* capacity cannot operate as res judicata in a subsequent suit against the other members of the sect *Sadagopa Chariar* v *Krishnamoorthy Rao* (1907) 30 Mad 185 34 I A 93 [The wrong complained of in the former suit was that the defendants carried an idol in procession through certain streets and that such processions were in violation of the plaintiff s rights The suit was against the defendants in their *individual* capacity and not as repre enting the sect to which they belonged]

(2) *A* alleging that he is the proprietor of a village sues *B* *C* and *D* for ejectment The defence is that *A* i not the proprietor and that part of the village belongs to *B* *C* and *D* and the rest to *X* *Y* and *Z* The Court finds that *A* is not the proprietor and *A* s suit is dismissed *A* then sues *X* *Y* and *Z* and also *B* *C* and *D* for a declara ion that he is the proprietor of the village and for possession The question of *A* s title to the village is res judicata so as to bar the suit against *B* *C* and *D* who were parties to the former suit but it is not res judicata so as to bar the suit against *X* *Y* and *Z* *who were not parties to the former suit* It cannot be said that *B* *C* and *D* litigated in the former suit in respect of a private right *claimed in common* for themselves and *X* *Y* and *Z* They set up only their own right to *a part* of the property and as to the rest they alleged that it belonged to *X* *Y* and *Z* *Jaimangal Deo* v *Bed Saran* (1911) 33 All 493 9 I C 819

(3) *A* and *B as members of the Mahomedan community* bring a suit against *C* for a declaration that a mosque and a garden attached to it are wakf property The plaintiffs

(*a*) *Somasundara* v *K landaiv lu* (190) 8 Mad 4 7 (F B) *Surender Nath* v *B oj Nath* (1886) 13 Cal 35 *Jaimang l Deo* v *Bed Saran* (1911) 33 All 493 9 I C 819 *Ramchand* v *Ma la Bakhsh* (19 4) 46 All 110 79 I C 310 (4) A A 178 *Sonachalam* v *Kumaravelu* (19 8) 51 Mad 128 107 I C 6 (28) A M 77 [F B]

(*b*) *Kuma andy* v *Venkatasubra n a* (19 7) 5 Mad L J 641 101 I C 58 (27) A M 645

fail to prove that the property is wakf property and the suit is dismissed After some years a suit is brought by nine other members of the same community against the same defendant *C* for the same relief The suit is barred as res judicata *Muhammad* v *Sumitra* (1914) 36 All 424 24 I C 97

The right referred to in this Explanation may either be a public right or a private right The words public right have been added into this Explanation in view of the provisions of s 91 below The right to have a public nuisance abated is a public right The right of pasturage claimed by custom by the inhabitants of a village over a tract of land or to take water from a spring or well is a private right (*c*)

In some of the ca es that arose under the Code of 1882 the opinion was expressed that the present Explanation so far as it relates to *private* rights must be confined to cases where leave to sue has been obtained under s 30 of that Code [now O 1 r 8 (1)] (*d*) But the Explanation is not confined to such cases and applies also where no such leave is obtained provided the litigation was carried on bona fide on behalf of all others interested in the right claimed (*e*) Suits by a Hindu widow or by a manager of a joint Hindu family or by a reversioner in her or his representative character are instances of this class

Shebait karnavan tru tee administrator etc —If the parties in the subsequent suit can be said to have been repre ented by the parties in the former suit the decision in the former suit will bind the parties in the subsequent suit Thus a shebait a trustee of a devasam a karnum a holder of vatan or saranjam lands an administrator of the estate of a deceased person a holder of an inam grant represents each his successor therefore a decree against him will bind his succe sor (*f*) A decree against the karnavan of a tarwad in his representative capacity binds the members of the tarwad (*g*) There are certain purposes for which the official assignee represents the insolvent (*h*) When however the official assignee brings the insolvent s property to sale for the benefit of the creditors he represents the whole body of creditors When a claim to an attached house was dismissed and on the insolvency of the judgment debtor the claimant filed a suit to establish his title to the house as against the official assignee the suit was not barred by res judicata as the official assignee represented not the judgment debtor but the whole body of creditors (*i*) A benamidar represents the real owner and a decree against the benamidar binds the owner (*j*)

Joint Hindu family —The question whether the manager of a joint Hindu family represents the other members in a suit affecting the family depends very largely upon the facts of the case If he was acting in the suit in the intere ts of the minor members and with the consent of the adult members they all are bound (*k*) If the cause of action

(*c*) *K lishunkur* v *Gopal Chunder* (1881) 6 Cal 49

(*d*) *Th akoti* v *Munappa* (18) 8 Mad 496 499 *Srini sa* v *Raghava* (1900) 3 Mad 28 *Ba ju Lal* v *Bulak Lal* (189) 24 Cal 38 *Somasundara* v *Kulandaivelu* (190) 8 Mad 457 463

(*e*) *Sonachalam* v *Kumaravelu* (19 8) 51 Mad 128 107 I C 6 5 (8) A M 77 [F B] *Gopalacharyulu* v *Subbamma* (19 0) 43 Mad 487 55 I C 984 *Muhammad* v *Sumitra* (1914) 36 All 4 4

(*f*) *Madh i n* v *Kesha an* (1888) 11 Mad 191 [tru tee] *Venkayya* v *Su amma* (1889) 1 Mad 23 [karnum] *Padlaba* v *Ana trav* (1855) 9 Bom 198 [vatan lands] *B i Meherbai* v *Magancha d* (1905) 29 Bom 96 [administrator] *Raja Panjit* v *Basu t* (1908) 1 C W N 3 *Jharula Das* v *Jalandhar* (191) 39 Cal 887 14 I C 14 [sebait] *Thakur* v *J ulth* (19 4) 46 All 651 80 I C 406 (4) A A 504 *P gu o Kumari* v *Golab Cha d* (18 5) 14 Beng L R 450 459 I A 145 [sebait *Upe dra ath* v *Kusum* (1915) 4 Cal 440 7 I C 328 *Subban Al* v *Imam Begam* (19) 52 Cal 971 5 I A 294 88 I C 347 ( ) A P C 184 [inam lands] *Madhavrao* v *Anusuyab i* (1916) 40 Bom 606 6 I C 505 [saranjam lands]

(*g*) *Komappan* v *Ukka an* (1894) 17 Mad 14 *Manavattil* v *Path am* (1907) 30 Mad 15

(*h*) *Miller* v *Lakh na i Debi* (1901) 8 Cal 419

(*i*) *Official Assign e* v *A ju* (19 5) 49 Mad L J 530 83 I C 8 (25) A M 688

(*j*) *G r Narayan* v *Sheo Lal Si gh* (1919) 46 I A 1 46 Cal 566 49 I C 1 *Na d Kishore* v *Ahmad* (1896) 18 All 69

(*k*) *Ling gowda* v *Basangowda* (19 7) 51 Bom 450 54 I A 1 101 I C 44 ( ) A I C 6 *K nj Man* v *J ganath* (19 0) 4 All 359 5 I C 846

is a wrongful act of the father the son who is not a party is not bound (l) For mortgage suits see note under O 34 r 1

Hindu widow and reversioners —A decree passed against a Hindu widow as representing the estate of her husband in respect of a debt or other transaction binding on the estate is binding upon the reversioners (m) *unless* as was observed by their Lordships of the Privy Council in the *Shivaganga case* it could be shown that there had not been a fair trial of the right in that suit—or in other words unless that decree could have been successfully impeached on some special ground (n) The reason of this qualification is that though a Hindu widow *represents* the estate of the reversioners for some purposes it is her duty not only to represent the estate but also to *protect* it (o) The observations of their Lordships in the *Shivaganga case* were construed in many cases to mean that a decree passed against a Hindu widow or other limited heir did not bind the reversioners unless the decree was passed in a suit *contested to the end* and that neither a consent decree nor a decree on an award however bona fide the compromise or reference might be bound the reversioners But this view has now been definitely rejected by the Privy Council as it involves very extreme consequences one of them being that a Hindu widow must fight the case up to the Privy Council and another that her opponent can never suggest a compromise because he would know that any compromise would be upset The rule of law as now established is that a widow has power to compromise a suit and a decree passed against her though on a compromise or on an award binds the reversioners as much as a decree in a suit contested to the end provided the compromise was entered into by her bona fide for the benefit of the estate which she represents and not for her personal advantage (p) A decree however against a Hindu widow not in her representative but personal character does not bind the reversioners (q) A decree passed against the legal personal representative of a Hindu widow in respect of her husband s estate does not bind the reversioners for the representative of a widow does not represent the estate of the husband (r)

There is no authority for the proposition that a Hindu widow otherwise qualified to represent an estate in litigation ceases to be so qualified merely owing to a personal disability or disadvantage as a litigant although the merits of a suit by or against her are tried and the trial is fair and honest The mere fact therefore that she is personally estopped from denying the material facts of a case is no ground for withholding the application of the rule enunciated at the commencement of this paragraph namely that where the estate of a deceased Hindu has vested in his widow or other limited heir a decree fairly and properly obtained against her is binding on the reversionary heirs Thus where a Hindu widow instituted a suit for a declaration that an adoption made by her to her deceased husband was invalid and the suit was dismissed on the ground that the widow was estopped by her conduct from denying the validity of the adoption and it was further found upon the facts that the adoption was valid it was held in a suit brought by the reversionary heir after the widow s death for a declaration that

(l) *Varadaraja* v *Sunkar* (190) 1 Mad L J 197

(m) *Kattama Natchiar* v *Rajah of Shivaganga* (1863) 9 M I A 43 *Ker b Narain* v *Trilok* (188) 11 C l 186 11 I A 19 *H Nath* v *Math M n* (1894) 1 Cal 8 0 I A 183

(n) *Katama Natchiar* v *Sri at Rajah* (1863) 9 M I A 43 609 *Chowdhri Ran l Singh* v *Balwant Singh* (1918) 4 I A 168 40 All 593 48 I C 553

(o) *Nugender Chunder* v *Sreemutty Kamini Dossee* (186) 11 M I A 241 267

(p) *Ram Saran Prasad* v *Shyam Kuma* (19) 49 I A 34 1 Pat 41 69 I C 71 ( ) A I C (3 6 appg *Mahendra Nath* v *Sham s a* (1915) 1 Cal L J 157 163 7 I C 9 4 *Hira Bib* v *Sohan Bib* (1914) 18 C W N 9 9 4 I C 309 P C *Behari* v *Daul* (1913) 3 All 40 18 I C 1 (settl ment of family dispute) *S bb m al* v *K d i j mal* (1906) 30 M d 3 [decree on admi ion] *I loga raji* v *Adleppa* (1912) 3 Ma l 60 564 6 I I C 1 3 *Gu* v *k* v *Ja ram* (191) 34 All 38 14 I C 184 [withdrawal f appe l by widow] *Sh b D o* v *R m Pra d* (19 4) 46 All 63 87 I C 938 ( ) A A 9 [decree on award]

(q) *S bbi* v *Ra l ish a* (1918) 4 Bom 69 43 I C 33 *Kali* v *Fa j* (1908) 30 All 334 *Sosh* v *Cl dra* (19 3) 3 C L J 349 68 I C 3 (3) A C 04

(r) *Ka la h* v *G rija* (191) 39 Cal 9 14 I C 299

the adoption was invalid that the reversionary heir was bound by the decision in the first suit as res judicata (*s*) The dismissal of a suit brought by a widow on the ground that it was barred by the provisions of s 47 below does not operate as res judicata so as to bar a subsequent suit by the reversioners (*t*)

A suit by the next reversioner for a declaration that an alienation made by a Hindu widow is not binding on the reversion is a representative suit on behalf of all the reversioners (*u*) A decree fairly and properly obtained against the reversioner in such a suit is binding not only upon him but the whole body of reversioners presumptive and contingent on the one hand and the alienee or his representative on the other (*v*)

Consent decree in a representative suit on behalf of the public —In the under mentioned case (*w*) the Privy Council left it an open question whether in India persons *instituting a suit on behalf of the public can bind the public by a compromise decree*

Judgment in rem —As already explained a judgment in a suit is binding only upon the parties to the suit and their privies As a general principle a transaction between two parties in judicial proceedings ought not to be binding upon a third for it would be unjust to bind any person who could not be admitted to make a defence or to examine witnesses or to appeal from a judgment he might think erroneous (*x*) There are however certain judgments which bind all the world and not only the parties to the proceeding in which they were passed and their privies A judgment that is binding upon the parties and their privies only is called a judgment *in personam* A judgment which binds all the world is called a judgment *in rem* Judgments *in rem* are outside the scope of the present section They are dealt with in the Indian Evidence Act s 41

Decree against minor —A decree passed against a minor properly represented is binding upon him to the same extent as a decree passed against an adult A minor however is entitled to impeach a decree passed against him if the next friend or guardian for the suit was guilty of fraud or gross negligence in allowing the decree to be passed (*y*) It has been said in one case that any act or omission on the part of the guardian ad litem which in the result has wrought prejudice to the minor s interest is gross negligence ( ) but this indeed is going too far An omission on the part of a guardian ad litem to bring to the notice of the Court a previous judgment between the parties for the purpose of raising the plea of res judicata has been held not to constitute negligence (*a*)

A decree passed against a minor not properly represented is a nullity and cannot operate as res judicata (*b*) But it has been held that if a suit is brought on the minor s behalf to set aside a sale in execution of such decree but the plea that the minor was not properly represented in the suit in which the decree was passed is not then taken it cannot be taken in a subsequent suit to set aside the decree and sale by reason of the rule contained in Explanation IV to the section (*c*)

(*s*) *Chaudhri Jagal Singh* v *B l t Singh* (1918) 4 I A 168 40 All 593 48 I C 3 v *Vikala Aiyakannu* (19) 43 Mad L J 9 0 I C 387 ( ) A M 33
(*t*) *G nesh* v *Lak hm ta* (19 1) 46 B n 6 6 I C 93
(*u*) *V nk tan rajana* v *S bba* *I* (1915) 39 Mad 406 4 I A 1 9 I C 298
(*v*) *Kesh Pr d* v *Sheo P rga l* (19) 44 All 19 64 I C 248 (2) A A 301 [F B] *Ramam a* v *(p l d a ja* (1918) 41 M d 6 9 46 I C 0 [F B] *I Ir M il n d* v *L n D n* (19 4) 5 Lah 4 1 84 I (4 ( ) A L 89 *Primatha* v *th* v *Bh b n Mohan* (1) 49 C l 4 64 I C 980 (2) A C 3 I *M l I d* v *g sh r* (19) I A 398 47 All 883 *Thakar Singh* v *Mst Uttam Kaur* (19 9) 10 Lah 613 118 I C 449 (9) A L 29
(*w*) *Abd r Rahim* v *M homed Ba kat Al* (19 8) 55 I A 96 55 Cal 519 108 I C 361 (8) A 1 C 16
(*x*) *D ch of K g t e* Smith L C 31 *Secretary of St t* v *d Ah I Badi* (1921) 44 M d 67 I C 8 1 [F B]
(*y*) *C r und s* v *Lalla Lalu* (189) 19 B I *L lk* v *R and* (18) (I 8 *I l* v *S lt Bibi* (191) P R 103 390 43 I C 3 4 *Colep* v *Gol p* (1914) 7 Mad L J 486 6 I C 16 v *I a Sakl r n* (191) 39 I o 3 8 I 644 *D m* v *Arya* (19 0) 44 I om 6 o I 4 S notes t 0 9 r 9
( ) *L J J r* v *r p* (19 6) 48 All 44 90 I 349 (6) A A 36
(*a*) *A l* v *App F o* (19 4) 4 M d I J 00 8 I 81 ( ) A M 8
(*b*) *F n Ch I P Julan* (19) 6 All L J ( ) A A 44
(*c*) *M llayya* v *I a a* (19 4) 4 M d 4 6 7 I 6 3 (4) A M 608

CONDITION III

Litigating under the same title

Litigating under the same title —The third condition of res judicata is that the parties in the subsequent suit must have litigated under the same title in the former suit The expression same title means the same capacity A verdict against a man suing in one capacity will not stop him when he sues in another distinct capacity *and in fact is a different person* (d) Thus where a suit is brought by a person to recover possession from a stranger of math property claiming it as the *heir* of a deceased mohunt but the suit is dismissed on his failure to produce a certificate of succession to establish his *heirship* the dismissal is no bar to a suit by him *as manager of the math on behalf of the math* (e) Where the trustees of a public charity fail in a suit to eject a trespasser they are not barred from suing again as members of the public with the consent of the Advocate General (f) The dismissal of a suit by *A* against *B* *C* and *D* in their individual capacity on a finding that a temple is public property does not operate as res judicata against *A* in a subsequent suit brought by *B* *C* *D* and others in their representative capacity against *A* for a declaration that the same temple is public property (g) Similarly the dismissal of a suit brought by a son against his *father* for maintenance claimed *under an agreement* is no bar to a suit by him against his *eldest brother* for a declaration that he is entitled to maintenance out of certain lands in his hands *held under a sanad* from Government whereby it was alleged the lands were charged at the time of grant with the maintenance of the junior members of the family (h) Where in a suit by *A* against *B* for the recovery of a property *B* sets up a jus tertii in *C* and the Court finds that *C* has no title to the property and allows *A* s claim the finding does not operate as res judicata in a subsequent suit by *B* after *C* s death against *A* claiming the same property as the heir of *C* as it could not have operated as such against *C* himself (i)

A mortgagee in possession does not lose the character of *mortgagee* and become *a trespasser* because he refuses to deliver up possession of the mortgaged property to the mortgagor on deposit being made by the latter in Court of the amount payable on the mortgage *A* executes a usufructuary mortgage of his property to *B* and places *B* in possession thereof At the proper time *A* tenders the mortgage debt Rs 500 to *B* and asks to be restored to possession *B* refuses to accept the tender on the ground that more is due to him and to deliver up possession of the property to *A* *A* sues *B* for redemption and deposits Rs 500 in Court The Court finds that the tender was proper and directs *B* to deliver up possession to *A* After entering into possession *A* sues *B* to recover mesne profits from *B* from the date of the deposit in Court to the date of the recovery of possession The suit is barred for *A* might and ought to have claimed the mesne profits in the first suit The suit is between the same parties litigating under the same title that is as mortgagor and mortgagee The mortgage is not extinguished after the tender and desposit and *B* does not become a *trespasser* after that date It cannot therefore be said that the suit against *B* for mesne profits is against him as a *trespasser* and not as a mortgagee (j)

(d) *Duchess of Kingstone s case* 2 Smith s L C 731 59 See also *Ali Moidin* v *Kombi* (188) 5 Mad 239 241

(e) *Babaji rao* v *Laxmandas* (1904) 8 Bom 215 Distinguished *Hargowan* v *Mulji* (1910) 34 Bom 416 4 I C 241 *Ghelabha* v *Uderam* (1912) 36 Bom 29 12 I C 5 7

(f) *Lakshman Das* v *Jugal Kishore* (1898) ? Bom 16

(g) *Hari Kishen* v *Pagh bar* (1926) 1 Luck 480 97 I C 8 3 (6) A O 578

(h) *Ahmad* v *Vihal ud D n* (1883) 9 Cal 945 10 I A 45

(i) *Jagannadham* v *Venkatasubba Rao* (19 7) 50 Mad 877 104 I C 468 ('27) A M 844

(j) *R khminibai* v *Venkatesh* (1907) 31 Bom 5 7 *Satyabadi* v *Harabati* (1907) 34 Cal 2 3 *Ram Din* v *Bhoop Singh* (1908) 30 All 5

The words "between parties under whom they or any of them claim litigating under the same title" cover a case where the later litigant occupies by succession the same position as the former litigant. There may be a succession by the ordinary rules of inheritance or succession by some very special rules as in the case of saranjam estates or vatan estates. The words of the section do not make any distinction between different forms of succession. A decree therefore against a saranjamdar may operate as res judicata against his heir and successor (*k*) so also a decree against a vatandar (*l*).

See notes above p 59 Shebait karnavan trustee administrator etc

CONDITION IV

"Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised"

Court of competent jurisdiction —In order that a decision in a former suit may operate as res judicata in a subsequent suit it is necessary that the Court which tried the former suit must have been a Court competent to try the subsequent *suit*. Mere competency to try the *issue* raised in the subsequent suit is not enough. As stated by their Lordships of the Privy Council in *Gokul Mandar v Pudmanund* (*m*) "a decree in a previous suit cannot be pleaded as res judicata in a subsequent suit unless the judge by whom it was made had jurisdiction to try and decide *not only the particular matter in issue but also the subsequent suit itself* in which the issue is subsequently raised." In this respect the enactment goes beyond s 13 of the previous Act 10 of 1877 and also as appears to their Lordships beyond the law laid down by the judges in the *Duchess of Kingstone's case* (*n*). The words in s 13 of the Code of 1877 were "No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a *Court of competent jurisdiction* in a former suit between the same parties or between parties under whom etc." Sec 2 of the Code of 1859 was in similar terms. In s 13 of the Code of 1882 the words "Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised" which also occur in the present section were substituted for the words "Court of competent jurisdiction" clearly restricting the operation of the principle of res judicata.

The Court which decided the former suit may be a Court of "exclusive" jurisdiction or a Court of "concurrent" jurisdiction or a Court of "limited" jurisdiction. As to superior Courts nothing is presumed to be out of jurisdiction except what is expressed to be so but with inferior Courts the presumption is to the contrary that nothing is within jurisdiction except what is expressed to be so (*o*).

Where the Court which decided the former suit is a Court of "exclusive" jurisdiction —If a matter directly and substantially in issue in a former suit has been adjudicated upon by a Court of *exclusive* jurisdiction the adjudication will bar the trial of the same matter in a subsequent suit. Thus Courts of Revenue have jurisdiction in respect of certain matters to the entire *exclusion* of civil Courts and the decision of a Revenue Court on such matters cannot be questioned in a civil Court (*p*). Similarly the Dekkan Agriculturists Relief Act gives exclusive jurisdiction to the Court under that Act over a particular class of suits and a decision in a previous suit tried by that Court will be res judicata if the suit falls within the class to which the Act applies (*q*).

(*k*) *Madh r ao v 4 s y b* (1916) 40 Bom 606 36 I C 0

(*l*) *Pall v A ant av* (188) 9 Bom 198

(*m*) (190) 29 I A 196 0 9 Cal 07 1 *Sh bo Po t Bab P ut* (1908) 3 C 1 3 3 3 9

(*n*) (1 6) 2 Smith s Leading Cases p 31

(*o*) See *R v Nab Ir p* (1868) 15 W R Cr 1

(*p*) *Kishore S gh v Bahad r S ngh* (1919) 41 All 9 48 I C 4 0 *B hi v M h p t* (1919) 41 All 03 49 I C 118 *Pa D v D b koe* (19) 44 All 4 7 I C 133 ( ) A A 336 *B lwant S gh v S abji t* (19 6) 48 All 4 95 I C 983 ( ) A A 0 (F B) *Mool Cha d v S ht f i* (19 9) 4 Luck 20 11 I C 83 (9) A O 36

(*q*) See *l th l S taba* (191) 36 Bom 543 16 I C 44

Where the Court which decided the former suit was not a Court of jurisdiction concurrent with that of the Court in which the subsequent suit is brought —In such a case the Court which decided the former suit cannot be a Court competent to try the subsequent suit within the meaning of this section (r)

Where the Court which decided the former suit was a Court of concurrent jurisdiction —In such a case the Court which decided the former suit might or might not have been competent to try the subsequent suit If it was the decision would operate as res judicata but not otherwise

Summarising the above we may say that in order that a decision in a former suit may operate as res judicata the Court which decided that suit must have been either—

1 a Court of *exclusive* jurisdiction or

2 a Court of *concurrent* jurisdiction competent to try the subsequent suit

The following are the principal rules as to concurrent jurisdiction —

(1) *The jurisdiction of the two Courts must be concurrent as regards the pecuniary limit as well as the subject matter* —This rule was laid down by Sir Barnes Peacock in *Edun* v *Bechun* (s) and it was approved by the Privy Council in *Misir* v *Sheo Baksh* (t) The learned Chief Justice said that there were in India many grades of Courts with different pecuniary limits of jurisdiction presided over by judges whose qualification differed widely that it would be improper that a finding as to the validity of an adoption or of a will in a petty suit in a Munsiff s Court should be conclusive in a suit for a property of a large amount in a High Court and that by taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the subject matter this evil or inconvenience is avoided. In *Run Bahadur* v *Lucho Koer* (u) the Privy Council said that if this construction of the law were not adopted the lowest Court in India might determine finally and without appeal to the High Court the title to the greatest estate in the Indian empire It is essential therefore that the first Court was a Court competent to try and decide not only the particular matter in issue but also the subsequent suit in which the issue is subsequently raised (v)

First as to pecuniary limit —The jurisdiction of the Court which decided the former suit and that of the Court in which the subsequent suit is brought must be concurrent as regards the *pecuniary limit* A sues B in Court X to recover *interest* due on a bond for Rs 12 000 For the defence it is alleged that the amount actually lent by A was Rs 4 000 and that A was not entitled to interest on more than Rs 4 000 The Court finds that the amount actually lent was Rs 4 000 and awards A interest on that sum only Court X is a Court of which the jurisdiction is limited to suits of which the value *does not exceed Rs 5 000* A then sues B in a High Court to recover the *principal* sum of Rs 12 000 alleging that that was the actual amount lent by him to B B contends that the actual amount advanced was Rs 4 000 and that the question as to whether Rs 12 000 was lent or Rs 4 000 is res judicata The question is not res judicata for the jurisdiction of Court X being limited to Rs 5 000 it was not a Court competent to try the subsequent suit in which the amount claimed is Rs 12 000 Pecuniary jurisdiction is determined by the plaintiff s estimate of the value of his claim and if the Court awards less that does

(r) *Edun* v *Bechun* (1868) 8 W R 175 179 *Misir* v *Sheo Baksh* (1883) 9 Cal 439 445 9 I A 197
(s) (1868) 8 W R 175 179
(t) (1883) 9 I A 197 204 9 Cal 439
(u) (1885) 11 Cal 301 12 I A 23
(v) *Misir* v *Sheo Baksh* (1883) 9 Cal 439 9 I A 197 *Gokul Mandar* v *Padmanand* (1902) 29 I A 196 202 29 Cal 707 *Ramdayal* v *Junkidas* (1900) 4 Bom 456 *Girija* v *Sabapathy* (1906) 9 Mad 65 *Sheikh Hossu* v *Ram Kumar Singh* (1894) 16 All 183 *Venkat* v *Onk* (1901) 45 Bom 805 61 I C 76 *Shibo Rout* v *Baban Rout* (1908) 35 Cal 353 *Hub Lal* v *Gulab Lal* (1927) 49 All 543 545 100 I C 601 (27) A A 97 *Venkata Subba Rao* v *Jagannadhuradu* (1929) 56 Mad L J 57 110 I C 554 (28) A M 840

not shew that the suit was brought in the wrong Court (*w*) But the plaintiff canno prevent a decision in a previous suit from operating as res judicata by overvaluing th second suit (*x*) Where A brought two suits in a Provincial Small Cause Cour for compensation in each suit for loss of one parcel and the suits were dismissed and h subsequently brought a suit in the Munsiff s Court joining together the claims in th respect of both the parcels so as to bring the valuation above the Rs 500 limit it wa held that the suit was barred on the principle of res judicata (*y*)

Secondly as to subject matter—The jurisdiction of the two Courts must b concurrent as regards subject matter Thus certain Courts have no jurisdiction t adjudicate upon questions of *title* though that question may be gone into *incidentally* i order to decide the principal question A finding on a question of *title* by such Court cannot operate as res judicata in a subsequent suit on *title* This generally happens i the three following cases —

(a) *Where the first Court is a Probate Court and the second Court a Civil Court* —There are cases in which it has been held that a decision in a proceeding in a Probat Court for a grant of probate or letters of administration as to which of the rival appli cants is the nearest heir of the deceased or as to whether the applicant is the residuary legatee upon a true construction of the will of the deceased and therefore entitled t probate does not operate as res judicata in a subsequent suit by the defeated party for a declaration of his title to the property left by the deceased and for possession thereo so as to preclude him from litigating the same question against the suit ( ) The authority however of these decisions has been considerably shaken by the judgment of t Privy Council in *Sheoparsan* v *Ramnandan* (*a*) and it has been held by the High Courts o Rangoon (*b*) and Calcutta (*c*) that a finding in a proceeding for letters of administration that one of two rival applicants is the nearest heir of the deceased is res judicata in a subsequent suit for a declaration of title These decisions proceed on the ground tha where a matter has been decided by a Court having jurisdiction to decide it the decision operates as res judicata though the Courts may not be the same It has similarly been that if *A* alleging himself to be the executor of *B* s will applies for probate of th will and *C* *B* s widow opposes the application and probate is refused on the groun that the will is not proved *A* will be preclud d in a subsequent suit by *C* against him to recover her husband s property from him from contending that he is executor an entitled as such to retain possession of the property Though the judgment of the Probat *Court refusing probate to A does not operate in such a case as a judgment in rem* i operates as res judicata between *A* and *C* under s 295 of the Indian Succession Act 1925 read with s 11 of the Code (*d*) Similarly a decision of the Probate Court tha the testator executed his will as a free agent and not under undue influence precludes the party against whom the decision is given from attacking the will on this ground in a suit in a civil Court (*e*) As to s 387 of the Indian Succession Act 1851 see the under mentioned case (*f*) See also the Indian Evidence Act 18 2 s 41

(*w*) *Lakshm n* *Babaji* (1883) 8 Bom 31 *Mahab S ngh* *B ha i L ll* (1891) 13 All 3 0

(*x*) *T mizi ussa* *Syed M l mmad* (19 8) 50 All 306 104 I C 467 (8) A A 1 *Chh le L l v Kh dr bhan* (19 3) 4 All 59 80 I C 1041 (3) A A 1 6

(*y*) *Mangan Lal* v *G I I Ry Co* (19 4) All L J 74 83 I C 969 (4) A A 840 See l o *Bl ug ianb lli* v *F b* (1901) 8 Cal 8 a expl l d in *Shib Raut Bab n R ut* (1903) 3 Cal 353 3

(*z*) *Arunmo n* v *Mole dra Nath* (1893) 0 C l 888 *Ch nt n* v *J im I ndra* (1910) 34 Bom 589 7 I C 944 *L lu Moh n Radl a man* (1911) 1 C W N 10 1 10 I C 434 *M qb l Sh h* v *M h m d* (1918) P R no 49 p 16 43 I C 4 3

(*a*) (1916) 43 I A 91 98 99 43 C l 694 70 06 33 I C 914

(*b*) *Maung Ht t* v *Ma Hlay* (19 3) 1 Ran 8 6 I C 494 (3) A R 7

(*c*) *Dw j pada D* *K l p da Das* (19 6) 31 C W N 808 100 I C 10 (7) A C 4 1 diss ntl fr m (1893) 0 Cal 888 *pra* nd (1911) 15 C W N 10 1 10 I C 434 s pra

(*d*) *I li h l* *Sd bai* (1914) 38 Bom 303 3 I C 3 l o *Br ndon* v *N da b* (1914) 38 Bom 3 I C 1

(*e*) *B v Lal* *H ri R Lal* (1913) P R no 13 p 60 41 I C 4 3

(*f*) *Mu l D* v *A h t D* (19 4) 5 Lah 10 9 I C 133 (4) A L 493

(b) *Where the first Court is a Munsiff's Court and the second Court a District Court* —*A* sues *B* for rent in a Munsiff s Court The defence is that *C* and not *A* is the landlord The Court finds that *A* is not the landlord and the suit is dismissed *A* then sues *B* in a District Court for a declaration of *title* to the land The suit is not barred for a Munsiff s Court has no jurisdiction to adjudicate upon questions of title (*g*)

Similarly a decision in a suit for damages instituted in a Provincial Small Cause Court [a Court not competent to try a suit on title] does not operate as res judicata in a subsequent suit for establishment of title (*h*) A decision in a suit for rent in a Pro vincial Small Cause Court [a Court not competent to try a suit for possession] does not operate as res judicata in a subsequent suit for possession (*i*)

(c) *Where the first Court is a Revenue Court and the second Court is a Civil Court* —A decision of a Revenue Court on a question of *title* is no bar to the trial of the same question by the ordinary Civil Courts unless the Revenue Court is empowered by the Legislature to determine questions of title so as to constitute it *pro tanto* a Civil Court (*j*) The reason is that Courts of Revenue are generally Courts of jurisdic tion limited to adjudicate upon questions of rent tenure etc (*k*) There are however some matters of which the decision by a Revenue Court is expressly declared by the Act constituting the Court to have *the force of a decree in a civil suit* (*l*) and some as to which it is declared that the decision *shall be final* (*m*) In such cases the decision of a Revenue Court will operate as res judicata so as to bar the trial of the same matter in a Civil Court In a recent case (*n*) an occupancy tenant sued in a Revenue Court to evict the defendant alleging that he was a sub tenant The suit was dismissed on the ground that the defendant was not a sub tenant but probably a sharer in the occupancy The plaintiff then sued in the Civil Court to eject the defendant as a trespasser but the suit was dismissed on the ground that its object was to reverse the decision of the Revenue Court This decision it is submitted is incorrect The finding of the Revenue Court that the defendant was not a sub tenant was final But it had no such jurisdiction to declare who were sharers in the occupancy and in any event its finding on that point was only incidental See notes Where the Court which decided the former suit was a Court of exclusive jurisdiction on p 64 above For other cases see foot note (*o*) See note Where the Court which decided the former suit was a Court of exclusive juris diction on p 63 above

(2) *When the first Court is a Criminal Court and the second Court is a Civil Court* —Criminal proceedings are not a suit hence no finding of a Criminal Court can be res judicata in a subsequent suit It has thus been held that a conviction or an acquittal in a criminal case is not conclusive in a civil suit for damages in respect of

(*g*) *R in B lal v Lucho J orr* (188) 11 C l 301 1 I \ 3

(*h*) *D l e Lal v Ha ari L l* (1914) 1 All L J 8 3 6 I C 56 It is otherwise where the first suit is tried as a regular suit *P m F qir v B d h S ngh* (1919) 41 All 54 47 I C 83

(*i*) *P kmi v Raj ji* (19 4) 48 Bom 541 83 I C 4 (4) A B 4 4

(*j*) *B d Saran v Bl ag t Deo* (1911) 33 All 453 10 I C 9 4 *B ha v Sl eobalak* (190) 3 All 601 *Appa Rao v G aju* (19 0) 43 Mad 8 9 60 I C 00 *Tlak r H ma t v Ut Jh la* (19) 0 All L J 340 66 I C 915 ( ) A A 9 *B ru Mal v Sunl r J l* (19 3) 1 All L J 330 I C 15 (4) A A 10

(*k*) *Hurn S ker v Mult am* (1875) 15 B L R 39 *P K shori v I j Ram* (1904) 6 All 468 *Ashraf v tl Ahmad* (1904) 26 All 601 *M hesh v Ranj r* (190) 7 All 163 *Inaj t Al v Murad Ali* (190) 7 All 569 *Dha a v Gab r* (1903) 30 Cal 339 *R g jya v Ratnam* (1897) 0 Mad 39 *P dmalav v L kmi l an* (190) 1 C W N 8 *As f e sa v Hemcha dr* (19) 4 Cal 114 100 I C 3 ( ) A C 916

(*l*) *D rga Cl rn v H leen* (190) 9 Cal 25 *Sh o Nar n v Parmesha* (1896) 18 All 0 *I alka Prasa l v M mol an Lal* (1916) 38 All 0 310 33 I C 86

(*m*) *Mahendra v C rish Cl a dra* (1918) 3 Pat L J 3 9 46 I C 1

(*n*) *Balwant Si gh v S abj t* (19 6) 48 All 7 4 98 I C 983 ( ) A A 70 (F B)

(*o*) *Lal B lari v P kal* (19 0) 4 All 309 55 I C [qu tion of title not i d or decided] *K damb v Lakshm* (1908) 31 Mad 6 *B l j pall v B l jepall* (1907) 30 Mad 3 0 *Ka ha v D ga* (1915) 37 All 3 7 I C 913 *S d r v D a ath* (1915) 37 All 80 8 I C 43 *Mulo v I am Lal* (1 0) 43 All 191 53 I C 772

the act charged against the accused (*p*) On this principle the finding of a Criminal Court that *A* assaulted or abducted *B* is not res judicata in a suit for damages against *A* for assault or abduction (*q*) nor is an acquittal a bar to a civil suit against the accused (*r*)

The High Court of Bombay has held that the judgment of a Civil Court may in a proper case be admissible in evidence in a criminal proceeding between the same parties Thus where *A* charged *B* with criminal breach of trust in respect of certain items and it appeared that all those items had been dealt with by the Civil Court and the contentions of the accused with reference to all of them had been found to be correct by that Court it was held that the judgment of the Civil Court was admissible in evidence in the criminal proceedings against the accused (*s*)

(3) *To determine whether the Court which decided the former suit had jurisdiction to try the subsequent suit regard must be had to the jurisdiction of that Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit* (*t*) —The words Court competent to try such subsequent suit refer to the jurisdiction of the Court at the time when the first suit was brought If at that time such Court would have been competent to try the subsequent suit had it been *then* brought the decision of such Court would operate as res judicata although on a subsequent date by a rise in the value of the property that Court had ceased to be a proper Court so far as regards its pecuniary jurisdiction to take cognizance of a suit relating to that very property The leading case on the subject is *Gopi Nath* v *Bhuguat* (*u*) In that case a suit was brought in the year 1860 to recover certain property of which the value at that time was less than Rs 1 000 and therefore the proper Court to try it was that of the Munsiff A second suit was afterwards brought in the year 1880 between the same parties in the Court of the Subordinate Judge to recover the *same property* which had then risen in value and become worth more than Rs 1 000 The matter directly and substantially in issue in both the suits was the same and the question arose whether the decision of the Munsiff in the first suit operated as res judicata in the second suit It was contended that as the Munsiff could not have tried the second suit in consequence of the value of the property being more than Rs 1 000 his decision could not have the effect of res judicata But it was held that the decision operated as res judicata for if the second suit was instituted in the year 1860 that is *at the time when the first suit was brought* the Munsiff s Court would have been competent to try it Mitter J said The reasonable construction of the words in a Court of jurisdiction competent to try such subsequent suit seems to us to be that it must refer to the jurisdiction of the Court *at the time when the first suit was brought* that is to say if the Court which tried the first suit was competent to try the subsequent suit if *then* brought the decision of such Court would be conclusive under s 13 [of the Code of 1882] although on a subsequent date by a rise in the value of such property or from any other cause the said Court ceased to be a proper Court so far as pecuniary jurisdiction is concerned to take cognizance of a suit relating to that property The same view has been taken by the High Court of Madras (*v*) It has however been held by that Court that the augmentation of a pecuniary claim by accrual of interest is not similar to a rise in the market value of a property and that though in the latter case the decision in the prior suit may operate as res judicata it cannot in the former case (*w*)

(*p*) *Bishonath* v *Hiro* (1886) W R [illegible] *Doorga* v *Doorga* (1866) 6 W R Cr Ref 26

(*q*) *Ali Buksh* v *Shaikh* (1869) 1 W R 47 *Ram Lal* v *Tula Ram* (188) 4 All 9 See Evidence Act s 43

(*r*) *Kohab* v *Manirudin* (1908) 1 C W N 501 4 I C 5 3

(*s*) *In re Ma l* (1914) 41 Bom 1 33 I C 633

(*t*) *Gopi Nath* v *Bhugwat* (1884) 1 C 1 69 *[illegible]* (188) 11 C I 1 3 *[illegible]* (183) 1 Mad 434 *[illegible]* *Shaanessa* (191) 19 C W N 1 40 I C 9 4

(*u*) (1884) 10 Cal 697 *Sempa* *Khem Lal* (19 9) 10 Lah 5 8 ( ) A I L 929 113 I C 90

(*v*) *Venkatachala* [illegible] *Perumal* (1919) 4 Mad [illegible] 3 I C 33

(*w*) *Cruja* [illegible] *bapathy* (1906) 9 Mad 6

But it will operate as res judicata if the claim for interest is not bona fide and is clearly untenable (*x*)

(4) *It is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which that suit was ultimately decided on appeal* (*y*) *or of the executing Court* (*z*) —A suit is instituted in a Munsiff s Court An appeal from the decree in that suit is preferred to a District Court A subsequent suit relating to the same matter in issue is brought also in a District Court The decision in the first suit cannot operate as res judicata in the subsequent suit for though the District Court that heard the appeal may have jurisdiction to try the subsequent suit the Munsiff s Court that is the Court which decided the former suit is not a Court of jurisdiction competent to try the subse quent suit

Though an appeal lies from a decision of a Talukdari Settlement Officer to the District Court yet the decision operate as res judicata in a subsequent suit in the District Court for a Settlement Officer is not a Court competent to try a civil suit he is merely an administrative officer (*a*)

(5) *A Court does not cease to be a Court of jurisdiction competent to try the subsequent suit if its inability to entertain it arises not from incompetence but from the existence of another Court with a preferential jurisdiction* (*b*) —Thus a finding by a Munsiff in a suit for possession under s 9 of the Specific Relief Act 1877 instituted in his Court that the plaintiff was wrongfully dispossessed by the defendant is res judicata on the issue as to wrongful dispossession in a subsequent suit brought by the same plaintiff against the same defendant for damages for wrongful dispossession in a Court of Small Causes

(6) *A decision on a matter directly and substantially in issue in a suit tried by a Revenue Court may operate as res judicata in a subsequent suit brought in the same Court though the character of the suits may be such that in the one case an appeal lies to the Commissioner and in the other to a District Court* —The fact that in the two suits appeals lie to different Courts does not affect the application of the rule of res judicata (*c*)

Explanation II —This explanation is new Under the Code of 1882 the High Courts of Bombay (*d*) and Madras (*e*) held that a decision in a suit in which no second appeal was allowed by law such as suits of a nature cognizable by Courts of Small Causes when the amount or value of the subject matter does not exceed five hundred rupees could not operate as res judicata in a subsequent suit in which such appeal was allowed The High Court of Calcutta dissented holding that that a decision in a suit could operate as res judicata notwithstanding that no second appeal was allowed by law in that suit (*f*) Explanation II affirms the view taken by the High Court of Calcutta that the competence of a Court does not depend on the right of appeal from the decision of such Court (*g*)

(*x*) *Velayuda v Su dara* (19 6) 51 Mad L J 630 9 I C 969 (26) A M 8 9

(*y*) *Topon dl ee v Sre p tty* (1880) 5 C 1 83 *Bh v Sarat Ch nder* (1896) 3 Cal 415 *Shibo I oat v Baba Roat* (1908) 35 Cal 3 3 3 6 *Mal bha v S rsa gji* (1906) 30 Bom 2 0 *I alesvara v Muthu kr h a* (1911) 1 M d L J 7 9 I C 686 *Anars gji v De p a gj* (19) 49 Bom 44 8 I C 588 ( ) A B 241 *Ka mu v M samm t F him n* (19) 44 All 71 76 I C 93 ( ) A A 445 *Amars ngji v Deepsangji* (19 5) 49 Bom 44 87 I C 588 (5) A B 241

(*z*) *Offici l Ass gn e of Mad as v Aiyu Dik h tha* (19) 48 Mad L J 530 533 88 I C 85 ( ) A M 688

(*a*) *Mal bh i v S s gj* (1906) 30 Bom 0

(*b*) *Ghulappa v R gl avend a* (1904) 8 Bom 38 *Raja Simhadr v R machund udu* (190) 7 Mad 63 *Bodlu v Mohan S ngh* (1917) 39 All 717 4 I C 86

(*c*) *Ben Madl o v Indar Sah i* (1910) 3 All 67 3 I C 0

(*d*) *Gov d v Dho dbarav* (1891) 15 Bom 104

(*e*) *Avanas v Nachamm l* (1906) 9 M d 195

(*f*) *Pai Charan Ghose v K m d Mohun* (1898) 5 Cal 571 *Bh gwa b ti v Forbes* (1901) 8 Cal 8

(*g*) *Ram Faqir v B nd shri Si gh* (1919) 41 All 54 58 47 I C 837

Judgment of Court not competent to deliver it—A judgment delivered by a Court not competent to deliver it cannot operate as res judicata [Evidence Act 1872 s 44] For this purpose there is no distinction so far as Chartered High Courts are concerned between cases where a Court has no jurisdiction at all to try a suit and cases where it cannot exercise jurisdiction unless leave to sue has been obtained under cl 12 of the Charter Therefore a judgment delivered by a Chartered High Court in a suit which it has no jurisdiction to try unless leave to sue has been obtained cannot operate as res judicata if leave to sue was not obtained (h)

Judgment obtained by fraud or collusion—A judgment obtained by fraud or collusion (i) cannot operate as res judicata [Evidence Act 1872 s 44] Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice Lord Coke says it avoids all judicial acts ecclesiastical or temporal (j) Where a decree is impeached on the ground of fraud the fraud alleged must be actual positive fraud a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of the decree by that contrivance The mere fact that a decree has been obtained by perjured and false evidence is no ground for setting it aside on the ground of fraud (k)

CONDITION V

The matter directly and substantially in issue in the subsequent suit must have been "heard and finally decided" by the Court in the former suit

Heard and finally decided— Res judicata by its very words means a matter on which the Court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter (l) The section requires that there should be a *final* decision (m) The mere fact that a matter directly and substantially in issue in a suit was directly and substantially in issue in a former suit is not sufficient to constitute the matter res judicata it is also essential that it should have been heard and finally decided This does not mean that there should be an *actual* finding on the issue in question it is sufficient if the decree necessarily *involves* a finding of the issue (n) It has thus been held that an issue may be res judicata if the judgment of the appellate Court shows that the issue was treated as material and was decided although the decree passed merely affirms the decree of the lower Court which did not deal with the issue (o)

In dealing with questions under the present head it is important to note—

(1) that if a decree is specific and is at variance with a statement in the judgment regard must be had to the decree and not to the statement in the judgment (p)

(h) *Abd l F ilir v Dool bibi* (1913) 3 Bom 63 0 I C 30

( ) *S e Ban ilal v Dl apo* (190) 4 All 94

(j) Cited in *D chess of K ng to e s case* 2 Smiths L C 31 See also *N itar i Das i v Nundo Lal* (1899) 6 Cal 801 90

(k) *J li F r v Lachm* (1915) 37 All 53 30 I C 89 *M hon l Gol b v Mahomed S li man* (1894) 1 C l 61 619 *Na d K m v I amjiban* (1914) 41 C l 990 23 I C 337 *Chattu Si gh v Ra Radh* (1919) 4 Pat L J 18 50 I C 4 1 *I m Rat n v Bl ri* (1916) 38 All 30 I C 73 *Gon ld v O tha j* (19 3) 5 Bom L R 803 I C 00 (4) A B 100 *M lt mala v I amch ind a* (19 6) 31 C W N 58 97 I C 879 (7) A C 84

(l) *Jenk s I obert on* (186) 1 H L S App 14

(m) *Pa tam G r v Narabada G* (1899) 1 All 50 6 I A 1 2

( ) *So rj mo e Day e v S dl d* (18 4) 1 B L R 304 I A Sup Vol 1 *I m Krish v I th l* (1891) 15 Bom 89 *Ap rba Shy a* (1913) 4 Cal W N 3 54 I C 9

(o) *M t ap r Z m dary C Ltd v Na e h Na a i I oy* (19 4) 51 I A 93 51 Cal 631 80 I C 6 (4) A PC 144

(p) *I d rju v Tichl a* (1 33) 15 All 3 2

(2) that neither an obiter dictum nor a mere expression of opinion in a judgment has the effect of res judicata (q)

(3) that when a Court merely for the purpose of preventing a remand records its finding on an issue not necessary for the decision of the case it does not operate as res judicata (r)

See notes Examination of pleadings and judgment on p 39 above

A matter will be said to have been heard and finally decided notwithstanding that the former suit was disposed of in any of the following ways —

(i) ex parte (s) or

(ii) by dismissal under O 17 r 3 (t) or

(iii) by a decree on an award (u) or

(iv) by oath tendered under s 8 of the Indian Oaths Act 1873 (v)

(v) by dismissal owing to plaintiff s failure to adduce evidence at the hearing (w)

The decision in the former suit must have been one on the merits — In order that a matter may be said to have been heard and finally decided the decision in the former suit must have been one on the merits Hence it could not be said of a matter that it was heard and finally decided if the former suit was dismissed—

(i) for want of jurisdiction (x) or

(ii) for default of plaintiff s appearance under O 9 r 8 (y) [but a fresh suit on the *same* cause of action may be barred under O 9 r 9] or

(iii) on the ground of non joinder of parties ( ) or misjoinder of parties (a) or multifariousness (b) or on the ground that the suit was badly framed (c) or on the ground of a technical mistake (d) or

(iv) for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree (e) or

(v) for failure to furnish security for costs under O 25 r 2 (f) or

(vi) on the ground of improper valuation (g) or for failure to pay additional court fees on a plaint which was undervalued (h) or

(q) *De ar lon ti De nko i ti* (1881) 4 M 1 134 *Ja ait nn a v Lutf uss* (188) All 606 *A l v I upp* (188) 8 M d 7 *Mol v P D al* (1880) 9 All 843 *Ramas ca i Al m l* (19 4) 46 M 1 L J 98 8 I C 9 1 (4) A M 604 *Rekhab Das Mt Sh ola* (19 3) 45 All 466 46 74 I C 6 6 (3) A A 49 [Lvid n e Act 18 2 109]

(r) *P t h v Bla ti* (19 4) 4 M d L J 3 8 I C 48 (4) A M 833

(s) *Modh di n B* (1889) 16 C l 00

(t) *I e k tachal n Mahat Lshma a* (188) 10 Mad *Sh k Sal b v M t I* (1890) 13 Mad 510 *H g Jh ir* (1918) 0 All 590 46 I C 390

(u) *Tyankat sl v Sakl ar i* (189) 1 Bom 46

(v) *Ah ued v Mo din* (1901) 4 Mad 444 *Sa y i v Artasicaro* (1913) 36 M d 8 18 I C 83

(w) *W t n v Collector of R j hal ye* (1869) 13 M I A 160 *Kartick v S dhar* (1886) 1 C l 63

(x) *Lak h an v R han ira* (1881) Bom 48 I A 18 *I i tili v Tulja* (1879) 3 B m 3 *Blukha das v Lall bla* (189) 1 Bom 56 *Ra n Gor djha v M ng r R m* (1883) 13 C L R 83 *Abd l K d Doolanbibi* (1913) 3 Bom 63 0 I C 530 See also Evidence Act 18 s 44

(y) *Rallia l rshad v Lal Sahab* (1890) 1 I A 1 0 13 All 3 *Cl and Koir v I rtab Si gh* (1888) 16 C l 98 1 I A 156 *Ramchandra v Va hacl arya* (1900) 4 Bom 251 54 As to suits for partition see *Bisheslia Das v R m I a ad* (1906) 28 All 6 *M ion M I n v Ba ka ti Nath* (1906) 10 Cal W N 839 *Radhe v Jal Mul han l* (10 4) 46 All 8 0 8 1 80 I C 933 (4) A A 90

(z) *Sheos g Sit am* (1897) 4 Cal 616 4 I A 0 *Sa l a v D k* (19) 43 Mad L J 57 3 I C 491 ( ) A M 59 *Jatu Nath Am tja* (19 7) 46 C L J 118 104 I C 5 6 (7) A C 794

(a) *Mi lan m d v bian* (1886) 8 All S

(b) *Fatt h S ngh v Lachm* (18 4) 13 B L R App 3

(c) *Deodlar v Lala S osaran* (18 8) 3 Cal L R 39

(d) *J kd la v Amb ka Prasad* (191) 2 Pat L J 313 39 I C 1 6

(e) *Peti ape umal v Murujandi* (189) 18 Mad 466

(f) *Har ram v L lb i* (190) 6 Bom 637

(g) *D it lh v Nar jin* (1868) 4 Bom H C A C 110

(h) *Irawa v S tjappa* (1911) 3 Bom 38 7 I C 96 *M h mmad v bia* (1886) 8 All 8

(vii) for want of a cause of action (i), or

(viii) for want of notice (j) or

(ix) on the ground that it is premature (k)

See notes Liberty to bring a fresh suit on p 75 below

The decision in the former suit must have been necessary to the determination of that suit—A matter directly and substantially in issue cannot be said to have been heard and *finally* decided unless the finding on the issue was *necessary to the determination of the suit* A finding on an issue cannot be said to be necessary to the decision of a suit unless the decision *was based upon* that finding And a decision cannot be said to have been based upon a finding unless an *appeal can lie* against that finding The reason is that everything that should have the authority of res judicata is and ought to be subject to appeal and reciprocally an appeal is not admissible on any point not having the authority of res judicata (l) It was at one time thought that the test of res judicata was whether the finding was embodied in the decree This however is not so for res judicata is a matter of substance and not of form It is the right of appeal which indicates whether a finding was incidental or necessary This leads to the following rules —

RULE I—If the plaintiff s suit is wholly dismissed no issue decided against the defendant can operate as res judicata against him in a subsequent suit for the defendant cannot appeal from a finding on any such issue the decree being wholly in his favour (m) [see ills. (1) and (3)] But every issue decided against the plaintiff may operate as res judicata against him in a subsequent suit for the plaintiff can appeal from a finding on such issue the decree being against him (n) [see ill (3)] With reference to the first branch of this rule it is well settled that when a plaintiff s suit is dismissed in spite of a finding on an issue in his favour that finding does not operate as res judicata against the defendant (o) With reference to the second branch of this rule the Allahabad High Court has expressed the opinion that it does not apply to a case where the Court after finding against the plaintiff on an issue which should in logical sequence have been decided first proceeds to record its findings against the plaintiff on other issues in such a case according to that Court the findings on the other issues do not operate as res judicata against the plaintiff in a subsequent suit (p) [See notes to s 96 Who may appeal]

Illustrations

(1) In a suit by *A* against *B* for ejectment *B* contends (1) that no notice to quit was given and (2) that the land being majhes land he is not liable to be evicted at all The suit is dismissed on a finding that no notice to quit was given Th Court however also finds that the land is not majhes land *A* afterwards sues *B* to evict him from the land after giving notice to *B* *B* contends that the land is majhes land and that he is

(i) *H rilar* v *Chandra K imar* (1918) 3 C W N 91 49 I C 9

(j) *Ram sw mi* v *Mu adai* (19 4) 4 Mad 453 84 I C 6 (4) A M 469

(k) *Pam eddi* v *Subbareddi* (889) 1 Mad 00

(l) Sav Syst s 93 *Na in D s* v *F u Shah* (1889) P P no 157 [F B]

(m) *R n Bahad* v *Jucho I oer* (188) 11 C 1 301 306 1 I A 23 34 *Midi p r Zam nd r Co Ltd* v *Nare h Narajan R y* (13 1) 48 I A 49 48 Cal 660 65 I C 833 *Gl ela* v *K l l a d* (1894) 18 Bom 97 60 *Shib Cl a a* v *I ji* (18) 17 All 1 4 v *to I H o* (1886) 13 Cal 1 *Th kur M ga d o* v *Th k r M ha eo* (1891) 18 Cal 64 *I a b t* v *Mattu a* (1913) 40 C l 9 1 I C 4 3 *Da dbl a* v *Daya am* (1919) 43 Bom 68 1 I C 10 *I Nath* v *Narsi* (13 0) 44 Bom 3 1 5 I C 3 *R ma m* v *Ma da* (19 4) 47 Mad 453 84 I C 6 (4) A M 469

( ) *I e rj* v *Amb a* (189) 4 Cal 900 *I K t raj* v *Ra a am* (191) 38 M 158 1 I C 8 *B bu L l* v *Ha b ksl* (1918) 1 P no 13 p 60 41 I C 4 9 *D kar* v *Ana t* (19 8) 30 Bom L P 90 (8) A B 349

(o) v *B dhoo* (1888) 13 C 1 1 *Th kur M ga deo* v *Th k M h deo* (1891) 1 Cal 64 *Shib Ch n* v *I gh ath* (1895) 1 Cal 1 4 *I g M d y ppa* (1894) 3 Bom 96 *I arb tt* v *M th ra* (191) 40 Cal 9 1 I C 4 3 *D d h* v *D y am* (1919) 43 Bom 56 5 1 1 C 109

(p) *Sh b Ch a* v *I ghu* (189) 1 All 1 4 19 commented upon in *Dink* v *A nt* (19 8) 0 Bom L R 90 906 ('28) A B 349

not liable to be evicted The finding in the first suit that the land was not majhes land does not operate as res judicata so as to preclude *B* from raising the same contention in the subsequent suit the reason being that *A* s suit having been dismissed *B could not have appealed* from the finding that the land was not majhes land The Court having found in the first suit that *A* had not given notice to quit it was *not necessary* for the determination of the suit to decide whether the land was majhes land or not The first suit was dismissed *in spite of* the finding in *A* s favour that the land was not majhes land *Thakur Magundeo* v *Thakur Mahadeo* (1891) 18 Cal 647 *Nundo* v *Bidhoo* (1886) 13 Cal 17

Suppose that in the above illustration *B* had not raised the defence that the land was majhes land in the first suit Would he be precluded from raising that defence in the second suit on the ground that he *might and ought* to have raised that defence in the first suit? No the reason being that when a point of defence that has been actually raised and disallowed cannot operate as res judicata against a defendant it certainly cannot operate as such when it has not been raised at all though it *might and ought* to have been raised (*q*)

(2) *A* sues B for possession of certain lands after the expiry of a lease granted by him to *B* *B* pleads (1) an occupancy right and (2) that the suit is premature as he [*B*] had a right of renewal The trial judge finds that there was no occupancy right but that the suit was premature and the suit is dismissed *A* files an appeal to the High Court *B* files a cross objection to the finding against him namely that he had no occupancy right The High Court affirms the decree on the ground that the suit was premature and upon the cross objection affirms the finding that *B* had no occupancy right After some years *A* after giving notice to *B* again sues *B* for possession *B* again pleads an occupancy right *A* contends that the finding of the High Court in the previous suit that *B* had no occupancy right is res judicata *Held* by the Judicial Committee that the finding is not res judicata the reason being that *B* having succeeded on the plea that the suit was premature he had no occasion to go further as to the finding against him *Midnapur Zamindari Co Ltd* v *Naresh Narayan Roy* (19_1) 48 I A 49 48 Cal 660 6_ I C 833 The decision to the contrary in *Mota* v *Vithal* (1916) 40 Bom 66? 36 I C 74 is not good law

(3) In a suit by *A* against *B* for damages for not removing filth from *A* s land *B* contends (1) that no notice was given as required by the Bengal Municipal Act and (2) that he was not bound to remove the filth The suit is dismissed upon two grounds namely that no notice was given as required by the Act and that *B* was not bound to remove the filth *A* then sues *B* for damages for not removing filth during a subsequent period after giving notice to *B* *B* contends that he is not liable to remove the filth and that the question of his liability is res judicata by reason of its having been decided against *A* in the first suit *A* contends that the question is not res judicata for the Court having decided in the former suit that the suit must fail for want of notice it was not necessary for the Court to decide the issue as to *B* s liability to remove the filth *Held* by the Calcutta High Court that the question is res judicata and *A* cannot raise it again in the second suit *Peary* v *Ambica* (1897) 24 Cal 900 The Allahabad High Court would seem to take a different view *Shib Charan* v *Raghu* (1895) 17 All 174 19_

RULE II —If the plaintiff s suit is decreed in its entirety no issue decided against the plaintiff can be res judicata for the plaintiff cannot appeal from a finding on any such issue the decree being wholly in his favour (*r*) But every issue decided against

(*q*) *Abdullakh n* v *Kh a* (1903) 3 Bom 31 *Abdul Rahim* v *Ojamsh* (19 9) 56 Cal 639

(*r*) *Ra go* v *Mudiyeppa* (1899) ?3 Bom ?96

the defendant is res judicata for the defendant can appeal from a finding on such issue the decree being against him (s)

Illustration

A alleging that he is the adopted son of X sues *B* to recover certain property granted to him by X under a deed and forming part of the estate of X The Court finds that *A* is not the adopted son of *X* but that he is entitled to the property under the *deed* and a decree is passed for *A* The finding that *A* is not the adopted son of X will not operate as res judicata in a subsequent suit between *A* and *B* in which the question of adoption is again put in issue for the decree being in favour of *A* *A* could not have appealed from that finding The Court having found that *A* was entitled to the property under the *deed* the finding on the question of *adoption* was *not necessary* to the determination of the suit The decree far from being based on the finding as to adoption was made *in spite of it* *Rango* v *Mudiyeppa* (1899) 23 Bom 296

Finality' of decree in redemption suits—If the mortgagor files a suit for redemption and no order for foreclosure extinguishing the right of redemption in default of payment is made the preliminary decree for redemption does not have that effect The right of redemption continues until a decree absolute for foreclosure is passed ( ) or the sale is confirmed (u) In such a case there is a conflict of decisions as to whether the mortgagor can enforce his right of redemption by a second suit after a preliminary decree on which no further proceedings have been taken According to Allahabad Bombay and Lahore decisions he can (v) on the other hand according to Calcutta and Madras decisions he cannot (w) But though according to the Allahabad and Bombay High Courts a second suit for redemption is not barred the same High Courts have held that any matter decided in the earlier suit e g the amount of the mortgage debt cannot be re opened in the subsequent suit (x)

In the converse case of the mortgagee not taking further proceedings on his decree for sale there is also a conflict of decision as to whether the mortgagor if he does not redeem under the decree may file a redemption suit The Bombay High Court says that he can (y) but the Madras High Court holds that he is barred by this section ( )

Where a decree is appealed from it is the appellate decree that must be looked to to determine the question of res judicata and not the decree appealed from—A decision *liable to appeal* may be final within the meaning of this section *until* the appeal is preferred But once the appeal is filed the decision lose its character of finality and what was once res judicata again becomes res sub judice that is matter under judicial inquiry The appeal destroys the finality of the decision the decree of the lower Court is superseded by the decree of the appellate Court and it is the latter decree that should be looked to to determine the question of res judicata (a)

(s) *Barjorji* v *Shripatpra adji* (19_7) 9 Bom L R _1 100 I C 1033 (7) A B 145

(t) *Somesh* v *Harikrishna* (1900) 7 Cal 0

( ) *Fa j P g Na n* (190) 9 All 339 34 I A 10

(v) *S ta I m* v *Madho Lal* (190) 4 All 44 [F L] *H I m* v *Ir I aj* (19) 44 All 30 6J I C 167 ( ) A A 37 *Mah d Bej m* v *f l Ha in* (1J 6) 48 All I J I C 60 (26) A A 0 *I gl nath S gh* v *Sheo Ir tap Singl* (19 9) 7 All L J 61 *Lamji Fand at* (1919) 43 Bom 334 49 I C 894 [F L] *I a cla fra* v *B bhim* (19 3) Bom L R 11 I C 315 (3) A B 1 *H nta* v *Sh I* (19 3) 4 Bom I C 5 6 (3) A B 300 *Ar* v *B S gh* (19 4) Lah 3 1 84 I C 67 ( ) A I 31 *Nakta Ram* v *Ch a j L l* (1910) 3 All 1 5 I C 69

(w) *S ia* v *N u d* (1891) 18 C I 13J *I la p tt* v *I all bla* (1 0) M 1 30(

( ) *F mj* v *Fanla ath* (1919) 43 Bom 334 49 I C 894 [F B] *I gh th Singl* v *Sl P atap Si gh* (19 9) 7 All L J 61

(y) *P a Bh g h id* (1J1) 39 B m 41 I C 43

(z) *P gi Nar a* (1915) 3J M d 896 3 I C 30 *Ell jan I g w* (1J 6) 4) M 1 6J1 96 I C 607 (6) A M 816

(a) *Sl o J r* v *S I r* (18) 4 Cal 616 4 I A 0 *Abd I h* v *I D* (1918) 45 Cal 44 44 I A 14 4 I C 9 J *N Iram* v *N I n* (188) 6 B m 110 *I d I ho* (18) 11 C L R — *I la I* v *G r ja* (191) 3J Cal 9 14 I C 9 *I all h n* v *K I La* (18) 11 All 148 *Ch J I L* v *I I he* (1J16) 30 Mad L J J 9 33 I C 9

A sues *B* for damages for cutting and removing trees from his land The suit is dismissed on the grounds (1) that the land did not belong to *A* and (2) that *B* did not cut the trees *A* appeals from the decree on both these grounds but the appeal is dismissed on the ground that *A* had failed to prove that *B* had cut the trees Note that the appellate Court does not decide the question of *A* s title *A* then sues *B* for *possession* of the land claiming that the land belongs to him *B* contends that the suit is barred as res judicata as the first Court had found in the former suit that the land did not belong to *A* The suit is not barred for the question of *A* s title became res sub judice when the appeal was preferred and it did not become res judicata as the appellate Court *did not adjudicate* upon that question But a judgment of an appellate Court will operate as res judicata as regards all findings of the lower Court which though not referred to in it are adopted by a decree which grants a relief that is possi ble only on such findings (*b*) An issue again is res judicata where the judgment of the appellate Court shows that the issue was treated as material and was decided although the decree passed merely affirms the decree of the lower Court which did not deal with the issue (*c*)

The Rangoon High Court has held that a decree may be final as regards a party *A* who has not appealed although another party *B* has appealed if *A* has not been made a party by *B* in his appeal. The mere possibility that the Appellate Court might make *A* a party and proceed under O 41 r 33 does not make it less final (*d*)

Consent decree and estoppel—The present section does not apply in terms to consent decrees for it cannot be said in the case of such decrees that the matters in issue between the parties have been heard and finally decided within the meaning of this section (*e*) A consent decree however has to all intents and purpose the same effect as res judicata as a decree passed *in invitum* (*f*) It raises an estoppel as much as a decree passed *in invitum* (*g*) So long therefore as a consent decree stands it is not open to either party thereto to give it the go by even if it contains clauses that are bad in law (*h*) A consent de ree however is a mere creature of the agreement on which it is founded and it may be et aside on any ground which would invalidate an agreement between the parties (*i*) But unless all the parties agree an application cannot be made to the Court of first instance in the original suit to set aside the decree (*j*) though it may be done in the case of an interlocutory order (*k*) See notes to s 96 Procedure for setting aside consent decree

Explanation V Relief claimed but not expressly granted—If a relief is claimed in a suit but is not expressly granted in the decree it will be deemed to have been refused and the matter in respect of which the relief is claimed will be res judicata

(*b*) *Na a ja an* v *Van amm i* (1905) 28 Mad 338 *Gok l* v *Sh i al* (1904) 6 Bom L R 98 *M thamm l* v *Secret ry of State for Indi* (1916) 39 M d 1 0 1206 6 I C 817

(*c*) *Mud ap r Z mi dary C Ltd* v *Naresh Na ajan Rou* (19 4) 51 I A 93 1 Cal 631 80 I C 8 7 (24) A PC 144 *N wab* v *Ianj ba* (19??) 4 Lah L J 44?

(*d*) *Ch kk l g m* v *M g Tha O* (19 6) 4 Rang 8 9 I C 104 (26) A R 1

(*e*) *Mi k l* v *Kha s ij* (1906) 30 Bom 39 408 B t see *Bhaishanker* v *Mora j* (191) 36 Bom 83 at p 8 1? I C 3 wh re it is s id that in th ca e even of a cons t d cree the matt s in i sue in th s it c nn t but be said to have been h rd a d finally decided If s why i it s id in th judgment (p 286) that a con ent d cre h s *to all te t a d p rposes the s me eff ct as* res judicata ?

(*f*) *Bhaishanker* v *Moraraj* (1911) 36 Bom 83 286 1 I C 63 *In re So th Ameri a l Mex can Co* [189] 1 Ch 37

(*g*) *Nichol s* v *1 phar* (1897) 24 Cal 16 37 *L kshmishankar* v *V ish r m* (1900) 4 B m *Raja Ruma* v *Thatha* (191) 35 Mad 9 I C 875 *Tir vambala* v *M nikkava haka* (1917) 40 Mad 1 7 189 34 I C 57 *S ad s* v *Birend a* (19 6) 43 C L J 116 94 I C 844 (6) A C 67 *Durga P as d* v *Narain* (19 9) 4 Luck 181 115 I C 94 (9) A O 63

(*h*) *Cow j* v *I a d s* (1911) 3 Bom 3 1 11 I C 984

(*i*) *H dler fi ld Bank g Co* v *Henry Lister d Son* [189] ? Ch 3 *Gre t North West Central Rail a j* v *Cha l bois* [1899] A C 114

(*j*) *H rri on* v *R m y* (1) 2 Ves Sen 488 *St rl* v *Harris* (1871) 19 W R [E g] 811 *Ai w rth* v *W ldi g* [1896] 1 Ch 6 3

(*k*) *Mill s* v *Howell* (79) 11 Ch D 63

Thus where in a suit by a mortgagee (1) for a money decree and (2) in default of payment for sale of the mortgaged property the mortgagee was content to take a money decree only it was held that a subsequent suit by him on failure of the mortgagor to satisfy the decree to have the amount of the mortgage debt paid to him by the sale of the property was barred as res judicata The relief as to *sale* having been claimed by the mortgagee but not having been expressly granted in the former suit, must be deemed to have been refused so as to bar the subsequent suit (*l*)

Liberty to bring a fresh suit —Where a former suit between the same parties in the same Court and for the same relief results in a decree of dismissal but the judgment leaves it open to the plaintiff to bring a fresh suit and leaves open untouched and undecided all matters affecting the rights of the parties the decree does not constitute res judicata as such matters cannot be said to have been heard and finally decided within the meaning of this section (*m*) But if the Court has in the particular circumstances of a case no power to reserve liberty to a party to bring a fresh suit, the subsequent suit may be barred as res judicata notwithstanding the liberty to bring a fresh suit Thus in *Watson* v *Collector of Rajshahye* (*n*) the former suit was dismissed for the plaintiff s failure to produce evidence but a direction was given that the plaintiff could institute a fresh proceeding as if no suit had been brought Nevertheless *the Privy Council* held that the subsequent suit was barred by *res judicata* for the reservation was of no effect Again *Fateh Singh* v *Jagannath Baksh* (*o*) recently decided by the Judicial Committee is a case directly on this point In that case the plaintiffs brought a suit to set aside a gift made by a Hindu widow out of her husband s estate they alleged that they were presumptive heirs. The widow died pending the suit After her death the plaintiffs applied to amend the plaint by setting up a family custom of inheritance Upon that application failing and the plaintiffs admitting that apart from the alleged custom they could not succeed the trial Court dismissed the suit but gave them liberty to file a fresh suit for possession Subsequently the plaintiffs brought another suit to recover from parties to the former suit a share in the property basing their claim upon family custom It was held that the suit was barred by res judicata since the custom was a matter which might and ought to have been set up in the former suit and further that the trial Court having dismissed the suit it had no power under O 23 r 1 (1) to give liberty to bring a fresh suit

When Explanation V applies —Explanation V does not apply unless the relief claimed was (1) *substantial relief* and (2) it was such as it is *obligatory* on a Court to grant. We proceed to consider these conditions in order

1 *The relief claimed must have been substantial and not merely auxiliary* —*A* sues *B* (1) to recover her share in the estate of *D* claiming the same as *D* s widow and (2) for a declaration that she was lawfully married to *D* a fact which *B* had denied. A decree is made by consent awarding Rs 55 000 to *A* in full satisfaction of her claim against the estate of *D* The decree does not contain any declaration as to *A* s marriage with *D* This circumstance will not bar a subsequent suit by *A* as *D* s *widow* against *B* to recover her share in the estate of a deceased relative for the relief claimed in the former suit in respect of the legality of marriage was not claimed as a specific or substantial relief It was auxiliary to the principal relief in respect of her share in the estate of *D* (*p*)

(*l*) *Shib ... Chandra Mohan* (1906) 33 Cal 849 ... (1909) 31 All 1... I C 6

(*m*) *... Narbada Gir* (1899) ... 1 All ... *Babu Lal ... Ishri ...* (18 8) 2 All 58 ... 86 588 *Dev ... v ... th* (191) ... R no 16 p 09 ... I C 930 The result is the same if the Court has expressly excluded a matter from decision though liberty to bring a fresh suit is not reserved *Ram Charan* v *... azuddi* (1884) 10 Cal 8 6 *Madan Mohan* v *... orooah* (1918) P R no 0 p 3 44 I C 8 ...

(*n*) (1869) 13 M I A 160 ... W R 43 P C

(*o*) (19) ... I A 100 4 All 158 91 I C 2.0 ( ) A PC 5 ... *Lal* v *Bhikhi* (1883) 11 All 15 (F B)

(*p*) *Fatmabai* v *Aishbai* (1 ...) 13 Bom. 42, 49

(?) *The relief claimed must have been one which the Court is bound to grant and not one which it is discretionary with the Court to grant*—Cases under this head relate principally to mesne profits It was enacted by sec 244 of the Code of 1882 that nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree That clause has been omitted in the present Code and under O 20 r 12 mesne profits subsequent to the date of the suit are to be ascertained and provided for in the final decree

A sues *B* for possession and for mesne profits both prior and subsequent to the suit A decree is passed in *A* s favour for possession. The decree is silent as to mesne profits

In the case put above there is no doubt as to mesne profits *prior* to the date of the suit that the plaintiff having claimed a relief in respect thereof and the relief not having been granted by the decree the matter is res judicata and *A* cannot institute a fresh suit for such profits (*q*)

As to mesne profits *subsequent* to the date of the suit it was held in cases under the Code of 1882 that it being discretionary with the Court to grant such relief the fact of the decree being silent as to such mesne profits did not operate as a bar to a fresh suit (*r*) In cases under the present Code it has been held by the High Courts of Madras (*s*) and Allahabad (*t*) that where in a suit for possession and for past and future mesne profits the Court gives a decree for mesne profits up to the date of the suit and says nothing about subsequent mesne profits a fresh suit to recover subsequent mesne profits is not barred under the present Code any more than under the Code of 1882 In the Madras case Wallis C J said The word relief in the Explanation means relief arising out of a cause of action which had accrued at the date of the suit and on which the suit was brought and did not include relief such as mesne profits accruing after the date of suit as to which no cause of action had then arisen but which the Court was nevertheless expressly empowered to grant The Explanation having been reproduced in exactly the same words the presumption is that it was intended to have precisely the same effect I do not find any sufficient indication to rebut this presumption in the fact that sections 211 and 212 of the old Code were amalgamated to form Order XX rule 12 The change introduced by the new rule is that the award of mesne profits in all cases is to be by preliminary decree and that when ascertained they are to be embodied in a final decree whereas under sections 211 and 212 they were to be ascertained in execution This change does not appear to me to affect the construction of Explanation V to section 11 nor do I think is affected by the omission in section 47 of the new Code of the proviso to the corresponding section 244 of the old Code On the other hand it has been held by the High Court of Bombay (*u*) that where a decree is silent as to future mesne profits claimed in a suit a fresh suit for such mesne profits is barred under Explanation V to this section the reason given being that the omission of the clause which appeared in section 244 of the old Code indicated that a separate suit should not be allowed for such mesne profits

Where a plaint in a mortgage suit contains a prayer for a personal decree but the preliminary decree is silent about it the plaintiff is not precluded from applying for a personal decree under O 34 r 6 for the balance of the mortgage claim after the sale of the mortgaged property as such a decree could not properly be passed until after sale (*v*)

(*q*) *Jiban v Durga* (1894) 21 C 1 2 ? *K ch v Lakshman* ? (1901) Bom 115

(*r*) *Mon M h n v Secretary of State* (1890) 1 Cal 968 *Bl ter Sd r* ? (189) 19 Bom 3 *I* ? *D* ? *v Mad* (1893) 1 All 4 *H* ? *v Pad a* ? (190) 3 C l 118 *K pp v V nkatara* ? (190) 1 Mad L J 46

(*s*) *Do* ? *v S b* ? (1918) 41 Mad 188 4 I C 9 ? [F B]

(*t*) *M l mm l Ish ? v M la ad R st n* (1918) 40 All ? 44 I C 83

( ) *Atm m Iar shra* ? (19 0) 44 Bom 9 ? 58 I C 419

( ) *Go d s m* ? *v Kandaswami* (19 7) 53 Mad L J 489

Section not exhaustive—The section is not exhaustive of the circumstances in which an issue may be res judicata (w) The plea of res judicata rests on the principle that there should be finality in litigation and the plea still remains apart from the limited provisions of the Code (x) In *Ram Kirpal* v *Rup Kuari* (y) the Privy Council referred to the binding effect of an interlocutory judgment even in execution proceedings as depending not on the section of the Code but on general principles of law That decision is an authority for the proposition that an issue may be res judicata though it may not have been decided in a former suit It has accordingly been held by the Privy Council that a decision on a dispute between rival claimants as to compensation deposited in Court under sec 31 (2) of the Land Acquisition Act I of 1894 operates as res judicata in a subsequent suit between the same parties Their Lordships said It has been suggested that the decision was not in a former suit but whether this were so or not makes no difference for it has recently been pointed out by the Board in *Hook* v *Administrator General of Bengal* ( ) that the principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of the Code in this respect (a) A decision in an administration suit whether a gift once was valid may be res judicata in a subsequent proceeding in the same suit (b) An order passed after a contentious proceeding for probate of a will may be res judicata between the parties (c) A decision on a question of relationship in a proceeding on an application for letters of administration after trial of the issue is binding as res judicata in a subsequent suit between the same parties (d) Again the expression former suit does not exclude the application of the rule when suits are tried together nor to interlocutory orders in the same suit or orders in execution proceedings The application of the rule *to suits tried together has been discussed on pp 36 37 above*

Orders in execution proceedings—The leading case on the application of res judicata to interlocutory orders and to execution proceedings is *Ram Kirpal* v *Rup Kuari* (e) decided by the Judicial Committee in 1883 The principle of that decision is that s 11 is not exhaustive and that the principle of res judicata still remains apart from the limited provisions of the Code Prior to that decision the Courts in India generally held that sec 13 of the Code of 1882 (corresponding with the present section) was not applicable to execution proceedings The Judicial Committee held that though the section in terms did not apply to execution proceedings the principle of res judicata applied to such proceedings The question in that case was whether a decision in the course of execution proceedings that the decree according to its true construction awarded future mesne profits operated as res judicata so as to preclude the Court from trying the question over again at a subsequent stage of the proceedings The *High Court of Allahabad held that it did not* Their Lordships of the Privy Council held that it did Their Lordships said —

The matter decided by Mr Probyn was not decided in a former suit but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit or as a final judgment in a suit is binding upon them in carrying the judgment into execution *The binding force of such a judgment depends*

(w) *Ma* [illegible] v *Kalidas* (1894) 19 Bom 8 6
(x) *Hook* v *Administrator General of Bengal* (19 1) 48 I A 18 48 Cal 499 60 I C 631
(y) (1883) 11 I A 37 6 All 69
(z) 48 I A 187 48 Cal 499 60 I C 631
(a) *Ram* [illegible] *dra* v *Jamel* [illegible] *d a* (19 0) 49 I A 1 0 4 M d 3 0 6 I C 4 8 ( ) A I C 80 See also *Mah* [illegible] *ja of* [illegible] *r dkot* v [illegible] *tram* (19 9) 10 Lah 44 466 114 I C 6 (9) A L 1
(b) 48 I A 187 48 Cal 499 60 I C 631 *B da B* [illegible] *H b b M rican Noo din* (1903) A C 615 6 3
(c) [illegible] (1903) 31 C 1 156 *Kaly nch d* [illegible] (1914) 38 Bom 309 3 I C 3 [illegible] (19 4) 46 Mad L J 3 3 I C 44 (4) A M 5 8
(d) [illegible] (19 3) 1 Ran 8 61 C 4 4 (3) A R
(e) (1883) 11 I A 3 6 All 269

not upon sec 13 *Act* X *of* 1877 [s 11 of the present Code] *but upon general principles of law If it were not binding there would be no end to litigation* The parties were bound by the decision of Mr Probyn who whether right or wrong had decided that it did [that is that the decree awarded future mesne profits] a decision which not having been appealed was final and binding upon the parties and those claiming under them

The ratio decidendi of *Ram Kirpal s* case is that if a particular construction is put on a decree in proceedings on a former application for execution it is not competent to the Court to treat that construction as erroneous and put another construction on it at a subsequent stage of the execution proceedings (*f*) Parties cannot raise a second time in the same suit or execution proceeding an issue that has already been determined (*g*) Thus the Judicial Committee held in *Mungul Pershad* v *Grija Kant* (*h*) that a decision on an application for execution after hearing both the parties that the application *is not barred* by the law of limitation though erroneous is binding on the parties in subsequent proceedings in execution Their Lordships said The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation No appeal was preferred against it Admitting for the sake of argument but only for the sake of argument that the decree was barred when the application was made still his order though erroneous was valid not having been reversed. Similarly a decision that an application for execution *is barred* by limitation though erroneous is conclusive between the parties and the question cannot be re tried on a subsequent application for execution (*i*)

The principle laid down in *Ram Kirpal s* case referred to above is that when a question has been raised in an execution proceeding and decided the decision even if erroneous is binding on the parties and the same question cannot be re tried in a subsequent proceeding in execution in other words that the principle of res judicata is applicable to proceedings in execution This principle has been followed by the High Courts of India (*j*) But this principle does not apply unless the parties to the subsequent proceeding were also parties to the former proceeding (*k*) and had litigated under the same title (*l*) Nor does it apply unless the former application was heard and decided Hence an order dismissing an application for execution for default of appearance (*m*) or allowing it to be struck off for the present (*n*) or allowing it to be withdrawn with liberty to present a fresh application (*o*) is no bar to a fresh application for execution Similarly where an application for execution under O 21 r 32 is dismissed on the ground that the decree holder had not given the judgment debtor an opportunity of obeying it a second application for execution after such opportunity had been given is not barred as res judicata (*p*) Further the decision in the former application must have been *necessary* for the determination of the application Thus if *A* applies for execution and *B* pleads limitation and neither party appearing on the date fixed for the hearing of the

(*f*) *Ben P m v N h i Mal* (188) 11 I A 181 7 All 10 *Venkata arasi nha* v *Papa i m h* (1896) 19 Mad 4

(*g*) *Behari Lal* v *Majid Ali* (1901) 4 All 138 *Bhaw uha k v Nar ni ha ka* (1899) 23 Bom 36 *Doorv s* v (*daswamy* (19 1) 40 Mad L J 5 6 63 I C 189

(*h*) (188) 8 I A 123 8 Cal 51 *Raja Ramnat v Kel sam Tevar* (19 1) 48 I A 45 40 Mad L J 19 59 I C 890 *Sheoraj v I me ha* (190) 4 All 8 *D lhi a d Lond B k* v *Orch rd* (187) 4 I A 1 3 Cal 4 is n t incon ist nt with th lat r decl ions See Mr Leith s reply as rep rte l in 3 C l on p 5

(*i*) *M j ath* v *I e l ite h* (188) 6 Bom 4 *B ley* v *Po ne h Ch nd r* (1883) 9 C l 6

(*j*) *Kap r Ch d* v *Ka h ra Lal* (19 3) 4 All 3 4 I C 513 (4) A A 34 in app from (19) 44 All 130 65 I (29 ( ) A A 24 [dec i i n as to which per n are liable in exe tion a d what property is liable to be taken i x cution] *Doorv s v Got n fi wami* (19 1) 40 Mad I J 5 6 63 I C 189 [pplicati n for execu ti n to wron Court]

(*k*) *G ana bai v Parv thi* (189) 15 Mad 4 7 4 9 *Har ndra Lal v Sh m Lal* (1900) 7 Cal 10

(*l*) *Go rmo i v Jugut Cha dr* (1890) 17 Cal 57 63

(*m*) *Lak hm bai* v *Pa ji* (19 9) 31 Bom L R 400 118 I C 00 (9) A B 17

(*n*) *Thaku Pershad* v *Sheikh Fakir ullah* (189) I A 44 17 All 106

(*o*) *H ri* v *Ram ab i* (1899) 23 Bom 3

(*p*) *K hor B Moh t* v *I ro n o Coomar* (1894) 21 I A 89 1 Cal 84

S

objection *A* s application is dismissed and *B* s objection is disallowed *B* is not precluded from raising the plea of limitation on a fresh application for execution made by *A* the reason being that *A* s application being dismissed for default it was not necessary for the Court to decide the question of limitation (*q*)

Where a decree holder applies for execution and the judgment debtor being entitled and having an opportunity to raise a plea in bar of execution *e g* a plea of limitation fails to do so and an order is made on the application the principle of Explanation IV applies and the judgment debtor is precluded from raising that plea at a subsequent stage in the execution proceedings (*r*) Thus where *A* applies for execution of a decree against *B* and an order is made directing execution to issue *B* cannot in a subsequent application for execution raise the plea that the first application for execution was barred by limitation (*s*) In one case the Allahabad Court held that the principle of Explanation IV does not apply to a case where a judgment debtor omits to object to the amount erroneously set forth in the application for execution and that he is entitled to raise the objection at a later stage of the execution proceedings (*t*) This decision however may be supported on the ground that the Court had inherent power to rectify the error The undermentioned cases (*u*) contain observations to the effect that Explanation IV should not be extended to execution proceedings and that an order made in execution proceedings should not have the force of res judicata unless the point raised in the subsequent proceedings was *actually* raised in the former proceedings and *decided* But these observations are obiter And so are the observations in a Madras case that Explanation V does not apply to proceedings in execution (*v*)

Ex parte orders —An ex parte order in execution proceedings passed after issue of notice and after the Court is satisfied that the notice was served is on general principles binding as res judicata (*w*) But the order will not have the force of res judicata unless the notice clearly specifies the nature of the claim (*x*)

Consent orders —An order made by consent of parties in an execution proceeding is as binding on the parties as an order after a contentious trial (*y*)

Application for amendment of decree —Though an application for amendment of a decree is not a suit within the meaning of this section yet if such an

(*q*) *Bholanath* v *Prafulla* (1901) 8 Cal 1 *Kashinath* v *Ramch dra* (1883) 7 Bom 408

(*r*) *Nanda Rai* v *Raghunandan* (188) 7 All 8 [limitation] *Desai ppa* *Duniappa* (1900) 44 Bom I C 3 9 [limitation] *G d geppa* *Siddappa* (19 4) 48 Bom 618 83 I C 1 5 (4) A B 49 [limitation] *Prabhulingappa* v *C r* *U* (19 0) Bom L P 1389 59 I C 74 [limitation] *Raghubar* v *Cokaran* (19 6) 1 Luck 171 93 I C 833 (26) A O 291 *Iayantagiripathy* v *Bl an ni* (19 4) 47 Mad 641 80 I C 103 (4) A M 6 3 [transfer of decree limitation] *Sher Singh* v *Daya Ram* (1891) 13 All 64 [execution barred under O 3 r 1] *Damb r Singh* v *Kal ans ngh* (19) 44 All 350 6 I C 99 (2) A A 7 [decree not capable of execution] *Brajlal* *Ai in o* (19 0) 5 Pat L J 633 5 I C 07 [non service of notice on transferor under O 21 r 16] *Taj Singh* v *J g n Lal* (1916) 38 All 1 83 35 I C 34 [validity of transfer of decr] *Gotr da* v *Fr h* (19 3) 4 M d L J 1 I C 397 (3) A M 649 [whether decree capable of execution] *Makund* v *Saras* *te ti* (1919) 29 Cal L J 245 51 I C 98 [claim for mesne profits] *Madl d* v *Satti* (1918) 35 Mad L J 31 44 I C 4 [propriety of order of attachment] *L it* *Ianc* *dra* v *Shri iwas* (19) 46 Bom 46 66 I C 940 ( ) A B 38 *Mahade* v *Trimb kbhat* (1919) 1 Bom I R 344 50 I C 97 *Dip Prakash* v *Bolra Dua ka Prasad* (19 6) 48 All 01 90 I C 83 (26) A A 71 [disobedience to decree for injunction]

(*s*) All 28 *supra* 44 Bom 7 *s pra* 48 Bom 638 *supra* 1 Luck 1 1 *sup*

(*t*) *Kal an Si gh* *J gan Prasad* (191) 37 All 589 0 I C 5 3 See also *Sheo Mang l* v *Mus mmat Hulsa* (19 1) 44 All 149

( ) *Pruth* v *J sl id* (19) 1 P t 593 599 600 6 I C 6 6 (2) A I 89 *G r m* v *Jugat Chand a* (1890) 1 Cal 63 *S na nda m* *Colli ng* (191) 40 Mad 80 38 I C 806 *S bra a ia* *Paje w r* (191) 40 M 1 1016 10 0 38 I C 6 7 dissented from in *I gl ta* v *C karan* (19 6) 1 Luck 1 1 93 I C 833 (6) A O 91

(*v*) *Naty n* *Ii* v *G* *p t* (1901) 4 Mad 681

(*w*) *Si bb ah* v *Pri athan* (1914) 3 M d 46 4 3 4 6 I C 993 *Lalsh a an* v *h tlaj* (1901) 24 M d 669

(*x*) *Na aja a* v *G jal Krish* (190) 28 Mad 3 *Sleil L li* v *I nch tr* (1883) 11 Bom 3 *Ch d mba am* v *Tha a as* (19 3) 46 Mad 68 4 I C 15 (4) A M 1

(*y*) *K l d* *P s* *n a* (19 0) 4 C l 446 454 5 I C 189 See also *C rentry* v *Tulshi* (1904) 31 Cal 8 2

application is heard and finally decided it will debar a subsequent application for the same purpose upon general principles of law analogous to those of res judicata (z)

Application for review—Where an application is made for a review of judgment and the application is refused it does not operate as res judicata so as to bar a subsequent *suit* for the same relief and on the same grounds as those put forward in the application for review Neither s 11 nor any doctrine of constructive res judicata can rightly be applied to such a case (a)

Waiver of plea of res judicata—The plea of res judicata is not one which affects the jurisdiction of the Court It is a plea in bar which a party may waive If a party does not raise the plea of res judicata it will be deemed to be a matter directly and substantially issue and decided against him (b)

Conflicting decrees—Where there are two or more conflicting decrees the last decree alone is the effective decree and it is this decree and not any other which can operate as res judicata (c)

Income tax proceedings—A decision of the Commissioner under s 33 of the Income tax Act 1922 in respect of the assessment for a particular year does not operate as res judicata so as to prevent that decision from being re opened in assessments for subsequent years (d)

Bar to further suit

12 [*New*] Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies

Rules precluding institution of a further suit in respect of the same cause of action—This section is new and is necessitated by the transfer of certain of the provisions of the Code of 1882 to Rules The following is a list of the Rules that bar a fresh suit in respect of the same cause of action—

O 2 r 2—Omission to sue in respect of part of a claim

O 9 r 9—Decree against plaintiff by default bars a fresh suit

O 22 r 9—Abatement of suit bars a fresh suit

O 23 r 1—Withdrawal of suit without leave of Court bars a fresh suit

When foreign judgment not conclusive

13 [S 14] A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

(a) where it has not been pronounced by a Court of competent jurisdiction,

(b) where it has not been given on the merits of the case,

(z) *La j t S gh v J ki Koer* (1911) 39 C l 6 1 I C 151

(a) *Sr h Ch nd a v Trigu a* (1913) 40 Cal 541 18 I C 444

(b) *Motu i v Sri F jah Venk tadri* (1916) 31 M I J 19 *Rajani v Ajnadd n* (19 8) 48 C L J 577 114 I C 1 9 (9) A C 163

(c) *R j i v Ajmudd n* (19 8) 48 C L J 577 114 I C 129 (9) A C 163

(d) *Commissioner of Income tax v Mas ey d Co Ltd* (19 9) 56 Mad L J 451 115 I C 814 (9) A M 453 [F B]

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable,

(d) where the proceedings in which the judgment was obtained are opposed to natural justice

(e) where it has been obtained by fraud,

(f) where it sustains a claim founded on a breach of any law in force in British India

Alterations in the section —Clause (a) is new The last clause of sec. 14 of the Act of 1882 has been omitted as to which see note below How a foreign judgment may be enforced in British India Other alterations are verbal

Foreign Judgment —The expression foreign judgment is defined in s. 2 as meaning the judgment of a foreign Court that is a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor General in Council The present section provides that a foreign judgment may operate as *res judicata* except in the six cases specified in the [illegible] and of course in order to so operate the other conditions of sec 11 must be fulfilled [illegible] The foreign Court must be competent to try the suit not only as regards [illegible] limits of its jurisdiction and the subject matter of the suit but also with reference [illegible] its territorial jurisdiction So a decision of a Kattiawar Court as to custom [illegible] partition will not be res judicata in a suit for partition between the same parties [illegible] in British territory (*f*) In matters of foreign judgments the Courts here are [illegible] by very much the same principles as those adopted by the Courts of England [illegible] act of State is not a *judgment* and it cannot therefore have the effect of [illegible] Thus it has been held that an order of the Political Agent of Meywar and the [illegible] of Udepore deposing a high priest from his *gadi* is not a foreign *judgment* [illegible] an act of State and it cannot therefore operate as *res judicata* (*h*)

How a foreign judgment may be enforced in British India.—[illegible] ment of a Court of British India can only be enforced by proceedings in execution [illegible] foreign judgment however may be enforced by *proceedings in execution* in [illegible] fied cases only (s 44) In other cases a foreign judgment can only be [illegible] *suit* upon the judgment That is to say if A has obtained a decree against B [illegible] Rs 5 000 in a French Court at Pondicherry and if B has got no property [illegible] to satisfy the decree but has got property in Bombay A may bring a [illegible] in Bombay to recover the amount of the *judgment* The suit must be [illegible] six years from the date of the judgment (*i*) and if a decree is passed in [illegible] may proceed to execute it by attachment and sale of B s property in [illegible] on s 44

It was at one time doubtful whether a suit could be maintained in [illegible] the *judgment* of a Court of a *Native State* in India or whether the plaint [illegible] upon the *original cause of action* The Madras High Court held that a [illegible] maintained on the judgment (*j*) The Bombay High Court held that [illegible]

(*e*) *Ind* [illegible] *Tiaka* (19 1) Lah 10 63 I C 387

(*f*) [illegible] (1903) 6 Bom L R 08 [illegible] (1888) 13 Bom [illegible]

(*g*) [illegible] (1) 0 Mad 11 114

(*h*) [illegible] *Gorardhan* [illegible] (1 [illegible]) [illegible] 42

(*i*) The I[illegible] Limitation Act [illegible]

(*j*) [illegible] 164

maintainable(k) and that the only remedy was by way of suit on the original cause of action The general rule is that a Court which entertains a suit on a foreign judgment cannot institute an inquiry into the merits of the original claim or the propriety of the decision (l) The Bombay High Court was apprehensive that a suit on the judgment of a Native State Court might lead to miscarriage of justice as judicial inquiries in Native States are not ordinarily conducted with intelligence and integrity To enforce the view of the Madras High Court and to remove the apprehensions expressed in the Bombay judgments a clause was added to sec 14 of the Code of 1882 by sec 5 of Act 7 of 1888 to make it clear on the one hand that a suit was maintainable on *the judgment of a Court of a Native State or any other Court in Asia or Africa* (m) and on the other hand to provide that in such a suit the British Indian Court should not be precluded from inquiry into the merits of the case (n) The clause has now been omitted as the reason for the distinction between Courts of Asia and Africa and Courts of other countries has disappeared especially in the case of Japan. The result is that a suit will lie upon a foreign judgment of any Court in Asia or Africa and such a suit now stands upon the same footing as a suit brought on the judgment of a foreign Court in Europe or America

Though a foreign judgment may be enforced by a suit in British India it is not to be supposed that British Indian Courts are bound in all cases to take cognizance of the suit and they may refuse to entertain it on grounds of expediency (o)

Operation of the section —The operation of the section may be illustrated by the following cases —

(a) *A* sues *B* in a foreign Court If the suit is dismissed the decision will operate as a bar to a fresh suit by *A* in British India on the original cause of action unless the decision is inoperative by reason of one or more of the circumstances specified in the section (p) If a decree is passed in favour of *A* in the foreign Court and *A* sues *B* on the judgment in British India *B* will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit in the foreign Court unless the decision of the foreign Court is inoperative on any one of the six grounds specified in the section.

(b) *A* obtained a decree against *B* in the Cochin Court and applied for execution of the decree in the High Court of Bombay [Decrees of the Cochin Court may be executed in British India under s. 44] It was proved that *A* obtained the decree at Cochin by concealment of essential facts and by fraud [see cl (e) of the section] It was held that execution of the decree should be refused (q)

A British Indian Court will not give effect to a foreign judgment pronounced by a Court without jurisdiction —The leading case on the subject is *Gurdyal v Raja of Faridkot* (r) In that case *A* sued *B* in the Court of the Native State of Faridkot claiming Rs. 60 000 alleged to have been misappropriated by *B* while in *A* s service at Faridkot *B* did not appear at the hearing and an ex parte decree was passed against him *B* was a native of another Native State Jhind. In 1869 he left Jhind and went to Faridkot to take up service under *A* In 1874 he left *A* s service and returned to Jhind. The suit was brought against him in 1879 *At the date of the suit B neither resided in Faridkot nor was he a domiciled subject of the Faridkot State nor did he owe allegiance to that State* On these facts the Faridkot State had on general principles of International Law no jurisdiction to entertain the suit against *B* in

(k) *H mmat Lall v Sh aj av* (1884) 8 Bom 93

(l) *Ga ga I asad v Ganesh lal* (19 4) 46 All 119 79 I C 33 (4) A A 161

(m) *G d l S gh v Raja f Far dkot* (189) 2 Cal. 37 1 I.A 1 1

( ) *Mayaram v Ravj* (1900) 24 Bom 86

(o) *Mu gesa v m la* (1900) 3 Mad 458

(p) *B l bhat v a h rbh* (1889) 13 Bom 4

(q) *Haj mu a v I rn a d* (1891) 1 Bom 16

( ) (189) Cal 1 I A 171

respect of the claim which it should be noted was a mere *personal* claim as distinguished from a claim *relating to land or movables* (s) The decree of the Faridkot Court was therefore an absolute nullity *A* then sued *B* in a British Indian Court on the judgment of the Faridkot Court The Court of first instance dismissed the suit on the ground that the Faridkot Court had no jurisdiction to entertain the suit This decision was upheld by their Lordships of the Privy Council The mere fact that the alleged *embezzlement* took place at Faridkot was not sufficient to give jurisdiction to the Faridkot Court The result would be the same if the suit were for damages for *breach of a contract* entered into by *B* with *A* at Faridkot (t) In other words a foreign Court cannot assume jurisdiction in cases where the claim is a *personal* one merely because the *cause of action* arose within its jurisdiction. But if *B* was *residing* at Faridkot at the date of the suit the Faridkot Court would have had complete jurisdiction In the case of *personal* claims it is *residence* alone that gives jurisdiction in a suit against a foreigner (u) The same rule applies where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature though owing allegiance to the same Sovereign Thus a decree passed by the Ceylon Court [which is a foreign Court within the meaning of s 2] in a suit on a *contract* against a native of British India who was not at the time of the action residing in Ceylon is a nullity and it cannot be enforced by a suit in a Court of British India (v)

Suppose that in the above case the Faridkot Legislature had passed an Act empowering the Courts of Faridkot to entertain suits in cases where the *cause of action* had arisen in Faridkot though the defendant was a foreigner neither residing in Faridkot nor owing any allegiance or obedience to the Faridkot State Could effect be then given to the judgment of the Faridkot Court in a suit brought upon the judgment in a Court in British India? It could not—for jurisdiction conferred against the general principles of international law is not recognized and no one State can by its legislation confer jurisdiction upon its Court to entertain a suit in respect of a *personal* claim against foreigners who at the date of the suit were neither resident in that State nor owed any allegiance or obedience to that State (w) But British Indian subjects owe allegiance to the Sovereign of Great Britain and the *British Parliament* may therefore by legislation confer jurisdiction upon the Courts of England as it has in fact done against British Indian subjects in British India (x) Hence a judgment passed by the Queen's Bench Division of the High Court of Justice of England (a foreign Court) against a British Indian subject residing in British India in an action founded on a breach of a contract committed within the jurisdiction of that Court is not a nullity and a suit may be brought on the judgment in British India (y)

In the case of the *Raja of Faridkot* the decree passed against the defendant by the foreign Court was an ex parte decree that is to say the defendant did not appear before the foreign Court and the decree was passed in his absence But what if the defendant had appeared and defended the suit in the foreign Court? This question is considered in the following paragraph

Submission to jurisdiction of foreign Court—Where a suit is instituted in British India on the judgment of a foreign Court effect will be given to the judgment though that Court *had no jurisdiction* over the defendant *if* the defendant appears and defends the suit brought against him in that Court without making any objection

(s) *Lakshmishankar* v *Vishram* (1900) 4 Bom ... *lla* v *Mahomed* (18..) 0 Mad 11

(t) *Mattappa* v *Chellappa* (18 6) 1 Mad 196

(u) *Jirappa* v *J...* (1916) 40 Bom 551 36 I C 363 *I...m* v *Isuf* (190) 9 Cal 500 *Ishri P...d* v *Sri Ram* (19) 5 All L J 687 10 I C 186 (27) A A 10

(v) *Sheik Atha...* v *D...d* (1909) 3 Mad 469 3 I C 190

(w) *Christian* v *Delaney* (1899) 6 Cal 931 *H...d* v *Po...th* (188) 4 Mad 3 9

(x) S e R S C O 11 r 1

(y) *Hossein Khan* v *Fuphal* (1901) 28 Cal 641 S... al o *I...swaradi* v *Jedd...* *Key...er* (1916) 39 Mad 9 100 I C 3 6 affirmed 40 Mad 11 44 I A 6 38 I C 6 3

to its jurisdiction ( ) for having taken a chance of judgment in his favour it is not right that he should take exception to jurisdiction when judgment goes against him (a) But if he protests against the jurisdiction and the suit is then proceeded with against him the judgment is a nullity and no effect will be given to it in a suit brought on the judgment The protest against jurisdiction must be made at an early stage of the proceedings hence where no objection to the jurisdiction was made until the case had reached the stage of appeal it was held that there was submission to jurisdiction (b) Nice questions sometimes arise as to what amounts to submission to jurisdiction A defendant who employs a pleader in a suit in a foreign Court will not be said to have submitted himself to the juri diction of that Court if the pleader states at the hearing that he has no instructions from his client (c) But if a defendant while protesting against the jurisdiction appears on the argument of the point of jurisdiction there by taking the chance of getting a decision in his favour he will be deemed to have submitted himself to the jurisdiction of the Court (d) A fortiori it is so if he also pleads on the merits (e) So also if he applies for a review of the order made against him in a foreign court (f) But submission is not voluntary if the appearance is made only to release property seized by a foreign tribunal in attachment or other proceed ings in such a case the judgment of the foreign tribunal is not binding on the party Whether submission was voluntary or it was for the purpose of saving property is a pure question of fact (g) A person who sues in a foreign Court as plaintiff voluntarily submits to the jurisdiction and cannot afterwards dispute it (h)

Agreement to submit to foreign jurisdiction —Where there is an *express* agreement to submit to the jurisdiction of a foreign Court a judgment pronounced by such Court binds the parties and effect will be given to such judgment in British Indian Courts (i)

The mere fact of entering into a contract of partner hip in a foreign country does not involve an agreement that all matters and disputes arising in connection with the partnership shall be submitted to and therefore *lie* within the jurisdiction of the Courts of that country (j)

Carrying on business in a foreign country through an agent —Persons who carry on business in a foreign country through an agent submit to the jurisdiction of the Courts of that country by giving the agent a general power of attorney including the right to institute or defend suits relating to matters connected with their business or otherwise (k)

Possession of immovable property in a foreign country —The possession of immovable property in a foreign country gives the Courts of that country jurisdiction *to deal with the property itself* (l) but not jurisdiction *in personam* over the po ses or even in regard to obligations connected with that property (m)

(z) *Gi gi Ira ad* v (e l L l (19 4) 46 All 119 9 I C 33 (4) A A 161 *Sl td Ali tham* v *D r d* (1909) 3 Ma 46 3 I C 190

(a) *I a doth* v \ *ibl l* (18 6) 8 Mad H C 14

(b) *K l n j n* v *Chok l gi* (18 4) M l 10

( ) *S r* v *Ib* (18) 18 M 1 3

(d) *H r n* v *Taylor* [191] 2 K B 80 *Sc l o ll le n jl Paper Co* v *L jll l* [19 0] H \ 344

( ) *Ha h d* v (*I bela l* (1914) 39 B m 34 6 I C 6 *I a na* v *I hn* (1916) 33 M l 33 3 I C J [F B] *o err iling I rry & Co pp a* (188) Mad 40

(f) *R n S q* v *M l mn ad* (10) 8 I at 4 10 I (3 ( ) A I 00

(g) *Ve raragl a a iyy r Muja S t* (1916) 39 M d 4 6 I C 8

(h) *Vellu t bt* v *I n mt* (18 9) M d 400 404

( ) *Aust a Lloyd Stea h p Co* v *Gr ha I fe Assu ance S iety* [1903] 1 K B 49 *I t l t & C* v *Gr ban* [1909] 1 Ch 413 *B r Elle Cut L ea Itl* (19) 43 B m 8 4 89 I C 666 ( ) A B 449 *Ha Abd lla* v *Sta p* (19 4) 6 B I R 4 90 I C 3 (4) A B 391

(j) *F l* v *S n* [1908] I K B 30

(k) *I t a ll n* v *Kal th* (191) 3 Mad 163 1 1 4 19 I C 18 *J oo* v *M ha a l* (19 4) 47 M d 8 8 I C 4 ( ) A M 15

(l) *D gl* v *Forr st* (18 8) 4 Bing 686 *Lo l a l North B tern I y Co* v *L nsay* (18 8) 3 Macq 99

( ) *En el* v *Sy on* [1908] I K B 30

Irregularities not affecting jurisdiction—In cases where a foreign Court has jurisdiction or where the defendant has submitted himself to the jurisdiction of a foreign Court the judgment of such Court is not vitiated by irregularities which do not affect the jurisdiction of the Court even when they are such as would in the view of the foreign Court render the judgment there a nullity (n)

Foreign judgment against a foreign firm—*A B* and *C* carry on business at Singapore in partnership in the name of X Y *D* a creditor of the firm brings an action against the *firm* in the supreme Court of Singapore but *A* alone is served with the writ of summons *B* and *C* are British Indian subjects and they did not reside at Singapore at the date of the suit or at any other time A decree is passed against the *firm* by the Singapore Court A suit is then brought by *D* in British India on the judgment of the Singapore Court against *A B* and *C* for a *personal* decree against them No personal decree can be passed against *B* and *C* as they were not served though such a decree may be passed against *A* (o) Compare O 21 r 50

Foreign judgment on a decree of a British Indian Court—The judgment of a foreign Court obtained on a decree of a Court in British India is no bar to the execution of the original decree in British India (p)

Foreign judgment as res judicata—This section applies not only to suits on foreign judgments but also to cases in which the defendant relies on a foreign judgment as a bar to a suit in British India (q)

Clause (b)—In order that a foreign judgment may operate as res judicata it must have been *given on the merits* of the case whether it was the judgment of a foreign Court in Europe or America or of a foreign Court in Asia or Africa (r) In *Keymer* v *Visvanatham* (s) an action was brought in the King's Bench Division of the High Court of Justice in England to recover a liquidated amount The defendant failed to comply with an order to answer interrogatories and his defence was struck out and judgment was entered for the amount claimed for the plaintiff under R S C O 31 r 21 corresponding to O II r 21 below The plaintiff subsequently instituted a suit on the judgment in the Madras High Court It was held by the Judicial Committee affirming the judgment of the Madras High Court that the judgment sued on was not given on the merits of the case and that the suit was not maintainable It has also been held by the same tribunal that a judgment on an award obtained in England by default cannot be sued on in India since it is not a judgment on the merits of the case (t) A foreign judgment passed on default of appearance of the defendant duly served with summons on the allegations contained in the plaint without any trial on evidence is not one passed on the merits of the case and a suit cannot be brought on such judgment in any Court in British India (u) but it is otherwise if a decree though ex parte is passed after hearing evidence adduced by the plaintiff (v) Where a suit in a foreign Court is adjourned for settlement and it is agreed between the parties that if the suit is not settled judgment should be passed for the plaintiff and there being no settlement the plaintiff appears on the adjourned date but the defendant does not appear and

(n) *G da* v *Ma l g l* (190) 30 Mad 3 *Pemberton* v *Hugh* [1899] 1 Ch 81
(o) *Sahib Thambi* v *Hamid* (1913) 36 Mad 414 12 I C 1006
(p) *F k r dde* v *Official Trustee of Bengal* (1881) 7 C 1 8
(q) *Cho k l ga* v *D rai v ms* (19 8) 1 Mad 0 108 I C 30 (8) A M 3
(r) *S ta S gh* v *R lla Singh* (1919) 1 R no 14 I 30 49 I C 383
(s) *Keymer* v *Visvanatham* (191) 44 I A 6 40 Mad 11 38 I C 683 affirming 33 Mad 9 I C 386
(t) *Oppenheim & Co* v *M hamed Haneef* (19) 49 I A 1 4 4 Mad 496 4 I C 616 ( ) A I C 1 0
(u) *M hamed Ka* v *F k r* (19) 50 Mad 61 100 I C ( ) A M 65 (F B) overruling *Ja oo* v *M han d* (19 4) 47 Mad 8 8 I C 4 (5) A M 155 *I hri P as* v *Sri l p* (19) 0 All 0 10 I C 186 ( ) A A 510 *Abd l F* v *Mal ed* 41 (19 8) 6 R n 5 (8) A R 319 *Arunachellam* v *M homed* (19 8) 10 I C 810 (8) A M 133
(v) *Col* v *F p* (1910) 41 All 1 50 I C 0

judgment is passed for the plaintiff according to the agreement the judgment is one on the merits of the case and a suit can be brought on such a judgment in a Court in British India (u) It cannot be said of a judgment that it was not given on the merits merely because it proceeds on a wrong view as to the burden of proof or the legal liability of a party (x)

Clause (c) —The mistake must be *apparent on the face* of the proceedings In England it has been held that a mere mistake as to English law will not vitiate a foreign judgment even though the mistake may appear on the face of the proceedings (y) In an old Madras case (z) this clause was referred to where a foreign Court had exercised jurisdiction contrary to the principles of International Law but such a case would now fall under clause (a)

Clause (d) —The expression natural justice in this clause refers rather to the form of procedure than to the merits of the particular case The mere fact that a foreign judgment is wrong in law does not make it one opposed to natural justice There must be something in the procedure anterior to the judgment which is repugnant to natural justice (a) Thus a foreign judgment obtained without notice of the suit to the defendant is contrary to natural justice and a suit on such judgment is not maintainable in a British Indian Court (b) So also a judgment based *on a third review after two applications for review* had been refused (c) or a judgment against a minor defendant for whom no guardian ad litem had been appointed (d) But notice served on an agent empowered to sue and defend suits in the foreign Court is sufficient (e) As to sufficiency of notice if the foreign Court has held service of the notice to be sufficient it must be taken to be correct in the absence of evidence to the contrary (f)

Clause (e) —All judgments whether domestic or foreign are void if obtained by fraud In the case of domestic judgments the fraud must be extrinsic to the matter tried but apparently this rule does not apply to foreign judgments (g)

Clause (f) —Presumably a foreign judgment for a gambling debt would not be enforced in British India

Limitation —Where as in the case of a suit on a contract limitation merely bars the remedy but does not extinguish the right the judgment of a foreign Court is not open to the objection that the suit was barred by the law of limitation applicable in the country where the contract was made (h)

Where the Court of a foreign country holds applying its own law that a suit is not barred by the law of limitation it cannot be said that it has refused to recognize the law of British India because the suit was barred according to the law of British India (i)

Presumption as to foreign judgments

14 [S 13 Expln VI] The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a

(w) *Valammal v Chinthamani* (19 0) Mad 503
(x) *Pa a Shenoi v Hallog a* (1918) 41 Mad 0 4 I C 03
(y) *Cod rd v C ay* (18 0) L R 6 Q B 139
(z) *Hi de v Po tl* (1881) 4 Mad 3 9
(a) *I i She i v Hall g a* (1918) 41 Mad 0 45 I C 03
(b) *Lo don I k v H rm sj* (18 1) 8 B H C 00 *Lo don B k v (d* (1881) 5 B m 3 *Lo d n B k v B jorji* (1885) 9 B m 346 *El lji v M elji* (188) 11 B m 41 *B gam m v Bala b a ian* (1890) 13 Mad 496
(c) *Hari S gh v M h mmed* (19 7) 8 Lah 54 10 I C 6 3 (7) A L 00
(d) *Hari S gh v Muhamm d sup a*
( ) *J oo Mahamad* (19 4) 47 M d 877 8 I C 4 (5) A M 155
(f) 4 Mad 8 7 8 I C 4 ( ) A M 155 *sup a*
(g) *V st ri D i v Ki ndo Lal* (1899) 6 Cal 891 910
(h) *Vall t bi v Ponn mi* (18 0) Mad 400 See also Limitation Act 1908 s 8
(i) *Ca ga Prash I v (e h Lal* (19 4) 46 All 119 9 I C 33 (4) A A 161

Court of competent jurisdiction, unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction

See s 13 cl (a) and the undermentioned case (j)

PLACE OF SUING

Court in which suits to be instituted

15 [S 15] Every suit shall be instituted in the Court of the lowest grade competent to try it

Place of suing —This heading governs sections 15 to 25 Place means place in British India and the heading indicates that the Courts referred to in these sections are in British India and the immovable property referred to is also in British India As said by the Lahore High Court these sections regulate the venue in British India and apply only to those places where the Code is in force They deal with matters of domesti concern and prescribe rules for the assumption of territorial juri diction by British Indian Courts in matters within their cognizance and do not govern claims against persons or things wholly outside their jurisdiction (k)

Scope and object of the section —The object of the section in requiring a suitor to bring his suit in the Court of the lowest grade competent to try it is that Courts of higher grades shall not be overcrowded with suits This section is a rule of *procedure not of jurisdiction* and whilst it lays down that a suit shall be instituted in the Court of the lowest grade it *does not oust the jurisdiction* of the Courts of higher grades which they possess under the Acts constituting them (l) Although therefore as a *matter of procedure* a suit below a certain value ought to be instituted in the Court of the Munsif the Subordinate Judge has still *jurisdiction* to try it (m) But also as a matter of procedure he ought not to entertain the suit but should return the plaint to the plaintiff to be presented *to the Munsif as provided by O 7 r 10 [Code of 1882 s 57] (n)* This is explained more fully below

Jurisdiction —The word competent used in this section has reference to the jurisdiction of a Court Jurisdiction means the extent of the authority of a Court to administer justice not only with reference to the subject matter of the suit but also to the local and pecuniary limits of its jurisdiction Thus a Presidency Small Cause Court has no jurisdiction to try suits in which the amount or value of the subject matter exceeds Rs 2 000 this is said to be the jurisdiction of a Court as regards its *pecuniary* limits Nor can it try suits for specific performance of contracts or for an injunction or for a dissolution of partnership this is said to be the jurisdiction of a Court as regards the *subject matter* of a suit Nor can it try a suit on a cause of action that has arisen beyond the local limits of the original civil juri diction of the High Court this is said to be the local limits of its jurisdiction

The jurisdiction of a Court may again be *original* or *appellate* In the exercise of its *original* jurisdiction a Court entertains original suits In the exercise of its *appellate* jurisdiction it entertains appeals The High Courts of Allahabad Patna and Lahore have no *original* jurisdiction

Court of lowest grade competent to try a suit —There are in British India a large number of Courts The High Courts of Calcutta Madras Bombay Allahabad

(j) *I hri P asad* v *Sri I am* (19) 2 All L J 88 10 I C 186 ( ) A A 510

(k) *Bh boo* v *I* \ *r n* (19 8) 9 Lah 45 109 I C 8 (-8) A L 9

(l) \ *dh Lal* \ *M ha* (18) All 30

(m) *Matra V d I H* (1 0) I C I 1 5 *Krish asam* v *Ka ka ba* (1891) 14 M d 183

( ) \ *d i Lal Ma Jar* (188) All -30

Patna Lahore and Rangoon have been established each by a Royal Charter Other Courts in India have been constituted by Acts of the Governor General of India in Council and they are of various grades with different pecuniary limits of jurisdiction

In each of the three presidency towns there is a High Court and a Small Cause Court High Courts are empowered in the exercise of their ordinary original civil jurisdiction to try suits of any value except suits falling within the jurisdiction of Presidency Small Cause Courts of which the value does not exceed Rs 100 (o) The pecuniary jurisdiction of Presidency Small Cause Courts is confined to suits of which the value does not exceed Rs 2 000 (p) Thus both a High Court and a Presidency Small Cause Court *are competent* to try a suit say for Rs 500 for damages for breach of contract but of these two Courts it is the Small Cause Court which is the Court of the lowest grade competent to try the suit The suit therefore shall be instituted in the Small Cause Court as required by the present section This does not mean that the High Court has no jurisdiction to entertain the suit It *has* jurisdiction to try the suit but in order that the High Court may not be overcrowded with suits the Legislature has established Small Cause Courts and the present section requires that suits which a Small Cau e Court is competent to try shall be brought in that Court There are however certain suits which a Small Cause Court is not competent to try such as suits for the recovery or partition of immovable property or for the fore closure or redemption of a mortgage of immovable property or suits for injunction or for specific performance (q) These suits must be brought in the High Court though the value of the suit may be *under* Rs 100

Outside the presidency towns there are in each province a number of Courts of different grades established by a Civil Courts Act for each province The Civil Courts in the mofussil of Bombay Madras and Calcutta are divided into three classes as shown in the following table —

	Bombay Presidency Act 14 of 1869	Madras Presidency Act 3 of 1873	Bengal N W P and Assam Act 12 of 1887
1	District Courts	District Courts	District Courts
2	Courts of Subordinate Judges of the first class	Subordinate Judges Courts	Subordinate Judges Courts
3	Courts of Subordinate Judges of the second class	District Munsifs Courts	Munsifs Courts

The jurisdiction of District Judges and Subordinate Judges except Subordinate Judges of the second class in the Bombay Pre idency extends to all original suits what ever may be the value of the suit But a District Court is a Court of superior grade to a Subordinate Judge s Court for a District Court is the principal Court of original civil juri diction in the district and it is also the Court of appeal from decrees and orders in certain suits passed by other Courts in the district including Courts of Subordinate Judges The jurisdiction of a Subordinate Judge of the second class in the Bombay Presidency extends to all original suits of which the value does not exceed Rs 5 000 The jurisdiction of a District Munsif in the Madras Presidency extends to all original suits (not otherwise exempted from his cognizance) of which the value does not exceed Rs 2 500 The jurisdiction of a Munsif in Bengal North Western Provinces and Assam extends to all original suits of which the value does not exceed Rs 1 000

(o) See Cl 1 of the Letters Pat nt Appe dix II
(p) Presidency Small C use Courts Act 18[illegible] s 18
(q) Pre ide cy Small Cause Courts Act 1882 s 19

Both a Subordinate Judge and a Munsif *have jurisdiction* to try a suit say to recover Rs 500 for rent But of these two Courts it is the Munsif's Court that is the Court of the lowest grade competent to try the suit The suit therefore shall be instituted in the Munsif's Court as required by the present section

As to Civil Courts in the Central Provinces see Act 16 of 1885 in Oudh Act 13 of 1879 in Jhansi Act 18 of 1867 As to Provincial Small Cause Courts see Act 9 of 1887

Where a suit which ought to have been instituted in a Court of lower grade is instituted in a Court of higher grade—Suppose that a suit which under the provisions of this section ought to have been instituted in a Munsif's Court is brought in the Court of a Subordinate Judge and the Subordinate Judge instead of returning the plaint under O 7 r 10 tries the suit notwithstanding objection taken by the defendant and that a decree is passed against the defendant Is the decree a nullity? No for the Subordinate Judge *has* jurisdiction to try the suit It is a case of *irregularity* not affecting the jurisdiction of the Court within the meaning of s 99 below (r) As to cases where a suit is by reason of *over valuation* brought in a Court of higher grade see notes below Over valuation and under valuation

Where a suit which ought to have been instituted in a Court of higher grade is instituted in a Court of lower grade—In such a case the Court of lower grade ought to return the plaint to the plaintiff to be presented to the Court of higher grade [O 7 r 10] If this is not done and the suit is heard by the Court of lower grade the decree is one passed without jurisdiction This is a case of *want of jurisdiction* as distinguished from a mere *irregularity* within the meaning of s 99 below (s) As to cases where a suit is by reason of *under valuation* brought in a Court of lower grade see notes below Over valuation and under valuation

Principles regulating pecuniary jurisdiction—It is the *plaintiff's valuation in his plaint* which fixes the jurisdiction of the Court and not the amount which may be found and *decreed* by the Court (t) But jurisdiction may be destroyed if the *plaint is so amended as to exceed the pecuniary limits of the Court in which the suit is* instituted (u)

Over valuation and under valuation—Although it is the value put by the *plaintiff* on his suit that *prima facie* determines jurisdiction it does not follow that a plaintiff is at liberty to assign any arbitrary value to the suit and thus be free to choose the Court in which he should bring the suit (v) Cases do occur in which a plaintiff over values his suit or he under values it The over valuation or under valuation may be erroneous or it may be done intentionally by the plaintiff for the purpose of bringing the suit in a Court different from that in which it would lie if it were properly valued If the over valuation or under valuation is patent on the face of the plaint it is the duty of the Court to which the plaint is presented to return it to the plaintiff *to be presented to* the proper Court under O 7 r 10 *If* [illegible] is not patent on the face of the plaint but objection is taken by the defendant that it is over valued or under valued the Court may require the plaintiff to [illegible] that the suit has been properly valued if there are prima facie grounds [illegible] believing *that the suit has not* been properly valued (w) but not otherwise (x)

(r) See [illegible] *Lal* v *[illegible]* (188) [illegible] All 30 and *[illegible]* v *[illegible]* (1890) 17 Cal 15 both cases of over valuation [illegible] decided without reference to the Suits Valuation Act 188[illegible]

(s) See *[illegible]* v *[illegible]* (1890) 17 Cal [illegible] 160 A case of over valuation but decided without reference to the Suits Valuation Act 188[illegible]

(t) *Lal* [illegible] v [illegible] (1883) 8 Bom 31 *[illegible]* v *[illegible]* (1 [illegible]) 13 All 3 0 *[illegible]* v *[illegible]* All [illegible] 6

(u) *[illegible]* v *[illegible]* (1886) 9 M [illegible]

(v) *[illegible]* v *[illegible]* [illegible] C O 653 [illegible] 31 Bom [illegible] (191) 40 Cal 45 [illegible]

(w) [illegible] *Hamid* [illegible] Cal 661 66

(x) *[illegible]* [illegible]

Suppose that a suit has been over valued or under valued so that it is brought in a Court whose grade is higher or lower than that of the Court which would have been competent to try it if the suit were properly valued Is the decree liable to be set aside or reversed by the appellate Court ? No not unless (1) the objection as to jurisdiction by reason of over valuation or under valuation was taken by the defendant in the Court of first instance at or before the hearing at which issues were framed or (2) the over valuation or under valuation is found by the appellate Court to have prejudicially affected the disposal of the suit on the merits (*y*) and it matters not whether the over valuation or under valuation was erroneous or intentional (*z*) See Suits Valuation Act 1887 s 11

The High Court of Calcutta has held that where a suit is under valued with the result that the *appeal* from the decree in the suit is heard and decided by a District Court instead of by a High Court the decree of the District Court is one passed by a Court without jurisdiction and therefore a nullity This happens in cases where a suit of which the true value exceeds Rs 5 000 is valued at less than Rs 5 000 *A* brings a suit against *B* for possession of immovable property in the Court of a Subordinate Judge The real value of the suit exceeds Rs 5 000 but the suit is valued at Rs 2 100 only A decree is passed in the suit for *A* *B* files an appeal in the District Court but the appeal is dismissed According to the Calcutta decisions the decree of the District Court is a nullity as being one passed without jurisdiction The reason given is that the true value of the suit being more than Rs 5 000 the proper forum of appeal if the suit had been properly valued would have been the High Court and not the District Court and the result of the under valuation was to oust the jurisdiction of the High Court as the Court of Appeal (*a*)

Where the subject matter of a suit does not admit of being satisfactorily valued —In some suits the subject matter is not capable of being estimated at a money value *e g* suits for restitution of conjugal rights suits to remove a karnavan (*b*) suits to direct registration of a document under the Registration Act 1908 s 77 (*c*) etc The court fee in such suits is Rs 10 as provided by the Court Fees Act 1870 Sch II art 17 cl vi There is a distinction however between valuation for the purpose of jurisdiction and valuation for the purpose of ascertaining court fee (*d*) The subject now under consideration is valuation for purposes of jurisdiction

In cases where the subject matter is not capable of being estimated at a money value it is provided by s 9 of the Suits Valuation Act 1887 that the value of the suit for purposes of jurisdiction is what the High Court may specify by rules made under that section Where no rules are made the High Courts of Allahabad and Calcutta have said that the safest and the most convenient course is to treat the valuation made by the plaintiff as prima facie the true valuation but subject to correction by the Court if the defective valuation has been due to an improper motive and the Court must decide what should be considered to be the proper value (*e*) The cases in which the above rule was laid down were suits for restitution of conjugal rights In a recent case however the High Court of Madras said that though the rule adopted by the High Courts of Allahabad and Calcutta might be appropriate in suits for restitution of conjugal rights it was not so in suits which affected property and that the best rule in such cases was to value the suit according to the value of the property liable to be affected

(*y*) *Sh D* v *T l* (1893) 1 All 3 8 3 0 *R m* v *Secret y f State* (1901) 4 M 1 4 *J Ant* v *Fra ueo* (1910) 3 Bom 4 I C 9 0

( ) *Ham d a* v *C pal* (18) 4 Cal 661 *Krish mi* v *K akas ba* (1891) 14 Mad 183

(*a*) *I jlaksh* v *I atj ja* (1911) 38 Cal 63 666-668 1 I C 461

(*b*) *Con n n Nambiar* v *I rish Namb r* (188) 4 Mad 146

(*c*) *S a m th* v *Rag n* (190) 1 Mad L J 88 *R m A y* v *S I Aiy r* (1908) 31 Mad 8

(*d*) *D y am* v *Gordandas* (190) 31 Bom 3

(*e*) *Z Hu a Kha* v *Ah rshed J* (1906) 9 All 45 *Jan Mahomed* v *Mahar Bibi* (190) 34 Cal 3

thereby (f) Thus a suit to compel registration of an instrument whether the instrument be registrable compulsorily (e g an instrument of gift) or voluntarily (e g a will) is valued in Madras according to the value of the property that would be affected by the suit (g) and a suit to set aside an instrument according to the value of the plaintiff s interest in the instrument (h) The Madras High Court has also held that though the court fee on a suit for the removal of a karnavan is only Rs 10 it does not follow that a District Munsif has jurisdiction to try such a suit where the value of the tarvad property exceeds the pecuniary limits of the jurisdiction of the Munsif s Court (i) and that a Munsif has no jurisdiction to entertain a suit to set aside an adoption if the value of the property which would be lost to the adopted son if the adoption were set aside exceeds the pecuniary jurisdiction of that Court (j) The High Courts of Allahabad and Calcutta would probably not agree In fact the High Court of Allahabad has held that the value for the purposes of jurisdiction of a suit to set aside an adoption is not the value of the property which may possibly change hands if the adoption be set aside but the value put upon his plaint by the plaintiff (k) But whichever view be correct it is certain since the enactment of the Suits Valuation Act (s 11) that when once a suit of this class is decided on its merits by the lower Court the decision will not be reversed in appeal on the ground of want of jurisdiction unless the cognizance of the suit by that Court has prejudicially affected its disposal on the merits

Suits to be instituted where subject matter situate

16 [S 16] Subject to the pecuniary or other limitations prescribed by any law, suits—

(a) for the recovery of immovable property with or without rent or profits,

(b) for the partition of immovable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate

Provided that a suit to obtain relief respecting or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be

(f) *R mu 4 y r v S la a 4ij* (1908) 31 Mad 83

(g) *F k h ma Bh g a* (1890) 13 Mad 6 (deed of gift) *I m a d y v S A ya* (1908) 31 Mad 89

(h) *Ka a an v Ko ppa* (1891) 14 Mad 169 *I i U y S I n a* (189) 1 Mad 34

(i) *Kri h a v Ram* (1) 11 Mad 66

(j) *K l a Lal l a ja a* (1 3) 6 Mad 19

(k) *Sheo De i Ram Tul h F m* (1 93) 15 All 3 8

entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain

Explanation—In this section "property" means property situate in British India

Alterations in the section—The words with or without rent or profits in cl (a) are new The word sale in cl (c) has been newly added

Subject to the pecuniary or other limitations prescribed by law—The pecuniary limitations have been referred to in the notes on sec 15 Instances of other limitations are suits under sec. 92 or suits in Bombay against Government or an officer of Government in his official capacity (l) which can only be filed in a High Court or a District Court

Chartered High Courts—This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction (see s 120) The High Courts of Calcutta Madras Bombay Allahabad Patna Lahore and Rangoon are Chartered High Courts each having been established by a royal charter The nature and extent of the jurisdiction of these Courts is defined by the charter for each of these Courts. The High Courts of Allahabad Patna and Lahore have no original civil jurisdiction The original civil jurisdiction of the High Courts of Calcutta Madras and Bombay is defined by clause 12 of the Charter which empowers them to try suits for land or other immovable property if such land or property be situated wholly within the local limits of the ordinary original civil jurisdiction or in case leave of the Court shall have been first obtained in part within such limits. There have been many conflicting decisions as to the meaning of the expression suits for land or other immovable property in the Letters Patent but the more specific and detailed provisions of this section leave no scope for uncertainty

Scope of the section—As already stated this is one of a group of sections which refer to Courts in British India and to immovable property situate in British India This is specially expressed in the Explanation lest the proviso be construed as giving a mofussil Court jurisdiction in respect of immovable property out of British India for British Indian Courts have no such jurisdiction (m) It specifies the Court in which suits relating to *immovable property* and suits for the recovery of *movable property actually under distraint or attachment* are to be instituted Section 19 indicates the Courts in which suits for compensation for wrong done to the person or to movable property are to be instituted. Section 20 is a general section

Clause (a) suits for recovery of immovable property—A suit for the recovery of immovable property situate in Bombay must be instituted in a Court in *Bombay* having *jurisdiction* to entertain the suit The Small Cause Court in Bombay has no jurisdiction to try such suit (n) The suit must therefore be brought in the High Court of Bombay Hence it is that the section commences with the words subject to the pecuniary or *other limitations* prescribed by any law The insertion of the words with or without rent or profits is intended to remove any difficulty there may be where the defendant does not reside within the local limits of the Courts within whose jurisdiction the property is situate

(l) Bom Civil Courts Act 1860 sec 3
(m) [illegible] (1900) 33 Bom. 373, 2 I C 459
(n) See Presidency Small Cause Courts Act 188[illegible] s 19

Clause (b) suit for partition of immovable property —For cases where the property is in the jurisdiction of different Court see sec 17 post If part of the property is outside British India the Court will deal with the property in British India while declining jurisdiction as to the rest (o) The Lahore High Court has recently held that a *British Court can in a partition suit deal with property situate in a Native State (p)* But this is incorrect

Clause (c) suit for foreclosure sale or redemption —*A* mortgages certain immovable property to *B* to secure payment of money lent to him by *B* Here *A* is the mortgagor and *B* is the mortgagee If *A* does not repay the loan on the due date *B* may institute a suit again t *A* for *sale* of the mortgaged property so that the *mortgage debt may be paid out of the sale proceeds of the property or he may sue for foreclosure* of the mortgage The decree in a foreclosure suit provides that if the mortgagor fails to pay the amount that may be found due to the mortgagee within a time specified by the Court (generally six months) the mortgagor shall be absolutely debarred of all right to redeem the property (q) If *A* offers payment of the mortgage debt to *B* but *B* disputes the amount and refuses to reconvey *A* may sue *B* for *redemption* of the mortgage and the Court will pass a decree ordering an account to be taken of what will be due to *B* and directing that upon *A* paying to *B* the amount so due *B* shall reconvey the property to *A* (r) Suits for foreclosure sale or redemption must be instituted in the Court within the local limits of whose jurisdiction the mortgaged property is situate

A Court cannot declare a charge on property wholly outside its jurisdiction and if it did a purchaser under such a decree would be in no better position than a purchaser under a money decree (s)

Clause (d) suits for the determination of any other right to or interest in immovable property —There is no definition of immovable property in the Code Immovable property is defined in the General Clauses Act 1897 s. 3 cl (25) as including land benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth Trees standing on land are immovable property (t) But once the trees are severed from the land they become movable property Growing crops are movable property (see s - cl. 13) Land includes water and a right of fishery in an enclosed water is immovable property (u) Benefits to arise out of land include incorporeal hereditaments such as a right of ferry (v) also pensions and allowances charged upon land and rents Thus a *hat* is immovable property (w) and so is the life interest of a widow in the rents and profits of her husband s estate (x) Immovable property as stated above includes benefits to arise out of land. Rent that *has already accrued due* is movable property for it is a benefit which *has arisen* out of land but rent that *is to accrue due* is immovable property for it is a benefit *to arise* out of land Hence a suit for *arrears* of rent is governed not by the provisions of this section but by those of s 20 and it may be instituted in any one of the Courts specified in that section although in such suit the plaintiff s *title* to the property of which the rent is claimed may incidentally come in question (y) But a suit for a *declaration* of the plaintiff s right to rent where such right is denied comes under cl (d) of the present section and must be instituted in the Court within the local limits of whose

(o) *Punchan n v Shib Cha der* (188) 14 C l 835 (a case under clause 1 of the Letters P t nt)

(p) *I i I ushan v Ran Jan* (19 3) I C 54 (3) A L 1

(q) Transf r of Property Act 188 ss 86 87 now O 34 r 3

(r) Tran f r of P operty Act ss 9 93 now O 34 rr 7-8

(s) *C d Lall v J g nath* (1886) 8 All 117

(t) *S U v I ish m* (18) 19 Bom 0 *B pu v Dh nd* (189) 16 Bom 353 *Umed Khan v D lat Ram* (1883) 5 All 564

(u) *Sh b Haldar v G p S d n* (1897) 4 Cal 449

(v) *Kr hna v Ak la d* (1897) 13 M d 4

(w) *S r nd a v Bh Lal* (18) Cal 449

(x) *N tha v Dh bh j* (1898) 23 B m 1

(y) *Ch nta a v Madh rra* (1869) 6 B H C A C 9 *I a go Lal v Wilso* (1901) 6 Cal 04 *Ku ja v Ma nd a* (19 3) C W N 54 7 I C 53 (23) A C 619

jurisdiction the property is situate ( ) So also a suit for rent and ejectment under sec 66 of the Bengal Tenancy Act (a) A suit to recover a share of the *sale proceeds* of land which *have already been reali ed* is a suit for money governed by the provisions of s. 20 (b) But a suit by a vendor of land for the recovery of *unpaid purchase money* against the buyer who *refuses to complete the purchase* is a suit for the determination of any right to or interest in immovable property within the meaning of cl. (d) (c) A suit by a mortgagee to recover the mortgage debt from the mortgagor *personally* is a suit for debt governed by the provisions of s. 20 but if in addition to the claim against the mortgagor personally the mortgagee seeks to recover the mortgage debt by *sale* of the mortgaged property the suit will come under cl. (c) of the present section (d) A suit for maintenance is governed by the provisions of s. 20 but if in addition to the claim for maintenance the plaintiff claims that she is entitled to a *charge on immovable property* in the hands of the defendant the case is one within cl (d) of this section (e) A suit for dissolution of partnership with the usual ancillary reliefs is not a suit within cl. (d) merely because part of the partnership assets consists of a factory (f)

Income and mesne profits of land situate outside British India—A suit will lie in a Court of British India to establish a right to a share in income derived from grants of land situated outside British India but received by the defendant within the local limits of a British Indian Court (g) Similarly a suit to recover mesne profits of land situate outside British India of which the defendant was in wrongful possession but of which he subsequently delivered possession to the plaintiff may be instituted in a Court in British India (h) Both these cases fall under s. 20 below

Clause (e) wrong to immovable property—This refers to torts affecting immovable property such as trespass (i) nuisance infringement of easements etc

Clause (f) movable property actually under distraint or attachment.—Movable property under attachment constitutes an exception to the general rule that movables follow the person (j) The exception is probably founded on the fact that when such property is under attachment its locality is fixed. The Code follows this rule for the sake of convenience of judicial administration (k) The clause applies to Courts in British India but when movables are under attachment by a foreign Court and the defendant is resident in British India and is able to get the attachment removed it has been held that he can be ordered in execution of a personal decree to recover the property (l)

Proviso to the section—The last paragraph of the section provides that suits to obtain relief respecting or compensation for wrong to immovable property may be instituted *at the plaintiff s option* either in the Court within the local limits of whose jurisdiction the property is situate or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business or personally works for gain provided—

(1) the property is held by or on behalf of the defendant

(2) the relief sought can be *entirely* obtained through the personal obedience of the defendant (m) and

(3) the property is situate in *and not beyond* British India (n)

(z) *K[illegible]har* v *[illegible]k* (189[illegible]) 23 Bo[illegible]
( ) *K[illegible]ja* v *Ma[illegible]* (19[illegible]3) 27 C W N 542, 7 I C 263 (3) A C 619
(b) *[illegible]* v *Kr[illegible]hna[illegible]* (1883) 6 Mad 344 *Ahmad* v *Abd[illegible]* (1904) 6 All 603
( ) *M[illegible]* v *Kola* (190) 9 Mad [illegible]
(d) *[illegible]* v *[illegible]* (1893) 1[illegible] Bom [illegible]0
(e) *S[illegible]ba* v *L[illegible]miba* (1916) 40 Bom 337 3 I C 9[illegible]
(f) *D[illegible]ga D[illegible]* v *Ja[illegible]* (191) 41 All 13 [illegible] I C 1 6 ([illegible]) A B 1[illegible]
(g) *Kash[illegible]* v *[illegible]* (1900) 4 Bom. 40
(h) *Mahadeo* v *Fama[illegible]* (19) 46 Bom 103 68 I C 510 ( ) A B 188
(i) *Crisp* v *[illegible]* (1893) [illegible]0 Cal 689
(j) *Co[illegible]panhia de Mora[illegible]* v *Brit[illegible]sh South Africa Co* (189) [illegible] Q B 358 3 7
(k) W[illegible]lrott p 74
(l) *Ko[illegible]* v *Udaya* (191) M W N [illegible] 14 I C [illegible]9
(m) W[illegible]s Private International Law p [illegible] *Mahadeo* v *[illegible]* supra *[illegible]* v *M[illegible]* (191) 3 Mad L J 6 9 17 I C [illegible]
( ) *Kr[illegible]* v *Gaja[illegible]* (1909) 33 Bom 373 I C 49[illegible]

The proviso does not apply when the property is in the possession of the plaintiff (o). As the plaintiff has the option of suing in the local jurisdiction the scope of the provis is more limited than in the rule of English Equity

Equity acts in personam—This proviso is an application though in a highl modified form of the maxim *Equity acts in personam* When it is said tha *Equity acts in personam* what is meant is that the Court of Equity in England (now th Chancery Division of the High Court of Justice) has jurisdiction to entertain certain suit [suits in cls. (a) (b) and (e) of the present section being entirely excluded] respectin immovable property though the property may be situate *abroad* if the relief sought ca be obtained through the *personal* obedience of the defendant The *personal* obedienc of the defendant can be secured only if the defendant resides within the local limits o the jurisdiction of the Court or carries on business within those limits For in the on case the *person* of the defendant being within the jurisdiction and in the other hi *personal* property the court may if he does not comply with the judgment direc the *arrest of the defendant* and commit him to jail or order that his *goods be attache* until he complies with the order of the Court (p) But if neither the person of the de fendant nor his personal property is within the jurisdiction the Court will not entertai a suit for a relief respecting immovable property situate beyond its jurisdiction for th Court cannot in that event execute its decree either *in rem* or *in personam* and a Cour does not entertain a suit if it cannot enforce its decree in the suit (q)

Suits in personam—Suits in respect of which Courts of Equity in England exercise jurisdiction *in personam* are called suits *in personam* The essential featur of suits *in personam* is that the land in respect of which the suit is brought is situat *abroad* but the person of the defendant or his personal property is *within the jurisdic tion* of the Court in which the suit is brought The land being situate abroad th decree cannot be executed *in rem* that is to say it cannot be executed against the *land* But the person or the personal property of the defendant being within the jurisdiction the decree can be executed *in personam* that is to say against the person or persona property of the defendant It must however be noted that the only class of cases in which Courts of Equity in England entertain suits relating to land situated abroad ar cases of *contracts fraud and trust* Thus suits for specific performance of contract for sale of land (r) and suits for foreclosure (s) sale (t) or redemption (u) in th case of a mortgage of land are cases of *contract* and the Court of Equity in Englanc will entertain such suits if the contract is made in England and the defendan resides or carries on business in England though the land may be situated abroad Similarly where lands abroad have been acquired by the *fraud* of a party residing in England a suit to set aside the transaction will be entertained by the Court of Equity in England (v) The Court of Equity will also entertain a suit to enforce *express trusts* affecting land situate in a foreign country if the trustee reside in England (w) But it has no jurisdiction to entertain suits for recovery (x) or for partition (y) of land or for damages for trespass to land (z) See cl (a) (b) and (e) of this section

Actually and voluntarily resides—See notes to s 20 under the same heading

Carries on business—See notes to s 20 under the same heading

Personally works for gain—See notes to s. 20 under the same heading

(o) *Cr.p v Wat o* (1893) 0 Cal 689
(p) *Pe n v Lord B ltimore* (1750) 1 Ves Sen 444
(q) S e *T nbak Lakshman* (1896) 0 Bo 495
( ) *C l.e F el* (18 6) 5 H L Ca 90
( ) *P j l F de* (18 4) L R 18 E 118
(t) Sp n s l q Ju 6 8
(u) *Be t v l o g* (1838) 9 Sim 1 0 190
( ) *Lord C t J lnston* (1 96) 3 Ves 1 0
(w) *Nel o Brid rt* (1846) 8 Be 54
(x) *I e Hawth rn* (1883) 3 Ch D 4
(y) *Carter ght v Tett* (16) Ch Ca 14
(z) *British S th Af ca Co v C p h a de Mocambiqu* [1893] A C 60 [18] Q B 358

17 [S 19] Where a suit is to obtain relief respecting or compensation for wrong to, immovable property situated within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate

Suits for immovable property situate within jurisdiction of different Courts

Provided that, in respect of the value of the subject matter of the suit, the entire claim is cognizable by such Court

Scope and object of the section —The provisions of this section are intended for the benefit of suitors the object being to avoid multiplicity of suits (*a*) *A* sues *B* in a Court in district X on a mortgage of two properties one situate in district X and the other in district Y The Court in district X has jurisdiction under this section to *order the sale* not only of the property in district X but also of the property in district Y and to *sell in execution of its decree* the property in district Y (*b*) *A* is not obliged to bring two suits one in the Court of district X and the other in the Court of district Y He may bring only one suit in either Court and it matters not if the properties are several one in each district or one property extending over two or more districts (*c*) The same rule applies to suits for partition (*d*) and to suits for the recovery of immovable property (*e*) *A* can sue in any Court in which any part of the immovable property is situate and he has the right to select his own forum (*f*) though this right may be controlled by the Court of appeal or the High Court see secs 22 and 23 below But no partition can be made of property situate outside British India (*g*)

A bona fide compromise will not divest the Court of jurisdiction once jurisdiction has properly vested in it *A* sues *B* in a Court in district X to recover possession of two properties one situate in district X and the other in district Y The suit is compromised as regards the property situate in district *X* This does not take away the jurisdiction of the Court in district X to proceed with the suit as regards the property situate in district Y unless it be shown that the compromise was a mere contrivance to defeat the policy of the rule of *procedure as to local jurisdiction* (*h*)

May be instituted —Cases are conflicting as to whether plaintiff suing in respect of a part of a property in one district only is barred from suing as to the other part or the rest of the property in another district in the jurisdiction of another Court But the better opinion is that there is no bar and that the section is permissive (*i*)

Immovable property within the jurisdiction of different Courts — As already stated the immovable property to which this section refers must be situate in British India *Courts in British India have no jurisdiction over property situate outside British India* (*j*) The Court will deal with property in British India if the suit is for partition while declining jurisdiction as to the rest (*k*) So also if part of the property is in

(*a*) *H ha d* v *Lal Bahad r* (1894) 16 All 3 9

(*b*) *M eyk* v *Steel* (188) 14 Cal 661 *Cop* *M han* v *D ybaki* (189) 19 Cal 13 *T kco n* v *Shib Ch ndr* (1 94) 21 Cal 633

( ) *Sh rroop Chander* v *Ameerru sa* (188) 8 Cal 103

(*d*) *Khat j* v *Ismail* (1889) 1 Mad 380

(*e*) *K b J* v *I m Bal* (1908) 30 All 560

(*f*) *I t ym I ull* v *I ic tha* (1 90) 10 Mad 4 7 *Z mira* v *Fat h Al* (190) 3 Cal 146 150

(*g*) *P macharya* v *Anantacharya* (1894) 18 Bom. 943

(*h*) *Fh t j* v *Ism l* (1889) 1 Mad 380 *K bra J n* v *I B l* (1908) 30 All 560

(*i*) *S bba R* v *R ima I t* (186) 3 M 1 H C R 3 6 (d ld d unl r th Act of 18 3 wl r l ave of a s perl r Court was re juir d) *N h l S gh* v *Son* (1884) P I 16 *Hari N aye* v *Ga patrao* (1883) Bom Contra *Jamoona* v *Bl amas o da e* (1 6) W R 148

(*j*) *Frish a* v *G ja a* (1909) 33 Bom 3 3 I C 483

(*k*) *P n hanan* v *Sh b Cha d r* (188) 14 Cal 836 *Bala a* v *I el I* (1909) Bom 9

a Scheduled District outside the local limits of the jurisdiction of the Court and outside the local extent of the Code (l)

Execution —When the Court has power to pass a decree as to immoveable property in a different jurisdiction it has also power to execute it See note under sec 38 Jurisdiction of Court executing a decree

Courts – Courts in this section mean Courts to which the Code applies (m)

Chartered High Courts – This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction (see s 120) See notes to s 16 Chartered High Courts.

Place of institution of suit where local limits of jurisdiction of Courts are uncertain

18 [S 16A] (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immovable property is situated, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction

(2) Where a statement has not been recorded under sub section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice

Uncertainty of local limits of jurisdiction —The uncertainty which the Legislature had in view was the alteration of boundaries by fluvial action (n) The absence of a notification of the boundaries of a district was held to create a reasonable uncertainty (o)

And there has been a consequent failure of justice —These words are new They have been added in order still further to restrict the taking of technical objections as to jurisdiction *Alla Ditta* v *Abdul Qadir* (p) is an instance of an objection to jurisdiction being disallowed although no statement was recorded as required by sub sec (1)

(l) *S[illegible]* v *Maharaja of Jaipur* (1913) [illegible] 46 I A [illegible] 18[illegible]
(m) *S[illegible] v Maharaja of Jaipur* [illegible]
(n) [illegible] Council
(o) [illegible] Cal 44[illegible]
(p) (1901) [illegible]

19 [S 18] Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts

Suits for compensation for wrongs to person or movables

Illustrations

(a) A residing in Delhi beats B in Calcutta B may sue A either in Calcutta or in Delhi

(b) A residing in Delhi publishes in Calcutta statements defamatory of B B may sue A either in Calcutta or in Delhi

Scope of section—Section 16 refers to suits for immovable property which have to be filed in the local jurisdiction Section 20 refers to personal actions such as actions in tort or contract where jurisdiction depends upon the residence of the defendant or the accrual of the cause of action Section 20 overlaps this section which gives an option where the cause of action accrues in the jurisdiction of one Court and the defendant resides in the jurisdiction of another Court The section is limited to torts in British India and to defendants residing in British India (q) It excludes suits for an injunction and suits in respect of torts committed outside British India Such suits fall where the defendant is resident in British India not under this section but under section 20

Wrong—Wrong means a tort or actionable wrong i e an act which is legally wrongful as prejudicially affecting a legal right of the plaintiff (r) But it must be a tort affecting the plaintiff's person or his reputation as in the illustrations or his movable property for tort affecting immovable property such as trespass or nuisance or infringement of easements fall under section 16 (e)

The plaintiff may sue either where the defendant resides or the wrong was committed (s) A wrong may however consist of a series of acts and it is sometimes not easy to specify the place where it was committed Thus in a case from Burma (t) the defendant at Inapon wrongfully obtained a magistrate's order for the seizure of plaintiff's boat at Rangoon and it was held that the Rangoon Court had jurisdiction as the wrong was done at Rangoon

Suits against Government—The word resides refers only to natural persons *The words carries on business refer to commercial business* The section therefore does not apply to suits against the Secretary of State for damages for a tort where the tort is committed outside the jurisdiction Such suits can only lie in the Court of the place where the tort is committed (u)

20 [S 17] Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

Other suits to be instituted where defendants reside or cause of action arises

(q) See Govind Nair v Achutha Menon (1916) 39 M 433 435 38 I C 394

(r) Templeton In re (1900) Bom L R 44 49

(s) Hatell Shah v Pai da Khan (1906) 31 C W N 1 4 96 I C 88 (1926) A C 89

(t) Ma Myit v Shw Tha (191) 3 L B R 164

(u) Govindaraj I v Secretary of State (19) 50 Mad 449 105 I C 5 6 ( ) A M 689

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution, or

(c) the cause of action, wholly or in part, arises

Explanation I —Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence

Explanation II —A corporation shall be deemed to carry on business at its sole or principal office in British India, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place

Illustrations

(a) A is a tradesman in Calcutta *B* carries on business in Delhi *B* by his agent in Calcutta buys goods of *A* and requests *A* to deliver them to the East India Railway Company *A* delivers the goods accordingly in Calcutta *A* may sue *B* for the price of the goods either in Calcutta where the cause of action has arisen or in Delhi where *B* carries on business

(b) A resides at Simla *B* at Calcutta and *C* at Delhi *A* *B* and *C* being together at Benares *B* and *C* make a joint promissory note payable on demand and deliver it to *A* *A* may sue *B* and *C* at Benares where the cause of action arose He may also sue them at Calcutta where *B* reside or at Delhi where *C* resides but in each of these cases if the non resident defendant objects the suit cannot proceed without the leave of the Court

Alterations in the section —The words every suit have been substituted for the words all other suits in the Code of 1882 The words wholly or in part in cl (c) are new Explanation III to s 17 of the Code of 1882 which related to causes of action in cases of contracts has been omitted in view of the addition of the words wholly or in part in cl (c) See notes below Cause of action in suits on contracts

Subject to the limitations aforesaid —The limitations are the pecuniary and other limitations referred to in s 16 See note under the same heading below

that section The former section was a residuary section referring to all other suits and as such was held to be subject to s 19 (v) The present section overlaps section 19 and is subject to section 16 and by implication to section 15

Chartered High Courts—This section does not apply to Chartered High Courts in the exercise of their original civil juri diction (see s 120)

Scope of the section—This is a general section embracing all personal actions At common law actions are either personal or real Personal actions are also called tran sitory because they may occur anywhere such as actions for tort to person or to movable property or suits on contract Peal actions are actions against the res or property and are called local becau e they must be brought in the forum rei sitæ that is the place where the immovable property is situate An action may also be a mixed action being partly real and partly personal Torts to immovable property such as tre pass and nuisance are mixed actions and are referred to in s 16 (e) Otherwise s 16 deals with real and local actions while secs 19 and 20 deal with personal or transitory actions

The limitations mentioned in this section exclude the real and mixed actions of s 16 and confine the section to personal actions The plaintiff has the option of suing either (1) where the cause of action has accrued or (2) in the forum of the defendant i e where the defendant resides or carries on business or personally works for gain (w) This alternative is shewn in the illustrations which are taken from two old cases the first from *B inter* v *Way* (*x*) and the second from *De Sou a* v *Coles* (*y*)

Actually and voluntarily resides—As to personal actions residence will give jurisdiction even when the cause of action has arisen out ide Briti h India Thus a partner was entitled to sue in the Court of Bulsar for the dissolution of a partnership commenced and carried on in foreign territory because the defendant partner at the time of the institution of the suit resided in Bulsar (z) And a suit for arrears of rent of lands in a Native State may be filed in a British Indian Court in the jurisdiction of which the defendant re ides for rent that has already accrued due constitutes a personal claim (a) On the other hand if the cause of action has ari en in the jurisdiction a Briti h Indian Court may entertain a suit again t a non resident foreigner See note below Suit against a non resident foreigner

The word actually excludes domicile or constructive residence while on the other hand compul ory residence does not confer jurisdiction Under the Code of 18‥9 a man was held to reside at a place where he was lawfully confined but the word voluntarily renders these cases obsolete

The word resides is construed according to the supposed intention of the Legislature (b) and even in this Code it is u ed sometimes in a more restrictive and sometimes in a more extended sen e see s 130 O 3 r 2 and O 2‥ r 1 However there appears to be no distinction between the meaning of the word resides in secs 16 19 and 20 and of the word dwells in cl 12 of the Letters Patent (c) Therefore cases decided on the latter word may be considered authorities on the construction of the former

Dwells within the meaning of clause 12 of Letters Patent—The dwelling or re idence must be of a more or less permanent character It must be of such a nature as to show that the High Court in which a defendant is sued is his natural *forum* (*d*)

(v) *F l r Pak i* v *Dwa ka Nath* (1903) 30 Cal 4 3
(w) *Por j i* v *S I ara* (1896) 19 M 1 4
(x) (1863) 1 Mad H C 300
(y) (1868) 3 M d H C 384 387
(z) *I mal j* v *Ismail* (19 1) 45 B m 1 8 63 I C 9 2
(a) *Bh jbal* v *Na h j* (189) 19 All 4 0
(b) *P m h dra* v *K sh* (1881) 6 Bom 100

G an i v *G erdha l lj* (1890) 14 Bom 54
(c) *M homed* v *Laldi* (18 0) 3 P m ... *Govind* v *G vardh n lji* (1890) 14 Bom 541 54
(d) *G mi* v *(ra d n l lj* (1890) 14 Bom 541 ... in app ... (1894) 19 Bom 230 and in app t ... (1 94) 19 Bom ‥34 I it see ... and 35 I A 1 9 13

Therefore when the defendant has a permanent dwelling at one place he cannot be said to dwell at a place where he has lodged for a temporary purpose only e g to defend a suit brought against him (e) or for a change while on leave (f)

Every person is deemed in law to have a dwelling or place of residence and so if he has no permanent place of residence he will be deemed to dwell where he is actually staying at the time Thus where a defendant who was Political Agent at Kolhapur residing in a Government building there sold his furniture and other effects and left Kolhapur on a year s furlough and while en route to England stayed in Bombay for three days before sailing he was held to dwell in Bombay so as to give jurisdiction to the High Court in a suit instituted against him during his stay in Bombay (g) And in a Calcutta case a racing man who had come to Calcutta for a month for racing was held to dwell in Calcutta for he had no other residence at the time when the suit was instituted against him (h)

On the other hand a person may have more than one permanent place of residence at the same time If so he will be deemed to dwell in any one of the places where he is actually staying for the time being and he may be sued in that place In *Orde* v *Skinner* (i) the defendant who had a dwelling place at Mussoorie was held under the circumstances of the case to have another dwelling place at Bilaspur Similarly where a defendant spent his time alternately in Calcutta and the mufassal he could be sued in Calcutta where he was residing at the time of institution of the suit (j) But a person who has been living and carrying on business in Bombay for twenty years cannot be said to be residing at Ahmedabad because he has a family house at Ahmedabad which he visits occasionally in such a case Ahmedabad cannot be said to be one of his places of residence (k) Where an Acharya (Hindu head priest) who had his permanent place of residence at Nathdwar where he had been installed on the gadi in 18 9 came to Bombay for the first time in April 1889 at the invitation of his devotees and stayed in a house which he had purchased in 1888 for *occasional* residence and exchanged visits with his followers it was held in a suit brought against him in Bombay in May 1889 that he did not dwell in Bombay (l) Where a person who was domiciled and resided in Mysore left his house in charge of a servant and hired a house in Madras to which he brought his wife and family and apprenticed himself for a year to a Vakil in Madras it was held in a suit brought against him in Madras some months after his residence there that inasmuch as he had taken up his abode in Madras meaning to remain there for several months and was actually living there when the suit was instituted he dwelled in Madras within the meaning of cl 12 of the Letters Patent (m)

Carries on business —These words also occur in cl 12 of the Letters Patent and the decisions under that clause apply equally to cases arising under ss 16 19 and 20 The word business is used in a restricted sense (n) and is limited to commercial business The expression carries on business is intended to relate to business in which a man may contract debts and is liable to be sued by persons having business transactions with him (o) A Hindu priest who receives offerings from his followers cannot be said to carry on business although the offerings are on such a large scale that he employs servants to collect and keep an account of them (p) A zemindari business has been held not to be

(e) *Fmrutloll* v *K ld* (1864) ? H de 119
(f) *K rasj* v *Walla e* (1863) 1 Bom H C 113 *Kissun S g* v *t rt* (18 0) 5 Mad H C 4 1
(g) *Fern ndez* v *Wray* (1001) 5 Bom 1 6
(h) *Morris* v *L mga ten* (1865) Coryt n 15 *Majh w* v *Tulloch* (18) 4 N W P H C 1
(i) (1851) 3 All 91 7 I A 196
(j) *Nula d ney* v *K ll* (1864) Coryton 4
(k) *Ug r Chand* v *S rajmal* (1900) Bom L R 60 *Gurand lla Mal* v *Ram D s* (1916) 1 R no 11 p 343 33 I C 6
(l) *Gosvam* v *Goverdh nl lj* (1890) 14 Bom 541
(m) *Sri vasa* v *Venkat* (1911) 4 Mad 39 I A 1 9 11 I C 447 in pp from Mad 233
(n) *D* v *ra* v *Secr t ry of St te* (1887) 14 Cal 6 3 *G draj l* *ecr ta y f Stat* (19) 50 Mad 449 10 I C 5 6 ( ) A M 653
(o) *Gosvami* v *Goverdh Lalj* (1890) 14 Bom 541
(p) *Gosvam* v *Go rdhanl lj* (1 90) 14 Bom 541

the kind of business contemplated by this section (q) The phrase carries on business or personally works for gain is inapplicable to the Secretary of State for India for whatever income is obtained by Government is held for the benefit of the Indian Exchequer (r) A person may carry on business at a place where he has no office or regular establishment Thus a person residing in the mufassal who goes once or twice a week from the mufassal to a friend s house in Calcutta and does business there will be said to carry on business in Calcutta (s) The business need not be caried on personally (t) The phrase carries on business is used as distinct from the phrase personally works for gain It does not involve actual presence or personal effort and a man may carry on buisness in a place through an agent or through a manager or by his servants without having ever gone there It means having an interest in a business at that place a voice in what is done a share in the gain or loss and some control if not over the actual method of working at any rate upon the existence of the business (u) But it is necessary that the following three conditions should concur namely—

(1) The agent must be a *special agent* who attends *exclusively to* the business of the principal and carries it on in the name of the principal and not a *general agent* who does business for any one that pays him Thus a trader in the mufassal who habitually sends grain to Madras for sale by a firm of commission agents who have an independent business of selling goods *for others* on commission cannot be said to carry on business in Madras (v) So a firm in England carrying on business in the name *A B & Co* which employs upon the usual terms a Bombay firm carrying on business *in the name of C D & Co* to act as the English firm s commission agents in Bombay does not carry on business in Bombay so as to render itself liable to be sued in Bombay (w)

(2) The person acting as agent must be an *agent in the strict sense of the term* The manager of a joint Hindu family is not an agent within the meaning of this condition (x)

(3) To constitute carrying on business at a certain place the *essential* part of the business must take place in that place Therefore a retail dealer who sells goods in the mufassal cannot be said to carry on business in Bombay merely becau_e he has an agent in Bombay to import and purchase his stock for him He cannot be said to carry on business in Bombay unless his agent made sales there on his behalf (y) A Calcutta firm that employs an agent at Amritsar who has no power to receive money or to enter into contracts but only collects orders which are forwarded to and dealt with in Calcutta cannot be said to do business in Amritsar (z) Similarly a Life Assurance Company which carries on busine s in Bombay employs an agent at Madras who acts merely as a Post Office forwarding propo als and sending moneys cannot be said to do business in Madras (a)

Leave of the Court—Leave of the Court is required when some of the defendants are within and others outside jurisdiction Thus a suit against the members of a firm one of whom resides within jurisdiction may be instituted with leave of the Court as regards the non resident defendants (b) and if the Court refuses leave the suit cannot proceed unless the non resident defendants acquiesce (c) Leave may be given even after institution of the suit (d)

(q) *Nob n Cha der v F roda* (197) 19 W R 341 *Anonymous ca e* (18) 3 W R 3
(r) *D ya Na a n v S cret ry of State* (1 8) 14 C L 56 2 3 *Govind j lu v S cr tary of St te* (19) 50 Mad 449 10 I C 6 ( ) A M 6 9
(s) *G ch nder v Coll* (1864) 2 Hyde 9
(t) *M Ugyn v Allan* (188) 4 Mad 09
(u) *Kirpa Ram v Ma gal Sen* (19 1) 19 All L J 696 63 I C 93 ( ) A A 36
(v) *Ch mmal v T luka nat mm l* (1866) 3 M H C 146
(w) *Kh mj v Fo be* (18 1) 8 Bom H C 10
( ) *A nalai v Muri gasa* (1903) 6 Mad 544, 30 I A 0
(y) *Fr mj Horm sj* (186) 1 B m H C 0
(z) *H ra and v C rm kh l a* (19 3) 3 I C 0 (3) A L 4
(a) *Joh v Samb m rthy* (19 8) 6 Mad L J0 (20) A M 347
(b) *Alag pp A m L i* (1916) 35 I C 74
(c) *Mahomedbh i v Ad j* (19) 46 Bom 9 64 I C 919 ( ) A B 15
(d) *Na a n v Secretary of St te* (1906) 30 Bom 6 0

Acquiesce—Section 20 of the Code of 1882 contained a provision that if a defendant who did not reside within the jurisdiction did not apply to the Court for a stay of proceedings he should be deemed to have acquiesced in the institution of the suit (*e*) but this clause has been omitted from the present Code and there is no express provision for such a presumption in the transfer sections 22 23 and 24 Nevertheless it is submitted that a defendant who appears and fails to apply for a transfer will be deemed to have acquiesced But when the defendant objected to jurisdiction the Calcutta High Court held that he could not be deemed to have acquiesced because he failed to apply for a transfer (*f*)

Personally works for gain—These words were inserted to give jurisdiction where a person lives outside the local limits of jurisdiction but comes within them to work for gain as in the case of a pleader who lives outside the jurisdiction of the High Court where he practises (*g*) The word works implies mental or physical effort and does not apply to the receipt of offerings by a Hindu priest (*h*) As already stated the phrase works for gain is not applicable to the Secretary of State or to Government (*i*)

Cause of action— Cause of action means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court (*j*) It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved to entitle the plaintiff to a decree (*k*) Everything which if not proved would give the defendant a right to an immediate judgment must be part of the cause of action (*l*) It is in other words a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit (*m*) It has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff It refers entirely to the grounds set forth in the plaint as the cause of action or in other words to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour (*n*) The cause of action must be *antecedent* to the institution of the suit (*o*) So when the plaintiff filed his suit for ejectment fifteen days before he was entitled to possession he failed for want of a cause of action (*p*)

Cause of action in suits on contracts—The corresponding section of the Code of 1882 merely referred to the place where the cause of action arose It was not clear whether this meant the whole cause of action or any part of the cause of action The section was therefore amended by section 7 of Act 7 of 1888 which added an Explanation as to the significance of the term when applied to contracts That Explanation was as follows —

Explanation III—In suits arising out of contract the cause of action arises within the meaning of this section at any of the following places namely —

(1) The place where the contract was made

(2) the place where the contract was to be performed or performance thereof completed

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(*e*) *Venkata v Krishnasami* (1883) 6 Mad 344 *Ramappa v Ganpat* (1906) 30 Bom 81

(*f*) *Ratan Chand v Secretary of State* (1914) 18 C W N 1340 7 I C 23

(*g*) *Rai Narain v Newton* (18 3) 6 N W P 43

(*h*) *G n v Goverdhanlalji* (1890) 14 Bom 541

(*i*) *Daya Narain v Secretary of State* (1887) 14 Cal 2 6 3 74

(*j*) *Cook v Gill* (18 3) 8 C 1 10 *London Bombay Bank v Ladee* (1880) 5 Bom 4 *Naryan v Secretary of State* (1906) 30 Bom 5 0

(*k*) *Read v Brown* (1888) 2 Q B D 128 131 *M v Bhola Ram* (1893) 16 All 16 [F B] *Salma Bibi v Sh k Mahammad* (1896) 18 All 131 *Muhammad Zakaria v Muhammad Hafi* (1917) 39 All 506 11 41 I C 33

(*l*) *Read v Brown* (1888) 2 Q B D 128

(*m*) *Dhanji haw v Hi rde* (18) 11 Bom 649 *Mus v Ma lal* (190) Bom. 368 *Raghoonath v Gob nd a a* (1895) 2 Cal. 451

( ) *Chand Ko v P a Si gh* (1889) 16 Cal 98 10 15 I A 156

( ) *Mahant Gobind v Rani Debe d abala* (1919) 4 P t L J 39 333 52 I C 31

(*p*) *Gulab S g v Kalyan Chand* (1893) 1 All 399

(3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable

This Explanation made it clear that in suits on *contracts* cause of action meant the whole or any part of the cause of action but it was still not clear that it meant the same in other suits (*q*) In the present Code the words wholly or in part have been inserted after the word cause of action which makes it plain that all suits may be instituted where the cause of action arises wholly or in part (*r*) Explanation III has been omitted as no longer necessary but it is nevertheless a correct statement of what is still the law (*s*)

In a suit for damages for breach of contract the cause of action consists of the making of the contract and of its breach so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred (*t*) Thus if a contract is made in Poona to be performed in Poona the whole cause of action arises in Poona and the suit for breach can only be filed in the Poona Court But if the contract is made in Poona to be performed in Belgaum t e suit for its breach can be filed either in the Poona or the Belgaum Court No leave of the Court is required in respect of a suit where part of the cause of action arises out of jurisdiction as in the ca e of High Court suits governed by clause 12 of the Letters Patent

The making of a contract is part of the cause of action and a suit on a contract can always be filed at the place where it wa made (*u*) The determination of the place where it was made is part of the law of contract A contract by correspondence is made at the place where the letter of acceptance is po ted (*v*) and if acceptance is by performance of a condition the suit may be instituted at the place where the condition is performed (*w*)

The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract should have been performed or its performance completed (*x*) The usual case is that of a contract for sale of goods and a suit on such a contract may be filed at the place where the goods were deliverable or the price payable (*y*) Thus if goods for delivery at Allahabad are sold according to sample and paid for in Bombay the buyer may sue in Allahabad if the goods prove not to be of sample quality (*z*) When a buyer at Kasganj ordered dyes from a seller at Delhi but after paying for and opening the parcel found it to contain only clay he was entitled to sue for damages at Kasganj (*a*) If not otherwise provided by the contract goods sold are deliverable at the place where they are sold or if not ready at the place of manufacture If they are sent by common carrier at seller s risk the contract is performed at the place where they are delivered to the buyer or if at buyer s risk at the place where they are delivered to the carrier (*b*) In the case of a contract f o b Bombay the place of per formance is Bombay (*c*)

(*q*) See *Banke B ha* v *P lhs Pa* (1903) All 48

(*r*) *Sal g l* v *Cl ha Mal* (191) 34 All 49 11 I C 1

( ) *S la I am* v *I am Chan l a* (1918) P R 6 44 I C 863

(*t*) *Dh jusha* v *Fforde* (188) 11 Bom 649 6 *M lch I S g la d* (18 6) 1 I m 3 (f undi) *Doya* v *Secret ry of tat* (1) 14 Cal 6 *I mp rt* v *I rem k* (1891) 1 Bom 93 *Dob on* v *I I Spg & W g C* (1) 1 Bom 1 6 *S I g n* v *N a l A k r* (1904) 7 Mad 491

(*u M h mm l Sh fi K mat Al* (1 96) P 1 6 *la Lam* v *I m Ch nd* (1918) 1 P 6 44 I C 863 *I g l m Ch ha M l* (1912) 4 All 43 11 I C 71 *J piter Gener l I n nce C* v *Abd l l u* (1 3) 1 Lang 31 6 I C 6 (4) A I *Dobson* v *Be g l Spg & W g C* (189) 21 Bom 1 6 *t a I m Bakshi* (19 0) 1 Lah 03 53 I C 331

(*v*) *K ell K lla* (1904) M d 3

(*w*) *S l r m Thomp n* (190) 3 Cal 894

( ) *G pikal a* v *S ik l* (1874) 13 Beng L R 461 2 W I 9 *Cl dal Malup t ar* (18 0) Bom H C 33 A C *I ren ji* v *Gh lam* (190) I R 36 *Bh tt I rya* v *C wnpore Woollen Mills* (1911) 16 C W N 3 13 I C 943

(*y*) *Llewhell n Cl Lal* (188) 4 All 4 3 *I Ch ra* v *T j Bha* (191) 39 All 38 39 I C 4 *Abl I asl d* v *The Su g M t n ls C* (19 0) 4 All 480 6 I C 18 l o ses 1 note (n) *sup*

(*z*) *Sleo Cl a a* v *Taj l ha* (1917) 39 All 368 23 I C 4

(*a*) *P m Lal* v *I lol N th* (19 0) 4 All 6 9 9 I C 3 J

(*b*) *H l ter* v *H ay* (1864) 1 M I H C 900

( ) *L m & Co* v *Debo* (19 4) A C 514

The place of performance is generally expressed in the contract and if not so expressed it may be inferred from the nature of the act Thus a contract to repair a house must be performed where the house is situate and an agreement to register a mortgage must be performed at the place where the law requires it to be registered (d) If the place *is neither expressed in the contract nor implied from the necessities of the case it will* be determined by the Court according to the intention of the parties (e) or the provisions of sections 48 and 49 of the Contract Act Thus in *Lleuhellin* v *Chunnilal* (f) the Court said that looking to the ordinary course of business it was the intention of the parties that payment should be made at plaintiff s place of business Similarly in *Sreenath Roy* v *Cally Das* (g) a suit for breach of an agreement to mortgage property outside Calcutta was held to lie in Calcutta as the plaintiff s place of business was in Calcutta and the defendant would have to repay the money there to redeem Ordinarily in the case of goods purchased or money borrowed payment must be made at the residence of the seller or lender as the case may be (h) In a contract of service which did not fix the place of payment of salary the salary was held to be payable at the place where the service was rendered (i) When *A* sued *B* on a contract of service made at Hyderabad for service rendered at Hyderabad alleging that after service rendered *B* promised to pay in Madras the Court held that there was no consideration for the latter promise no contract to pay in Madras and therefore no breach of contract in Madras so as to enable *A* to sue in Madras (j)

If the contract is to be performed at the place where it is made the suit on the contract must be filed there and nowhere else In *Dadabhai* v *Diogo* (k) *A* at Karwar sent money to his agent in Bombay with instructions to negotiate a contract for the purchase and shipment of goods from Bombay to Karwar The agent entered into a contract with *B* and paid him the money but *B* failed to ship the goods *A* sued *B* at Karwar but the Court there had no jurisdiction for the contract was made and the money paid in Bombay and the performance was also to be in Bombay by the shipment of goods from there

Contract of agency —In suits for an agent s account the cause of action arises at the place where the contract of agency was made or the place where accounts are to be rendered and payment is to be made by the agent (l) In *Lal Singh* v *Kadir Baksh* (m) a Sialkot firm sent hides for sale to their commission agent at Calcutta and were entitled to sue at Sialkot for the sale proceeds as the accounts were to be rendered there and the money was payable there In *Motilal* v *Surajmal* (n) a Bombay merchant *A* ordered goods from time to time from *B* who acted as his pucca adatia at Phulgaon *A* sued *B* in Bombay for the amount due to him on the account Tyabji J held (1) that as instructions were sent by *A* to *B* from Bombay and (2) that as accounts were rendered by *B* to *A* at Bombay and (3) that as demand was made for payment of the amount due from Bombay that payment of the money was intended to be made in Bombay and that a material part of the cause of action arose in Bombay This case was dissented from in *Tika Ram* v *Daulat Ram* (o) where the Allahabad High Court held that a commission agent doing an independent business of his own is liable to account at his own place of business This is in

(d) *Sami* v *Gopal* (1873) 7 Mad H C 1 6
(e) *Dhanjisha* v *Forde* (188) 11 Bom 649 *Muhammad* v *Muhammad* (1916) P R 2 31 I C 698
(f) (188) 4 All 4 3
(g) (1879) 5 Cal 8
(h) *Bagali Mal* v *Ganga Ram* (19 3) 1 I C 431 (3) A A 46
(i) *Bag Mohammed* v *Karasj* (1900) Bom L R 514
(j) *Se hag r Row* v *Nawab Iskur Jung* (190) 30 Mad 438 See also *Kamisetti* v *Katha* (1904) Mad 35
(k) (1894) 14 Bom 43
(l) See *Ramdass* v *Dhanpat* (19 5) 6 Lah 1 3 88 I C 9 0 ( ) A L 387
(m) (19) 3 Lah L J 409 63 I C 4 4 ( ) A L 36
(n) (1906) 30 Bom 167 a case under cl 1 of the Letters Patent
(o) (19 4) 45 All 465 80 I C 691 (4) A 530

accordance with the decisions of the Punjab (*p*) and Lahore (*q*) Courts The mere sending of goods does not constitute part of the cause of action and does not give jurisdiction to the Court of the place from which the goods were sent (*r*)

Place where money expressly or impliedly payable—Part of the cause of action arises where money is expressly or impliedly payable under a contract In *Lal Singh* v *Kadir Baksh* (*s*) the case referred to in the last paragraph the suit could be instituted at Sialkot as it was an implied term of the contract that the agent should pay his principal there When the place of payment is not specified the Court will be guided by the intention of the parties (*t*) The amount due on a balance struck at foot of an account is payable at the place where the balance was struck although the transactions which were the subject of the account took place elsewhere (*u*) In *Luchmee Chund* v *Zoravur Mul* (*v*) an account was taken and balance struck on dissolution of a partnership business at Muttra and Privy Council held that although the partnership agreement had been entered into at Rutlam the suit for the balance was properly instituted at Muttra as that was the place where the balance was struck and the amount became due and payable On the other hand the mere fact that a cheque is sent in payment from a particular place will not alter the locality of the suit (*w*) If under a contract for the sale of goods the price is payable at the seller s place of business but the buyer failing to pay the seller sends his man to the buyer s residence and the buyer pays at his residence the buyer cannot in a suit for compensation for inferiority of the goods take advantage of that fact and sue in the Court of the place where he resides (*x*) The fact that the creditor is described in a promissory note made at Y as resident of A does not make A the place of payment so as to give jurisdiction to the Court at A No place of performance being fixed the question as stated above is one of intention to be gathered from the contract and the surrounding circumstances (*y*)

The debtor must find his creditor—Under the English law if a place is appointed for the performance of a contract it is the duty of the creditor to attend at the place named to receive payment but if no place is appointed the debtor is bound to find the creditor and tender him the money in other word there is an *implied* promise to pay inter alia where the creditor resides or carries on business Under the Indian law as enacted in s 49 of the Indian Contract Act 1872 where no place is fixed for the performance of a promise whether the promise is to deliver goods or to pay money (*z*) it is the duty of the debtor to apply to the creditor to appoint a reasonable place for the performance of the promise and to perform it at such place But what if the debtor does not apply to the creditor to appoint a place? In such a case it has been held in some cases (*a*) that the common rule applies and there is an implied promise to pay the creditor wherever he might be and in some (*b*) that there is no such duty and no implied promise arises The point arose in a recent case

(*p*) *M hammad Sl fi* v *Karamat Ali* (1896) 1 R 6
(*q*) *Bhamboo* v *Ram N ra n* (19 8) 9 Lah 455 109 I C 9 (8) A L 297
( ) *Na flal* v *Kus lal* (19 8) 30 Bom L R 1301 119 I C 734 (8) A B 548 *Pur Ch d* v *Jodh R j* (19) 66 I C 501 ( ) A A 449
(*s*) (19)3 Lah L J 409 63 I C 4 4 ( ) A L 36
(*t*) *Dhu jusha* v *Fford* (1887) 11 Bom 649 *D rragh & Co* v *Pursh tam* (1881) 4 Mad 3 *Sad l a Nath* v *R mru dar* (191) 16 C L J 2 0 15 I C 89 *G fi runisa* v *Narayan* (1919) 49 I C 950 *Muh m m d* v *M h mmad* (1916) 1 R 31 I C 608
(*u*) *Ha mraj* v *P m Bux* (1866) 1 Agra 115
(*v*) (1860) 8 M I A 291 (a ca e under Beng Reg of 1803)
(*w*) *Soh n Si gh* v *Riddick* (19) 6 I C 86 ( ) A L 164
(*x*) *Dam i Shah* v *Ral a Mal* (19 0) Lah L J 555 64 I C 387
(*y*) *Raman* v *Gopalachari* (1908) 31 Mad 3
(*z*) *So r m* v *R D Tata & C* (1927) 54 I A 265 71 5 Rang 451 457 10 I C 610 (27) A I C 156 The dicta to the contrary in *Tika R m* v *D l t P m* (19 4) 46 All 465 at pp 467 468 are erroneous
(*a*) *Dhu jishah* v *Ff rde* (1887) 11 Bom 649 6 6 *Motil l* v *Surajmal* (1906) 30 Bom 167 171 *Gokul D* v *Nathu* (1926) 48 All 310 9 I C 49 (26) A A 477
(*b*) *Kad rm l* v *Surajm l* (1907) 9 Bom L R 903 909 910 *R m n* v *G palach ri* (1908) 31 Mad 223

before the Judicial Committee (c) and it was held that where no application has been made by the debtor to appoint a place for the performance of the promise the place of performance is to be determined with reference to the intention of the parties and that in so doing regard should be had to the fact that the obligation to pay the creditor involves the further obligation of finding the creditor so as to pay him Their Lordships said Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that s 49 of the Indian Contract Act gets rid of the inference that should justly be drawn from the terms of the contract itself or from the necessities of the case involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him The Common Law rule however applies only when the creditor is within the realm It cannot extend further than it does in England and a debtor in a Native State is not bound to find and pay a creditor in British India (d)

Negotiable Instruments —The cause of action in a suit on a negotiable instrument arises wherever any one of the facts the proof of which is essential to plaintiff s ca e occurs Thus a suit may be filed at the place where the bill was drawn or where it was accepted or dishonoured or where it was payable A suit may be instituted at the place where a hundi was drawn (e) Where a promissory note was signed by the defendant at Secunderabad and delivered to the plaintiff at Madras the Madras Court had jurisdiction as delivery was necessary to complete the plaintiff s title (f) If the promissory note is drawn in the juri diction of the Court the suit may be filed there although the promissee is described in the note as resident of another place (g) But a promissory note is presumed to have been drawn at the place where it purports to have been executed (h) If a hundi was neither drawn nor payable in Bombay it cannot be sued on in the Bombay High Court although it was for the balance of an account of Bombay transactions (i) A hundi may be sued on at the place where it was dishonoured (j) or where it was payable (k) A suit on a promi sory note executed at Vizianagram and payable at Secunderabad or Madras is maintainable in the High Court of Madras (l) A promissory note not expressly payable at Delhi wa delivered to the payee there and it was presumed to be payable there so as to give juri diction to the Delhi Court (m)

The endor ee of a hundi may sue his endor er at the place of endorsement (n) and so may the assignee of a promissory note (o) The Calcutta High Court ha held that an endorsee may sue the drawer and acceptor at the place of endorsement For when *D* drew a hundi at Benares on his firm at Bombay in favour of *B P & Co* a firm at Calcutta and the hundi was endorsed by *B P & Co* to *P* in Calcutta part of the cause of action was held to arise in Calcutta where the endorsement was made and *P* could sue in the Calcutta High Court after obtaining leave under clause 12 of the Charter (p) But the case is different when the drawer of a hundi rai es money by negotiating his own hundi A seller of goods drew hundis outside Madras on the buyer firm in Madras and negotiated them outside Madras The Madras firm paid the endor ee and was entitled to sue the drawer in Madras to recover moneys overpaid as the amount

(c) Soni m v *R D T ta & Co* (19 7) 4 I A 26 5 Ranc 4 1 10 I C 610 (27) A PC 156 distin uishing *Putappa* v *Virbhadrappa* (190) 7 Bom L R 993
(d) *La silal* v *Ch l i* (19 6) 3 I A 58 53 Cal 89 9 I C 60 ( ) A I C 10
(e) *Ra purt b I rems k* (1890) 15 B m 93 *Sl j H m aj* (1900) 1 1 5 J *J l* v *O ll (i e cial I L* (1916) 34 I C 191 *L sa t I F l lal* (1 8) 1 All 39
(f) *W nter I o d* (186) 1 M H C 0
(g) *Rama* v *Copal hari* (1908) 31 Mad 3
(h) *Me lsh Myle* (190) 8 M d 19
( ) *S war n P jranjlal* (1916) 40 Bom 4 3 3 I C 918
(j) *M l ha d* v *S g chand* (1) 1 Bom 3 *N ra n D Kotu al* (1883) P R 13
(k) *D od r Da Pe a B l* (1 0) 5 lat L J 536 3 I 6
(l) *S r j M ll H d o* (1901) 4 M d
( ) *M la al* v *M ham d* (1916) F 31 I C 6
( ) *S nch d M le I* (1 3) 9 Bom H C 0
(o) *M epall* v *M nepall* (1916) 31 M L J 816 3 I C 6 1
(p) *Jayhoon th Gobindnara* (18) C 451

of the hundi was in excess of what was due for the price of the goods (*q*) The over payment in Madras was part of the cause of action but the payment received by the drawer from his endorsee could not be treated as a payment towards the contract The negotiation by the drawer was only a provisional method of realizing the money from persons who were willing to accept the hundi for a small profit and take the trouble of getting paid The High Court of Calcutta has held that if *P* accepts and pays a hundi in Calcutta for the accommodation of *D* in Cawnpore and *D* fails to pay part of the cause of action arises in Calcutta (*r*)

Partnership—A suit for the dissolution of partnership and for accounts may be instituted either where the contract of partnership was entered into (*s*) or where the business of the partnership was carried on (*t*) and if the business was carried on in two places the suit may be filed at either place (*u*) If the partnership has been dissolved and the accounts taken and balance struck a suit for the balance will lie at the place where the balance was struck (*v*) The fact that a partnership owns immovable property does not make a suit for the dissolution of partnership and for accounts a suit for immovable property (*w*)

Cause of action in other suits—In an administration suit the undertaking to administer is part of the cause of action (*x*) The grant of letters of administration is part of the cause of action in a suit for a legacy (*y*) In a contract of bailment the payment of the bailee s charges is part of the performance of the contract ( ) and part of the cause of action also accrues at the place where the goods bailed are stored (*a*) A suit for a breach of a contract of betrothal may be filed where the breach takes place (*b*) and in case of a contract to marry at the place where the marriage was to have been celebrated (*c*) A suit for damages for misrepresentation will lie at the place where the misrepresentation was made (*d*) or for wrongful arrest at the place of arrest (*e*) or for death caused by negligence at the place where the death took place (*f*) or for libel at the place of publication (*g*) The cause of action in a suit to set aside a forged will arises at the place where the will was published (*h*) or if plaintiff s interest in any property is prejudicially affected by the will the suit may be filed at the place where that property is situate (*i*) In a suit to set aside a deed of release executed in Calcutta of plaintiff s interest in property in Bombay it was said that the cause of action did not arise wholly in Calcutta but included the effect of the release on the Bombay property (*j*) In a contract of insurance of goods made in Rangoon and providing for payment at Rangoon the cause of action is at Rangoon and not at the place where the goods were destroyed or damaged (*k*) But in the case of a life insurance the cause of action accrues at the place where the death occurs (*l*) A suit for restitution of conjugal rights may be brought in the Court of the place where the husband resides or it may be brought in the Court

(*q*) *Po mi Damoda* (19 4) 4 Ma l 403 9 I C 800 (24) A M 404

(*r*) *Pamcha dar* v *G ap t am* (1J 0) 4 Cal 583 9 I C 539

(*s*) *D ga Das* v *Jai* in (191) 41 All 13 0 I C 158 *J g n G di Mal* (18J) P R 6 *Jaganna d* v *I hna Cha d* (1909) 1 W R 100

(*t*) *Alla Ditta* v *Sl ka Das* (1916) P R 4 33 I C 953 *Ni a ja S gh* v *Z lshi Ram* (1919) 17 All L J 1015 I C 6

( ) *Thimmappa* v *Balakrish a* (19 6) 0 Mad L J 98 9 I C 91 (6) A M 4 7

( ) *Lu hmee Ch nd* v *Zorav r Mul* (1860) 8 M I A J1

(*w*) *D ga Da* v *Ja Nar in* (1917) 41 All. 513 50 I C 1 6

(*x*) *Sri a l e ata* (1906) 9 M d 39 9

(*y*) *Re I ller Ma k y* (18 4) 2 Y & B 3

( ) *Hoseck M He t n* (1906) 1 R 0

(*a*) *Ga esh Prasad* v *Lans Har* (191) 1 All L J 13 41 I C 904

(*b*) *Bhag gh* v *I l s ngh* (1916) P R 93 37 I C 114

(*c*) *Math a I r rad* v *S tj* (19) 6 I C 81

(*d*) *Be g l Coal Co* *Flyin Cotto Co* (18 0) W I 13

(*e*) *I ddi Kohn on* (18 1) 6 Beng L R 141

(*f*) *Sham N ra n* v *B B & C I Rly* (1919) 41 All 488 50 I C 130

(*g*) *C ff rt I k hi I* (18 9) 13 Bom 1 8

(*h*) *Sheod I* v *D ga I r* (1883) A W N 1 3

(*i*) *Nut Is I la ya* v *Nut la I lla ma* (19 3) 43 M I L J 615 2 I C 9 0 (23) A M 109

(*j*) *Hadje Isma l H lj e Mah i* (19 4) 13 Beng L I 91

(*k*) *J piter General I s rance Co* v *Abd l Az* (19 3) 1 Rang 231 6 I C 4 (4) A R

(*l*) *P j b Mut al H nd Famil Pl lief Fu d* v *S da* (1919) 1 R 93 45 I C 900

of the place where the wife resides (*m*) A suit by a guardian for the custody of his ward removed by the defendant from Allahabad to Lahore may be brought in the Court at Lahore or it may be brought in the Court at Allahabad (*n*) A suit for damages for infringement of a trade mark may be brought in the Court of place where the defendant resides or in the Court of the place where the defendant publishes advertisements constituting infringement of the trade mark (*o*) A suit for damages for conversion may be brought in the Court of the place where the conversion originally took place (*p*)

Place of suing where decree sought to be set aside on ground of fraud —The question whether a suit can be instituted in one District for setting aside a decree passed by a Court in another District has been the subject of many decisions The result of the actual decisions ignoring what are merely obiter dicta may be stated thus A suit to set aside a decree obtained by fraud in Court X where nothing is done beyond transferring the decree for execution to Court Y can only be maintained in Court X that is the Court which passed the decree (*q*) Where however a decree passed by Court X is transferred for execution to Court Y *and* the decree holder makes an application to Court Y for execution of the decree (*r*) or property belonging to the judgment debtor is attached by Court Y (*s*) or the judgment debtor is arrested by Court Y in execution and released on giving security (*t*) the judgment debtor may institute a suit in Court Y for a declaration that the decree was obtained by fraud and for an injunction restraining the decree holder from executing the decree Similarly if the judgment debtor s property is sold by Court Y in execution he may sue the decree holder in Court Y for a similar declaration and for setting aside the sale and for possession (*u*) In all these cases the cause of action arises *in part* within the jurisdiction of Court Y But where the decree holder has done nothing beyond getting the decree transferred for execution to Court Y and has not made an application to Court Y for execution the judgment debtor as stated above cannot institute a suit in Court Y for setting aside the decree not even if the plaint includes a relief for injunction (*v*) A High Court will grant leave under its Charter and entertain a suit to set aside a decree of a Mofussil Court for fraud if part of the cause of action has arisen in its jurisdiction (*w*)

Suit against corporations Explanation II — Irrespective of the Companies Act the domicile of a trading company is fixed by the situation of its principal place of business (*x*) that is to say its chief office where the central management and control are actually to be found (*y*) In the case of a company registered under the Companies Act the controlling power is as a fact generally exercised at the registered office and that office is therefore not only for the purposes of the Act but for other purposes the principal place of business (*z*) This is not however necessarily the case (*a*) and the question whether that or some other place is the principal place of business of the company is in each case a pure question of fact to be determined upon a scrutiny of the

(*m*) *L ldaja v Ba Suraj* (1894) 18 Bom 316 As t its und r the Indian Divor e Act 1869 see *Nu serua j v Ele ora* (1913) 38 Bom 1 at p 148 0 I C 43
(*n*) *Sa at Cha ira v For* (1890) 1 All 13
(*o*) *Ile ltra Lal v Ta cl Si gl* (191) 3 All 446 J I C 98
(*p*) *K rl k Ch n Gopal* (18 7) C 1 64
(*q*) *Un rao S gl v H d o* (190) All 418
( ) *L nk Bel ri v P kl F i n* (1903) 5 All 48 *I d a Pro ide t Co Ltd v G nta* (192) C W N 3 3 6 I C 318 (3) A C 4
( ) *J al v A k r* (191) 3 All 189 S I C 0 *Ja wi Singl v E D S o i d Co* (19 6) Lal 61 94 I C 3 7 (6) A L *D an v F rm I c Mal* (19) 3 Luck 14 106 I C 41 (8) A O 88 contra *Da D j l Ma r il l* (1914) 36 All 64 4 I C 97 *Jawal Singl E D S so n d Co* (19 6) 7 Lah 61 94 I C 377 (6) A L 7
(*t*) *I I lal I an Gok l Cla d* (191) 39 All 60 41 I C 3
( ) *Fel r N th I oe a Ku a* (1901) 5 C W N 50
(*v*) S 6 All 564 t p 56 4 I C 9 8
( ) *N r ee Das v N ndo Lall* (190) 30 Cal 69
( ) *J es Scott h Accide t I sura e Co* (1896) 1 Q B D 4 1
(*y*) *Ibid De B s Consolidat d M e Ltd v Howe* [1906] A C 4 4
( ) *H ll s v cott sh Ir peri l I su e Co* (1 3) 3 Q B D 35
( ) *Key st n Ll e Lias Co v Ba ker* (1863) 2 H & C 9

course of business and trading (*b*) But a Company may have subordinate or branch offices in fifty different jurisdictions and it may be sued in any one of such jurisdictions in respect of a cause of action arising there (*c*)

Suit against non resident foreigners —The Court has no jurisdiction in a suit against a non resident foreigner on a cause of action which arose wholly without British territory (*d*) As already stated the Court has jurisdiction to entertain a suit against a foreigner resident within the limits of its jurisdiction in respect of a cause of action that has accrued abroad (*e*) A foreigner is not exempt from the jurisdiction of British Indian Courts (*f*) If a foreigner resides or *himself* carries on business *or personally* works for gain in British India it is clear that he is amenable to the jurisdiction of British Indian Courts But what if a foreigner does not reside or does not *himself* carry on business or *personally* work for gain in British India and

(1) the *cause of action* arises within the local limits of a British Indian Court or

(2) the cause of action arises without British India but the foreigner carries on business *through his agent* within the local limits of a British Indian Court ?

As to case(1) it is settled that a non resident foreigner who is a subject of a protected Native State may be sued in the Court of British India if the *cause of action* arises within the jurisdiction of such Court (*g*) Thus if *A* a subject of the Native State of Sangli and residing at Sangli borrows money from *B* at Belgaum *B* may sue *A* for recovery of the money in the Belgaum Court for the cause of action arises at Belgaum

As to case (2) the High Court of Bombay in one case held that where no part of the cause of action arose in Bombay it had no jurisdiction to entertain a suit against a foreigner who did not reside in Bombay but carried on business *through an agent* in Bombay (*h*) But that decision was disapproved in the later case of *Girdhar* v *Kassigar* (*i*) The point arose in a later case before the Privy Council but it was left open (*j*) The Madras High Court has held that the expression carrying on business in cl 12 of the Letters Patent includes carrying on business through an agent in British India by foreigners living outside jurisdiction (*k*)

21 [*New*] No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice

Objection to jurisdiction

(*b*) *De Beers Co olidated M s Ltd* v *Howe* [1906] A C 4 5 H lsbury vol v p 15 art 6

( ) *B k of Be gal* v *Sarat Cha dra* (1919) 4 Pat. L J 141 48 I C 943

(*d*) *Bh doo* v *I am ra n* (19 9) 9 Lah 455 109 I C 9 (8) A L

(*e*) *Ismailji* v *Ismail* (19 1) 45 Bom 1 3 63 I C 9 9 *Bhujbal* v *Namheju* (189) 19 All 4 0

(*f*) *Smith* v *I d an Textile Co* (19 7) 49 All. 669 101 I C 6 3 ( ) A.A 413 *R m I arji* v *Pralhaddas* (1896) 20 Bom 133 *C rdh* v *Kassigar* (1891) 17 Bom 66 *Tadepall* v *N wab Sayed* (1906) Mad 6 *A n m lai* v *Murugas* (1903) 6 Mad 544 30 I A 0 *Rambhat* v *Shanka* (1901) B m 5 8 *Srin vasa* v *V e k ta* (1911) 38 I A 1 9 34 Mad 11 I C 44 ffm Mad 39

(*h*) *K s owj* v *Khimj* (1888) 1 Bom 0

(*i*) (1893) 1 B m 66 [a ca under the Pre sid ncy Small Cause Courts Act 188 s 18]

(*j*) *Annamalai* v *M ruga a* (1903) 6 Mad 544 30 I A 0 [a case under s 17 of the Code of 188 corresponding with s 20 of the present Code]

(*k*) *Janoo* v *Latch* (19 3) 45 Mad L J 471 76 I C 5 (24) A M 158 dissent I g from 1 Bom 0 and f ll wing 17 Bom 66

This section is new It proceeds on the lines of the Suits Valuation Act 1887 s 11

Chartered High Courts —This section does not apply to Chartered High Courts in the exercise of their original jurisdiction (l)

Meaning of 'jurisdiction' — By jurisdiction i meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision The limits of this authority are imposed by the statute charter or commission under which the Court is constituted and may be extended or restricted by the like mean If no restriction or limit is imposed the jurisdiction is said to be unlimited (m)

A limitation may be (1) as to the subject matter (2) as to person (3) as to the pecuniary value of the suit or (4) as to place or it may partake of two or more of these characteristics (n)

(1) *Subject matter* —Subject matter depends upon the nature of the cause of action and the relief prayed for Thus a Presidency Small Cause Court has no jurisdiction to entertain certain suits such as suits for the recovery or partition of immovable property suits for the foreclosure or redemption of a mortgage of immovable property suits for compensation for defamation suits for dis olution of partnership etc see the Presidency Small Cau e Courts Act 15 of 1882 s 19 These and certain other suits are also excepted from the cognizance of a Provincial Small Cause Court see Provincial Small Cause Courts Act 9 of 1887 s 15 If a Pre idency Small Cause Court or a Provincial Small Cause Court entertains a suit which is excluded from its cognizance its decree is a nullity See also Bombay Civil Courts Act 14 of 1869 s 28 A and Bengal N W P and Assam Civil Courts Act 12 of 1887 s 23

(2) *Person* —The general rule as stated by Garth C J in *Olner* v *Lave o* (o) is that civil Courts here as in England have jurisdiction to try all civil suits against all persons of any nationality within the local limits of their jurisdiction Independent foreign sovereigns are exempt but may submit themselves to jurisdiction by appearance to a writ (p) As to Princes Chiefs and Ambassadors see sec 86

(3) *Pecuniary value* —Throughout British India there are Courts of different grades having jurisdiction in suits of different amounts in different local areas These have been set forth in the notes to sec 15 where the principles regulating pecuniary jurisdiction are also discussed A suit may be over valued and instituted in a Court of a higher grade or it may be under valued and instituted in a Court of a lower grade but section 11 of the Suits Valuation Act 7 of 1887 now provides that an objection on this ground shall not be entertained by an Appellate or Revisional Court unless (1) the objection was taken in the Court of first instance at or before the hearing at which issues were fir t framed and recorded *or* (2) the Appellate or Revi ional Court is satisfied that the over valuation or under valuation has prejudicially affected the *disposal* of the suit on its merits (q)

(4) *Place of suing* —This phra e may refer to territorial jurisdiction in its wider sense as where the suit is not cognizable by a Briti h Indian Court being for instance a suit for partition of land outside British India or in its narrower sense of the local venue in British India for suits cognizable by British Indian Courts The words are used in this section in this latter sense with reference to the local venue for which rules have

(l) *M n nd a Ch nd a* v *L l Moh n* (19 9) 56 Cal 940 (9) A C 358

(m) H l b ry vol 9 rt 10 p 13 *H t j Nath I m h d* (19 1) 48 Cal 138 148-149 58 I C 806 *Amr lr v L l Krish* (1887) 11 Bom 488 490

( ) S l sh *I r l ar* (188) 11 B 1 3 1 0

(o) (18 4) 10 C l 8 8 8

(p) *Mighell* S *U of J h e* (1893) 1 Q B 149

(q) See *Jose* *Fra cisco* (1910) 3 B m 4 I C 950 *P y L k hm K tway* (1910) 38 C l 658 660-6 I I C 464 *I acl appa* v *Shidappa* (1919) 46 I A 24 43 Bom 0 50 I C 0

been enacted in the preceding sections 15 to 20 (*r*) These sections it will be ob erved occur under the heading Place of suing

Waiver of objection to jurisdiction —It is a fundamental rule that a judgment of a Court without jurisdiction is a nullity (*s*) Where by reason of any limitation imposed upon the authority of a Court a Court is *without jurisdiction* to entertain any particular action or matter neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the Court nor can consent give a Court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled Where a limited Court takes upon itself to exercise a jurisdiction it does not possess its decision amounts to nothing (*t*) The general rule therefore is that consent cannot give jurisdiction and want of jurisdiction cannot be waived There is an apparent conflict in the reported cases on this subject owing to the failure to keep clearly in view the distinction between want of jurisdiction and irregularity in the exercise of jurisdiction, or to use the phrase of Mookerjee J irregularity in the assumption of jurisdiction (*u*) The leading case on the subject is *Ledgard* v *Bull* (*v*) decided by the Privy Council in 1886 The suit was for damages and an injunction for infringement of a patent Under the Patents and De igns Act such a suit can only be brought in a District Court but it was brought in the Court of a Subordinate Judge who had no jurisdiction to entertain it The suit was eventually tran ferred from the Subordinate Judge s Court to the District Court and there heard and decided The defendant contended that an order for transfer of a suit from one Court to another under s 24 could not be made unless the suit had been brought in a Court having jurisdiction but this contention was overruled The same view was taken by the High Court on appeal The judicial Committee held that the suit having been instituted in a Court which had n juris diction no order of transfer could be made but that the Di trict Court being competent to entertain and try the uit if it were competently brought the defendant could waive the objection to the irregularities of its institution but that he had not done so and the decree of the District Court could not therefore stand and it ought to have been set aside by the High Court Lord Watson in delivering the judgment of *the Board said* —

> The District Judge was perfectly *competent to entertain* and try the suit if it were competently brought and their Lordships do not doubt that in such a ca e a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit [But] when the Judge has *no inherent juri diction* over the subject matter of a suit the parties cannot by their mutual con ent convert it into a proper judicial process although they may constitute the Judge their arbiter and be bound by his decision on the merits when the e are submitted to him But there are numerous authorities which establi h that when in a case which the Judge is competent to try the parties without objection join i sue and go to trial upon the merits the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which if objected to at the time would have led to the dismissal of the suit

The principles laid down in *Ledgard* v *Bull* were reiterated by their Lordships of the Privy Council in *Meenakshi Naidu* v *Subramania Sa tri* (*w*) That was a case in which the High Court of Madras had entertained an appeal from an adjudication from which no appeal was provided for by any enactment Their Lordships held that the decree of

( ) *I l* *boo* *I* *n Narain* (19 8) 9 Lah 4 5 1091 I C 98 (28) A L)

( ) *I jl I hm* v *Katyr ya* (1913) 39 Cal 630 1 I C 464

(t) Il I I ury v 1 9 rt 11 p 13

( ) t *rd o S gh* v *C l* *drika* (1909) 36 Cal 193 1 I C 913

( ) (18) 13 I A 134 9 All 191 See also *I h* *Krusl* *a* (1 8) 11 Pom 1 3 1 9

(*w*) (1887) 14 I A 160 11 M d 6 *J anchod Dakore Templ C ut* (19) Bo L R 8 8 6 87 I C 313 ( ) A I C 155

the High Court was a nullity In the course of the judgment their Lordships said In the present case there was an inherent incompetency in the High Court to deal with the question brought before it and no consent could have conferred upon the High Court that jurisdiction which it never possessed

These two cases illustrate the distinction between want of jurisdiction and irregular exercise or assumption of jurisdiction Irregular exercise or assumption may be waived as it was in the case of *Ledgard* v *Bull* But when the Court is not competent to entertain or try the suit there is a want of inherent jurisdiction which cannot be waived But here again there are certain exceptions If the Court has no jurisdiction owing to some privilege attaching to a party the party may waive that privilege Thus a defendant may waive his status as an agriculturist Another exception is in the case of pecuniary jurisdiction enacted in section 11 of the Suits Valuation Act 7 of 1887 A third exception is this section as to the place of suing or the local venue of suits within the cognizance of British Indian Courts

Objection as to place of suing —The words place of suing occur in the heading to sections 15 to 20 a group of sections which refer to the local venue of suits cognizable by British Indian Courts in British India and in places to which the Code applies Sections 15 to 20 lay down rules as to place of suing and there is no doubt that in this section the expression is used with reference to those rules Those rules regulate the venue in places in British India where the Code applies They deal with matters of domestic concern and prescribe rules for the assumption of territorial jurisdiction by British Indian Courts in matters within their cognizance Section 21 is therefore limited in the same way and has no application to cases not cognizable by British Indian Courts (*x*) The decision of Privy Council in *Setrucherla* v *Maharaja of Jeypur* (*y*) makes this clear The suit was instituted in the Court of the Subordinate Judge of Vizagapatam on a mortgage of property which was partly situate in Vizagapatam and partly in a Scheduled District to which the Code did not apply The defendant did not object to the jurisdiction of the Court and a decree was passed for the sale of the whole of the property On appeal the defendant objected for the first time to the jurisdiction of the trial Court The High Court overruled the objection in view of the provisions of section 21 The Privy Council however upheld the objection on the ground that sec 21 only applied when the right place of suing was one subject to the Code Their Lordships said This is not an objection to the place of suing it is an objection going to the nullity of the order on the ground of want of jurisdiction Another instance is the case of *Manjappa* v *Rajagopala* (*z*) where a Court in the Madras Presidency passed a decree in a suit which was in the cognizance of a foreign Court in Mysore and the High Court held that the defect of jurisdiction could not be cured by section 21 Again when a Subordinate Judge passed a decree on a mortgage of lands in the Santhal Parganas in a suit which the Legislature had withdrawn from the cognizance of the civil Courts as they were under settlement there was no question of the application of section 21 and the Court of execution was entitled to treat the decree as a nullity and to refuse to execute it (*a*)

On the other hand when the suit is one within the cognizance of British Indian Courts and the want of jurisdiction is only as to local venue under sections 15 to 20 the defect may be waived under this section Thus if the defendant resides in the jurisdiction of Court A and he is sued in Court B on the allegation that he resides in its jurisdiction he cannot raise this objection for the first time in appeal (*b*) nor can he in a

(*x*) *Bl amboo* v *Ram Nara* (10 8) 9 Lah 455 109 I C 8 (8) A L 9

(*y*) (1919) 46 I A 151 4 Mad 813 51 I C 18

(*z*) (1918) M W N 378 45 I C 3

(*a*) G *Chand* v *Pr j lla K ar* (19 6) 3 C 1 166 89 I C 65 ( ) A C 90 (F B)

(*b*) *F tti Ram* v *Ku dan Lal* (1914) I 1 8 6 I C 543

subsequent suit set aside the decree as a nullity (c) If a suit on a mortgage of land in the jurisdiction of Court *B* is instituted in Court *A* contrary to the provisions of section 16 and the defendant does not object the decree is not a nullity (d) So also when the territorial jurisdiction of the Court is altered by a notification during the pendency of the suit (e)

"Objection as to place of suing when to be taken—The general rule is that an objection to jurisdiction may be taken at any stage of the proceedings provided there are materials on the record to sustain it (f) It may be taken for the first time in appeal or in second appeal (g) or in revision (h) or after remand in second appeal (i) or in appeal to the Privy Council provided the objection is patent on the face of the proceedings (j) This section which is framed on the analogy of section 11 of the Suits Valuation Act is an exception to this general rule

Under this section the objection must be taken at the earliest opportunity in the Court of first instance and in cases where issues are settled at or before settlement of issues Even then the Court of Appeal or Revision will not allow the objection unless there has been a failure of justice If the objection is raised for the first time in appeal or revision it is excluded by the terms of the section (k) In the original suit however the objection may be raised at any time before final judgment (l)

Section 21 and execution proceedings—The waiver extends to execution proceedings and the judgment debtor cannot object to the validity of the decree in execution proceedings In *Zamindar of Ettiyapuram* v *Chidamabaram* (m) Wallis C J said The effect of the section in my opinion is that objections which the appellate or revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree of the original Court The ordinary way of questioning a decree passed without jurisdiction is on appeal or revision and if this is forbidden a Court of first instance cannot in execution do that which the appellate or revisional Court is precluded from doing But it is different where after the passing of a preliminary mortgage decree the Court which passed it ceases to have territorial jurisdiction over any of the mortgaged properties In such a case failure on the part of the mortgagor to object to the passing of the final decree precludes him from disputing the validity of the decree but not from objecting to the jurisdiction of the Court to order a sale (n)

When a Court executing a decree transferred to it attached and sold properties after territorial jurisdiction had been withdrawn from it the Madras High Court held that the judgment debtor s failure to object estopped him from questioning the validity of the sale but that there was no estoppel against a subsequent purchaser of the same property at a sale held in execution of a decree passed against the same judgment debtor in another suit for the estoppel of the judgment debtor did not operate against such purchaser (o) The same Court has also held

(c) *Ammal* v *Sambasiva* (1914) 3 Mad L J 349 3 I C 463
(d) *Zamindar of Ettiyapuram* v *Chidambaram* (1920) 43 Mad 675 (F B) 58 I C 871
(e) *Chikkalinga* v *Ittiachan* (1914) 4 Mad L J 448 87 I C 1 ( ) A M 11 *Jamna* v *Narayanaswami* (1914) 4 Mad L J 19 8 I C 341 (4) A M 63 *Durga Prasad* v *Kesho Prasad* (1918) 7 I t 16 108 I C 3 1 (8) A I 3 4 (the ratio of jurisdiction by [illegible])
(f) *P a* v *Narayanaswami* (1914) 4 Mad L J 19 8 I C 341 (4) A M 63
(g) See (1920) 43 Mad 6 6 8 I C 8 1
(h) *Nath Lal* v *Madan* [illegible] (1884) All 230

(i) [illegible] (1889) 13 [illegible] 4 4 [illegible] *Ali* *Jala* (1890) 13 Mad 3
(j) *Bibi Lal* v *Bibi Lal* (1889) 13 Bom 6 0
(k) *Khan* v *Raj* (1899) 3 Bom
(l) *Mahar Prasad* v *Prema Shah* (1914) 4 Cal 116 136 41 I A 19 04 I C 41 *Kusha* (1914) I I 1 Cal 361 83 I C 531 (4) A I C 9
(m) (1920) 43 M d 675 (F B) 58 I C 871 See also *Gopal* v *Kamadar* (1904) M 1 118
( ) *Si* *Kand* v *Raja of Jeyp* (1917) 40 Mad 8 103 I C 4 ( ) A M 6
(o) *Verappa* v *I* (1920) 43 Mad 13 3 I C 1

that if a Court continues to execute a decree against immovable property after territorial juri diction has been withdrawn from it the judgment debtor s failure to object will preclude him from raising the point in appeal (p)

Section 21 and new suit—It has been held in Madras (q) and Lahore (r) that if the defendant does not object to jurisdiction and a decree is passed against him he cannot in a sub equent suit set aside the decree for want of jurisdiction In a Calcutta case (s) a landlord filed a suit for rent and ejectment under sec 66 of the Bengal Tenancy Act and obtained a decree in execution of which the tenure was sold and pur chased by himself The land was situate in the jurisdiction of another Court but the defendant had raised no objection When the landlord went to take possession the tenant defendant filed a suit for a declaration that the decree had been made and the sale held without jurisdiction It was contended for the landlord that the sale were validated by section 21 but this contention was overruled Mookerjee J said that section 21 is an exception to the well established rule that where a Court has no inherent jurisdiction over the subject matter of the suit its decree is a nullity even though the parties may have consented to jurisdiction of the Court This exception cannot obviou ly be so interpreted as to have a wider application than what is justified by its terms It is impos ible for us to hold that section 21 debars the defendant from questioning the validity of the execution sale which is the root of the title of the plaintiff In the view taken by the learned judge the decree was validated by section 21 but the execution sale was a nullity It is submitted however that the view taken by the Madras High Court is correct that when once the objection to jurisdiction is waived under section 21 it is waived for all purposes

Unless there has been a consequent failure of justice—Even though the objection has been raised at the earliest opportunity and wrongly disallowed the judgment will not be disturbed unless the trial in the wrong Court has led to a failure of justice (t) In order to ascertain whether there has been a failure of justice the appellate Court must go into the merits of the case and form an opinion upon the justice or otherwise of the decision of the first Court (u)

Remand—There is no question of territorial juri diction when a suit is remanded by a Court of Appeal for jurisdiction then depends entirely upon the order of remand (v)

Power to tr n fer uit which may be in tituted more than one Court

22 [S 22] Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant after notice to the other parties, may at the earliest possible opportunity and in all cases where issues are settled at or before such settlement apply to have the suit transferred to another Court and the Court to which such application is made after considering

(p) *M n v krama v Ananth raya a* (19 4) 46 Mad L J 50 9 I C 806 (4) A M 457 *Pa a* ... *asuan* (19 4) 47 Mad L J 1 8 I C 34 (4) A M 6 *Pa gopala Tirup ti* (19 6) 49 Mad 46 9 I C 1 (6) A M 4 1

(q) ... *m l S l ast* (19) 3 Mad L J 34 3 I C 463 *Clok l ga v lek vudha* (1 4) 4 Mad L J 44 I C 1 ( ) A M 117

( ) *P r holars D s Radl k hen* (19) 11 L I L J 306 (9) A L 44

( ) *K n Ma t* (1) C W N 4 I C 3 (3) A C 610 See *P Cent l B k of Ind* (1 6) 5 B m I R 8) 683 9 I C 341 (6) A L 481

(t) *Bl a* ... *L bl* ... (1916) 1 I 93 3 I C 114

( ) *La hh m I* (1 1) 19 All L J 30 6 I C 3

(v) *Uthr v Na* (1 3) 44 Mad L J 38 I C 314 (3) A M 351

the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed

Transfer where plaintiff has a choice of Courts —The power of transfer given by this section is not a general power as in section 24 It is limited to cases in sections 16 and 20 where plaintiff has the option to sue in more Courts than one (w) Prima facie plaintiff as arbiter litis has the right to select his own forum (x) That right is controlled by the power of transfer but it is a right that ought not lightly to be interfered with (y)

Grounds of transfer —See note to section 24 under the same heading

Notice —The provisions of this section as to notice and time of application are mandatory (z) Notice must be before application and to co defendants as well as to the plaintiff

Stay of suit —Section 20 of the Code of 1882 provided for stay of proceedings in order to compel the plaintiff to take his case to another Court This has been omitted as sufficient provision has been made by the power of transfer in sections 22 to 24 But the Court has an inherent jurisdiction to stay any suit which is an abuse of its process Whether the institution of the suit in a particular Court is an abuse of the process of that Court is a question of fact In a suit filed in the Bombay High Court the fact that both the parties and the witnesses of the defendants were residents of Wardha in the Central Provinces was held not to justify an order for the stay of the suit (a) The High Court has also power to stay a suit in another Court See note under O 39, r 1

23 [Ss 22, 23, 24] (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court

To what Court application lies

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court

(3) Where such Courts are subordinate to different High Courts the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate

Chartered High Courts —Sections 22 and 23 do not apply to Chartered High Courts in the exercise of their ordinary original civil jurisdiction (b)

Subordinate Courts —Subordination of Court is regulated by sec 3 A Court of a subordinate Judge is subordinate to the District Court no matter what the forum of appeal may be in the particular case for the transfer of which application is made (c)

(w) *I ra Ch dr* v *Dho e Krist* (1914) 1 All L J 896 4 I C 318 *Nat o I P j ern g Co* v *J ttan* (193) 1 I C 68 (3) A L 3

(x) *Khat j Bibi* v *Taruk* (1883) 9 Cal 350

(y) *Um t l* v *Kul o n* (1909) 10 Cal L J 08 3 I C 33

(z) *G lab Ch d* v *Sher S gh* (1917) I R 11 3 I C 616, *She D tt* v *Mot I m* (19) Lal I J 93 63 I C 31 ( )

A L 3

(a) *Geffert* v *I u kcha d* (188) 13 Bom 1 8 *Hind stan Assura ce Ltd* v *I a l Mulr j* (1914) 7 Mad L J 64 7 I C 4 5 *Sh v* v *Kanh ya* (1919) 1 P 167 54 I C 03

(b) *M hi d a Ch dra* v *Lal Mohan* (19 9) 56 Cal 940 954 (9) A C 3 8

(c) *Um t l* v *A lsoom* (1901) 10 Cal L J 08 3 I C 539

Different High Courts—If suits between the same parties are instituted in Courts subordinate to different High Courts either High Court can transfer the suit from the Court which is subordinate to it (*d*) A Judge on the Original Side of the High Court is not a Court subordinate to the High Court and a Bench of the High Court cannot entertain an application for the transfer of a suit from him to another Court (*e*)

24 [S 25] (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

General power of transfer and withdrawal

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit appeal or other proceeding pending in any Court subordinate to it, and

(*i*) try or dispose of the same, or

(*ii*) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(*iii*) retransfer the same for trial or disposal to the Court from which it was withdrawn

(2) Where any suit or proceeding has been transferred or withdrawn under sub section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either re try it or proceed from the point at which it was transferred or withdrawn

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall for the purposes of such suit, be deemed to be a Court of Small Causes

Alterations in the section—These have been noted in their appropriate place in the commentary below

Chartered High Courts—This section applies t Chartered High Courts in the exercise of their ordinary original civil jurisdicti n (*f*)

(*d*) *Venk t Sa Iarod* ... *Maksud* ... *D* (1 08) 3 Cal 541 ... *all* ... *Chot* ... (1) 7) 1 B m 6 9 30 100 I C 1 4 ( ) A B 9

(*e*) *Ily t M lo ed v Sh Ih Ma u* (19) 45 Cal L J 1 100 I C 331 ( ) A C ... *H* ... *A* ... *Ltd v* ... *M* ... (1914) Mad L J 615 ... I C 450

(*f*) *M h dra Ch nd* ... *Lal Moh* (19 9) 56 Cal 941 954 ( ) A C 3 8

Form —For form of notice of application see App H form no

Jurisdiction —An order for the transfer of a suit from one Court to another cannot be made under this section unless the suit has been *in the first instance* brought in a Court that *has jurisdiction* to try it But if after the transfer is made the parties without objection join issue and go to trial *upon the merits* the order of transfer cannot subsequently be impeached (*g*) The same rule applies to appeals (*h*) See note Waiver of objection to jurisdiction under sec 21 Conversely a suit cannot be transferred to a Court which has not jurisdiction to try it (*i*) Thus a High Court cannot transfer to a District Court an insolvency petition presented to it under the Presidency towns Insolvency Act (*j*) Nor can a District Court transfer a suit from one subordinate Court to another subordinate Court which has been newly created and empowered to try subsequently instituted suits (*k*) See notes to s 21

General power of transfer —This section gives a general power of transfer of all suits appeals and other proceedings and is not limited like section 22 to suits in which the plaintiff has the option of suing in more than one Court It may be exercised at any stage of the proceeding and even suo motu without an application

Grounds of transfer —As stated in the notes on section 22 the plaintiff as arbiter litis or dominus litis has the right to choose his own forum or rather any forum the law allows him This right is subject to control under sections 22 to 24 The burden lies on the applicant to make out a strong case for a transfer A mere balance of convenience in favour of proceedings in another Court is not a sufficient ground (*l*) though it is a relevant consideration (*m*) As a general rule the Court should not interfere unless the expenses and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular Court for the purpose of working injustice (*n*) What the Court has to consider is whether the applicant ha made out a ca e to justify it in closing the doors of the Court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction (*o*) Where in a suit for partition instituted in the Court of 24 Pergunnahs the parties were residents of Calcutta and the major portion of the immovable property was also situate in Calcutta the suit was transferred to the original side of the High Court of Calcutta on the ground principally of convenience (*p*) In a suit to set aside certain deeds of gift executed by a decea ed person who e heir the plaintiff claimed to be on the ground that the deceased was not of a sound mind and that the deeds were procured by undue influence the High Court of Allahabad ordered the suit to be transferred to the Court of the place where the deeds were executed on the ground that the witnesses were residents of that place and that the defence must turn upon local evidence (*q*) Another ground of transfer is a pecuniary or other personal interest in the presiding Judge (*r*) or a reasonable apprehension of the litigant that he will not get a fair trial (*s*)

(*g*) *Ledg rd v B ll* (1887) 9 All 191 13 I A 134 *Pe ry Lal v Komal Kishore* (18 0) 6 C 1 30

(*h*) *R m Nara v Parmeswa* (1898) 2 Cal. 39

(*i*) *J mat v Ch lan* (19 0) 5 Pat L. J 98 57 I C

(*j*) *Sri i asa v Official Assignee* (191) 38 M d 4 2, 21 I C 7

(*k*) *Latt dinga v K liaperumal* (1918) M W N 291 45 I C 13

(*l*) *P Norton s Settlement* [1907] 1 Ch. 407 409 *Madho Prasad v Mot Chand* (1919) 41 All 381 50 I C 368

(*m*) *T la Ram v H rj wan Das* (1883) 5 All. 60 *S bba Bd v Maqbul* (1916) 14 All L. J 4 3 I C 613 *I ayat ullah v Nasar* (19) 44 All 8 6 I 8 ( ) A A 6

( ) *Re Norton s Settl ment* [1907] 1 Ch 471 *H nd n i o M l aj* (1914) 2 M I L J 61 I C 45

(*o*) *Tula Ram v Harjiw n Das* (1883) 5 All. 60 61

(*p*) *Jotendro ath v P j Krist* (1890) 16 Cal 71

(*q*) *Inayat Ilah v Nasar* (1922) 44 All 9 6 I C 8 (1922) A A 6

(*r*) *Loburi v Assam R way and Trad g Co* (18 4) 10 Cal 915

(*s*) *Sher Si g v Thaku Das* (1903) I R 84 *Ahad Shah v Aisha* (19 3) I C 62 (3) A L 64

Notice —No notice is necessary if the Court acts suo motu If an application is made notice must be given by the Court and not by the party as in sec 22 The provision as to notice is imperative and an order for transfer made without notice will be set aside (*t*) and so will an ex parte decree made by a Court to which the suit has been transferred without notice to the defendant (*u*) On the other hand the Madras High Court treats the matter of notice as one of practice and procedure and holds that notice may be waived (*v*) and that want of notice is an irregularity which *does not* invalidate the order of transfer (*w*)

At any stage —These words and the substitution of the word pending for instituted settle a doubt as to whether a suit could be transferred or withdrawn after the hearing had commenced The High Courts of Bombay Madras and Allahabad held that a suit could be transferred or withdrawn at any stage even after the hearing had commenced and even in the course of *execution proceedings* (*x*) On the other hand the Calcutta High Court held that there was no power to interfere after the hearing had commenced and no power to transfer an execution proceeding (*y*) It is now clear that the former view is correct

Pending before it —Under the corresponding section of the Code of 1882 it was held that a District Judge had no power to transfer to a subordinate Court a suit pending before him elf (*z*) Clause (a) confers this power on District Courts and High Courts

District Court —District Court in this section means a Court of *unlimited* pecuniary jurisdiction An order of transfer under this section cannot therefore be made by an Assistant Judge whose pecuniary jurisdiction is *limited* (*a*)

Clause (a) Court subordinate to it —A decree for di solution of marriage under the Indian Divorce Act 4 of 1869 made by the Divi ional Judge of Nagpur is subject to confirmation by the High Court of Bombay but after the Bombay High Court has confirmed the decree an application for alimony must be made to the Court at Nagpur The Bombay High Court cannot entertain it nor can it transfer the application to the Nagpur Court for that Court i not subordinate to it (*b*) A senior Subordinate Judge in the Punjab cannot transfer a ca e from his Court to that of a junior Subordinate Judge for the latter is not subordinate to him (*c*)

Clause (a) Suit —The High Court of Allahabad has held that the word suit in this clause includes proceedings in execution (*d*) This is no doubt correct for an execution proceeding is a proceeding in a suit and would therefore not be included in the expression other proceeding which must therefore have the same meaning as all proceedings in any Court of civil justice in section 141 See note on that section The words dispose of have been added evidently with reference to mi ellaneous proceedings

Clause (b) Other proceedings —The words other proceedings include an insolvency petition (*e*) but not a proceeding under s 476 of the Code of Criminal Procedure (*f*) The Madras High Court has held that a District Court has

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(t) *Fatema* v *Imdad Ali* (19 0) 18 All L J 351 58 I C 560

(u) *Ganga am* v *Gujar Mal* (19) 34 I C 38 (3) A L 444

(v) *Sa k ma i* v *Ikoran* (1890) 13 Mad 11

(w) *Bellary Pr ss C* v *Venkata* (1911) 1 Mad L J 8 0 8 I C 7

(x) *In re Balaji* (1881) 5 Bom 680 *Va sana ji* v *Kl sedji* (1905) Bom 7 8 *M t talagiri* v *Mutt vj* (1883) 6 Mad 3 7 *Iaīn s m* v *Tlon lima* (1903) 6 Ma 1 9 *Bandi* v *Lakhi* (188) 7 All 34

(y) *Kish Mohun* v *I Maho ed* (18 8) 15 Cal 1

(z) *Sakh am* v *Gang* (1889) 13 Bom. 6 4

(a) *Haj Uma* v *G st idji* (1910) 34 Bom. 411 6 I C 518

(b) *Walla* v *Wallace* (1916) 40 Bom 109 31 I C 331

(c) *Fish n L l* v *J Lal* (19 0) 1 Lah 158 I C 3

(d) *M hammad* v *Tikam hand* (19) 47 All 5 8 I C 46 ( ) A A 6

(e) *Na rea* v *Khur hedj* (1893) 22 Bom 0

(f) *Fa ha* v *Fazl ar* (19) 49 All 460 101 I C 4 ( ) A A 463

power under this clause to withdraw to its own file proceedings in execution transmitted by it to a Subordinate Court (*g*)

Competent Court—Under cl b (ii) the transfer of a suit must be to a Court competent to try or dispose of it The High Court therefore has no power to transfer a Small Cause suit pending before a Subordinate Judge to the Court of a District Munsif where the Small Cause jurisdiction of the Munsif is less than the value of the Small Cause suit (*h*) Nor has the High Court power to transfer an insolvency petition made under the Provincial Insolvency Act 1920 and pending before a Subordinate Judge to the Judge of the High Court exercising insolvency jurisdiction (*i*)

Re transfer—Clause (b) (iii) gives power to re transfer a suit to the Court from which it was withdrawn There was no such power in the Code of 1882 and the cases in footnote (*j*) are obsolete

Sub section (4) Court of Small Causes—The High Courts of Allahabad (*k*) Madras (*l*) and Patna (*m*) and latterly also the High Courts of Bombay (*n*) and Calcutta (*o*) are agreed that the expression Court of Small Causes in sub sec (4) includes a Court vested with the powers of a Court of Small Causes The High Courts of Bombay (*p*) and Calcutta (*q*) at one time held that it was restricted to a Court established under Act 9 of 1887 but those decisions are no longer law

The provisions of sub section (4) do not constitute the Court to which the suit is transferred a Small Cause Court (*r*) It is however deemed to be a Small Cause Court for the purposes of the suit (*s*) with the result that its procedure in the trial of the suit is governed by the provisions of Act 9 of 1887 (*t*) and no appeal lies if there is no appeal under that Act (*u*) The procedure will be that of a Small Cause Court even though the District Judge transferring the suit directs it to be tried as a regular suit for he has no jurisdiction to give such a direction (*v*) The decree will not operate as res judicata in a suit which the Small Cause Court had no jurisdiction to entertain (*w*) The same principles apply where on the retirement or transfer of a Subordinate Judge having Small Cause Court powers the suit is transferred by order of the District Judge to another Judge not invested with Small Cause Court jurisdiction and no appeal will lie from a decree passed by the latter Judge (*x*)

Transfer of suit from Presidency Small Cause Court to High Court—See notes to cl 13 of the Letters Patent

Power of Court to stay suit pending before it—See notes to s 22 under the same head

Power of High Court to stay suit pending in another Court—See note to O 39 r 1 under the same head

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(*g*) *Vell ppa v S b ahma jam* (1916) 39 Mad 48 9 I C 119

(*h*) *M r ge a V nk ta* (19 9) 56 Mad L J 619 (29) A M 513

(*i*) *Govuld s v Sadasivie* (19 9) 5 Mad 5 ( ) A M 1031 See also *In the Matt of Oomer Ahm d Bros* (19 6) 4 Rang 554

(*j*) *Im Pr Mal* (190) 24 All 304 *Nan d n v Kenney* (190) 4 All 3 6

(*k*) *Mangal v I p Cha* (1891) 13 All 3 4 *S kha v I gh ath D s* (191) 39 All 14 3 I C 809 *Chatr n S gh v Mus m mat R ta* (1918) 40 All 46 I C 93 See also *Megh Mal v H a Lal* (19 4) All L J 850 8 I C (4) A A 761

(*l*) *S k a v I adm abha* (1915) 38 M d 3 1 I C 4

(*m*) *Bhagw D s v Ke hwar Lal* (19) 1 Pat 6 6 I C 681 (3) A I 49

(*n*) *N y v Bhagubai* (190) 31 Bom 314 (F B)

(*o*) *Bad I Cha dra v Sukri h a* (19 9) 6 Cal. 599 *Madh I v Behari Lal* (1918) 7 C L J 461 44 I C 891

(*p*) *Ra nch dr v Ga esh* (1899) 3 Bom 38

(*q*) *D l l v I am Na ain* (1904) 31 Cal 1057

(*r*) *Kr h v Bhan M sram* (1894) 18 Bom 61

(*s*) *Sa karama v Padmanabh* (1915) 38 Mad 17 I C 4

(*t*) *Chh j Lal v Lakhmi Cha d* (1916) 38 All 4 34 I C 113 See also *Ugrah Singh v Motihari Co Ltd* (1919) 4 Pat L J 13 49 I C 08

(*u*) *S kh v J agh th Das* (191) 39 All 14 37 I C 809

(*v*) *S nkara a v I dm a ha* supra

(*w*) *D l r Lal v Ha n Lal* (1914) 1 All L J 8 3 6 I C 56

(*x*) *Kaule hr v Dost Muhammad* (1893) All 4 *P m Charan v Kish n Lal* (19 8) 50 All 810 115 I C 1 (9) A A 50

25 [Ss 20 21] (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor General in Council, who may, by notification in the *Gazette of India*, transfer such suit, appeal or proceeding to any other High Court

Power of Governor General in Council to transfer suit

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit appeal or proceeding was originally instituted ought to have applied to such case

The object of this section is to empower the Governor General in Council to transfer cases from one High Court to another under certain circumstances The section proceeds on the analogy of s 527 of the Code of Criminal Procedure 1898

INSTITUTION OF SUITS

26 [S 45] Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed

Institution of suits

Suit—A proceeding that does not commence with a plaint is not a suit (y) The essential provisions as to procedure in suits is enacted in sections *26* to *35 A* Details have been relegated to the rules of procedure in the first Schedule For institution of suits see O 4 r 1

Changes introduced by the section—The words or in such other manner as may be prescribed are new No other manner of instituting suits has hitherto been prescribed

SUMMONS AND DISCOVERY

27 [S 64] Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed

Summons to defendant

Issue and service of summons—See O 5 below

28 [S 85] (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province

Service of summons where defendant resides in another province

(y) Venkata v Venk t ma (18 3) M t 3 Cal 3 Ram K rpal v Ram K ari 6 Upadhay v Ler lh Singh (1896) (1 4) 6 All 69 4 11 I 4 3

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto

See note to O 5 r 23

29 [S 650A] Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts

Service of foreign summonses

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor General in Council, or that the Governor General in Council has, by notification in the *Gazette of India*, declared the provisions of this section to apply to such Courts

By notification—For notifications issued under this section see General Statutory Rules and Orders Vol. I pp 642 655 and Vol. IV pp 682 684

30 [*New*] Subject to such conditions and limitations as may be prescribed the Court may, at any time, either of its own motion or on the application of any party —

Power to order discovery and the like

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery inspection production, impounding and return of documents or other material objects producible as evidence

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid,

(c) order any fact to be proved by affidavit

Delivery and answering of interrogatories—See O 11 below

Admission of documents and facts—See O 12 below

Discovery and inspection—See O 11 below

Production impounding and return of documents—See O 13 below

Summonses to persons to give evidence—See O 16 below

Proof of facts by affidavits—See O 19 below

31 [*New*] The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects

Summons to witness

32 [*New*] The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

Penalty for default

(a) issue a warrant for his arrest

(b) attach and sell his property,

(c) impose a fine upon him not exceeding five hundred rupees,

(d) order him to furnish security for his appearance and in default commit him to the civil prison

See O 16 rr 10 13 r 17 and r 21

To whom a summons has been issued —This section applies only if a *summons* has been issued. It does not apply where a person is merely *ordered* to produce a document (z)

JUDGMENT AND DECREE

33 [S 198] The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow

Judgment and decree

See O 20 r 1

On such judgment a decree shall follow —Under this section it is imperative that a decree shall follow the judgment and as it is the duty of the *Court* to comply with the provisions of the law the Court's failure to prepare a decree should not deprive a party of his right of appeal. The appeal should not be dismissed and the appellant should be allowed time to move the lower Court to prepare a decree (a)

INTEREST

34 [S 209] (1) Where and in so far as a decree is for the payment of money the Court may, in the decree order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the

Interest

(z) [illegible] (19[illegible]0) 51 [illegible] L J 50 [illegible] I C 31

(a) [illegible] Chand (1919) [illegible] 68 p 16 [illegible] I C 49

aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest and a separate suit therefore shall not lie

Scope of the section —This section applies only where the decree is for the payment of money It does not apply where the decree is for the enforcement of a mortgage or charge See notes below under the head Interest in suits for enforcement of mortgage There is no analogy between interest awarded under this section and mesne profits (*b*)

The three divisions of interest —Interest that may be awarded to a plaintiff in a suit for money may be divided into three heads according to the *period* for which it is allowed namely—

(1) interest accrued due *prior to the institution of the suit* on the principal sum adjudged (as distinguished from the principal sum claimed)

(2) additional interest on the principal sum adjudged from the *date of the suit* to the *date of the decree* at such rate as the Court deems reasonable

(3) further interest on the aggregate sum adjudged i e the principal sum *plus* interest from the *date of the decree* (i) to the *date of payment* or (ii) to such earlier date as the Court thinks fit at such rate as the Court deems reasonable

Interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head (*c*) It applies only to the second and third heads

I **Interest prior to date of suit** —Interest antecedent to suit is not a matter of procedure but a brief note on the subject will not be out of place The law on the subject may be considered under the following two heads

(1) where there is a stipulation for the payment of interest at a fixed rate

(2) where there is no stipulation at all for the payment of interest

1 If there is a stipulation for the rate of interest the Court must allow that rate up to the date of the suit however high it may be [Usury Laws Repeal Act 28 of 1855 s 2] subject to the two following exceptions (1) if the rate is penal the Court may award interest at such rate as it deems reasonable [Indian Contract Act 1872 s 74] and (2) even if the rate is not penal the Court may reduce it if the interest is excessive *and* the transaction was substantially unfair [Usurious Loans Act 10 of 1918 s. 3].

2 If there is no express stipulation for payment of interest the plaintiff is not entitled to interest except in the following cases —

(i) *Mercantile usage* —Where it is allowed by mercantile usage (*d*)

(*b*) *Dwarka nath* v *Debendra* (1906) 33 Cal 125.
(*c*) C mison v Ga h (19 0) 3 Cal L J 33 .3 60 I C .84
(*d*) *Dool bdas* v *Ramlall* (18 0) 5 M I A 109 136 (Bombay) *Juggomoh n* v *Ma ek hand* (18 9) M I A 263 (Calcutta) *J ggom h* v *K ureech d* (18 0) 9 M I A 60 (Calcutta)

(ii) *Statutory right to interest*—Interest is payable where a right to it or an authority for its allowance or payment is conferred by statute Section 80 of the Negotiable Instruments Act 26 of 1881 provides that when no rate of interest is specified in a promissory note or bill of exchange the Court shall notwithstanding any agreement relating to interest between the parties award interest at the rate of 6 per cent per annum from the date on which the amount claimed became due and payable Similarly the Interest Act 32 of 1839 enacts that where there is no stipulation to pay interest but the amount claimed is a sum certain (as distinguished from unascertained damages) *and is payable at a certain time* by virtue of some written instrument the Court (e) may allow interest at a rate not exceeding the current rate of interest *from the date on which the amount became payable* If no time is fixed for the payment of the amount the Court may award interest at the rate aforesaid *from the time the creditor demands payment in writing intimating* to the debtor that interest will be claimed from the date of such demand up to the date of payment The provisions of the Interest Act 32 of 1839 are in the main a reproduction of the provi ions of Lord Tenterden s Act [3 and 4 Wm 4 c 42 s 48] The House of Lord in *London Chatham and Dover Railway Co* v *South Eastern Railway Co* (f) the modern leading case on interest held that the sum certain within the meaning of that Act must be a certain sum which is one absolutely and in all events due and not a mere provisional payment to be made by one party to the other

(iii) *Implied agreement*—Where an agreement to pay interest can be implied from the course of dealing between the parties (g)

In the *London Chatham and Dover Railway Company s case* the House f Lords held that interest cannot be given by way of damag s for detention of a debt

II Interest from date of suit to date of decree—The rate of interest from the date of the suit to the date of the decree is in the discretion of the Court (h) and this discretion is not excluded even if a fixed rate is mentioned in the contract as payable up to *reali ation* (i) But though the rate of interest for the aforesaid period is discretionary the Court should in the exercise of that di cretion award interest at the *contract rate* unless it would be inequitable to do so (j) The Court may under this head award interest in a suit for money although interest is not specifically asked for in the plaint (k) [see O 7 r 7]

It i well established that no interest can be allowed on damages for any period *prior* to the suit (l) but there is a conflict of decisions whether intere t can be allowed under this section on damages from the date of the suit it being held in some cases that it can be allowed (m) and in some that it cannot be allowed (n)

Where the High Court has refused to exercise its discretionary power t allow interest from date of suit the Judicial Committee as a rule will not interfere (o)

III Interest from date of decree to date of payment—The rate of nterest from the date of the decree to the date of payment is also in the discretion of the Court The plaintiff getting *security* of a decr e has his intere t reduced in

(e) This does not apply to an executing Court *Hogarth Shippi g Co Ltd* v *Mitsui B san Ka ha Ltd* (19 6) 53 Cal 35 98 I C 38 (6) A C 1119

(f) [1893] A C 4 9 S e Halsbury Vol 1 pp 37 39

(g) *Willmot* v *G rd er* [1901] Ch 548 *Re Duncan* [190] 1 Ch 30

(h) *Panna L l* v *Nu l cha d* (19) 6 C W N 737 67 I C 4 3 ( ) A I C 46 [I C]

(i) *Mog a n* v *Dhoutal I* (1886) 1 Cal 569 *C malho* v *N bibi* (1879) 3 Bom 0 *Lme Ch de* *F l a* (1 91) 18 Cal 164 180 1 I A 01 Th d ci ion to the contrary in *Pamach nd a* *Deru* (1 89) 1 Mad 4 5, is no lon r law

(j) *Orde* v *Sk ne* (1 80) 3 All 91 106 10 I A 196

(k) *P p P m* v *Ha ph l* (19 1) Lah C 64 I C 846 See l o *I l Chhajmal Da* *Brijbhukan Lal* (19 22 I A 19

(l) *Fr j* v *C m ner of C sto s* (18 0) Bom H C A C 85 *I t* *H sh C h nder* (1885) 11 Cal 1

(m) *Pa nal l* *Mukh m* (19 4) 39 Cal L J 84 85 80 I C 8 (4) A C 63 *I a nal ga* v *G k Ilis* (19 0) 51 Mad L J 43 9 I C 8 1 (0) A M 10 1

(n) *C eudson* *G h* (19 0) 3 Cal L J 39 3 4 60 I C 38

(o) *So endra M ha* v *H n Prasad* (19 6) 5 I t 135 5 I A 418 91 I C 1033 ( ) A PC 80

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(c) *Crevdson* v *Gane h* (19
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(e) This does not apply to an executing Court *Hogarth Shipping Co Ltd v Mst ... Bussan Ka. ..a Ltd* (19 6) 53 Cal 3 98 I C .38 (26) A C 1119

(f) [1893] A C 4 9 See Halsbury Vol 1 pp 37 39

(g) *Willmot v Gardner* [1901] Ch 548 *Fe Duncan* [1905] 1 Ch 0

(h) *Pa..na Lal v ..hal Cha..d* (19) 6 C W N 737 67 I C 4 3 ( ) A I C 46 [I C]

(i) *Mag..an v Dhoutal Roy* (1896) 1 Cal 569 *Carvalho v N..b..* (1879) 3 Bom .0 *Umes Chunder v Fat..n a* (1 91) 19 Cal 164 180 1 I A 01 The decision to the contrary in *Rama handra v Devu* (1 9) 1 Mad 485 is no longer law

(j) *Orde v Skinner* (1880) 3 All 91 106 10 I A 196

(k) *R.p Ram v Harpl..l* (19 1) . Lah 6 64 I C 846 See also *Lala Chhajmal Das v Brijbhukan Lal* (189) I A 199

(l) *Fr.. j.. v C..mmissioner of C..st ms* (18 0) Bom H C A C 8. *P..t..es v H..rrish Ch..nder* (1885) 11 Cal 1 2.

(m) *I.. l l M..kh..m* (19 4) 39 Cal L J 84 85 80 I C 8 (4) A C 63 *Ramal..ga v G..kuldas* (19 6) 51 Mad L J 43 9 I C 8 1 (6) A M 10 1

(n) *C..erdso.. G.. ..h* (19 0) 3. Cal L J 3.. 3 4 60 I C .8

(o) *So..endra Moha.. v Hari Prasad* (19 6) 5 1 t 135 5 I A 41 91 I C 1033 ( ) A PC 0

aggreg ite sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest and a separate suit therefore shall not lie

Scope of the section —This section applies only where the decree is for the payment of money It does not apply where the decree is for the enforcement of a mortgage or charge See notes below under the head Interest in suits for enforcement of mortgage There is no analogy between interest awarded under this section and mesne profits (b)

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(3) further interest on the aggregate sum adjudged *i e* the principal sum *plus* interest from the *date of the decree* (i) to the *date of payment* or (ii) to such earlier date as the Court thinks fit at such rate as the Court deems reasonable

Interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head (c) It applies only to the second and third heads.

I **Interest prior to date of suit** —Interest antecedent to suit is not a matter of procedure but a brief note on the subject will not be out of place The law on the subject may be considered under the following two heads

(1) where there is a stipulation for the payment of interest at a fixed rate

(2) where there is no stipulation at all for the payment of interest

1 If there is a stipulation for the rate of interest the Court must allow that rate up to the date of the suit however high it may be [Usury Laws Repeal Act 28 of 18.. s 2] subject to the two following exceptions (1) if the rate is penal the Court may award interest at such rate as it deems reasonable [Indian Contract Act 18.. s 74] and (2) even if the rate is not penal the Court may reduce it if the interest is excessive *and* the transaction was substantially unfair [Usurious Loans Act 10 of 1918 s. 3].

2 If there is no express stipulation for payment of interest the plaintiff is not entitled to interest except in the following cases —

(i) *Mercantile usage* —Where it is allowed by mercantile usage (d)

(b) *Dwarka ath v Debendra* (1906) 33 Cal 1 3
(c) *Crendon v Ganesh* (19?0) 5? Cal L. J) ..3 60 I C ..4
(d) *Doolubdas v Ramlall* (18.0) M I A 109 136 (Bombay) *Juggomohun v Manick chand* (1 .) M I A 63 (Calcutta) *Juggomohun v Kaseechund* (1 6) 9 M I A 760 (Calcutta)

(ii) *Statutory right to interest* —Interest is payable where a right to it or an authority for its allowance or payment is conferred by statute Section 80 of the Negotiable Instruments Act 26 of 1881 provides that when no rate of interest is specified in a promissory note or bill of exchange the Court shall notwithstanding any agreement relating to interest between the parties award interest at the rate of 6 per cent per annum from the date on which the amount claimed became due and payable Similarly the Interest Act 32 of 1839 enacts that where there is no stipulation to pay interest but the amount claimed is a sum certain (as distinguished from unascertained damages) *and is payable at a certain time* by virtue of some written instrument the Court (e) may allow interest at a rate not exceeding the current rate of interest *from the date on which the amount became payable.* If no time is fixed for the payment of the amount the Court may award interest at the rate aforesaid *from the time the creditor demands payment in writing intimating* to the debtor that interest will be claimed from the date of such demand up to the date of payment The provisions of the Interest Act 32 of 1839 are in the main a reproduction of the provisions of Lord Tenterden s Act [3 and 4 Wm 4 c 42 s 48] The House of Lords in *London Chatham and Dover Railway Co* v *South Eastern Railway Co* (f) the mod rn leading case on interest held that the sum certain within the meanin of that Act must be a certain sum which i one absolutely and in all events due and not a mere provisional payment to be made by one party to the oth r

(iii) *Implied agreement* —Where an agreement to pay interest can b implied from the course of dealing between the parties (g)

In the *London Chatham and Dover Railway Company s ca e* the House f Lords held that interest cannot be given by way of damag s for detention of a debt

II Interest from date of suit to date of decree —The rate f interest from the date of the suit to the date of the decree is in the di cret on of the Court (h) and this dis retion is not excluded even if a fixed rate is mentioned in the contract as payable up to *reali ation* (i) But though the rate of interest for the aforesaid period is discretionary the Court should in the exerci e of that discretion award interest at the *contract rate* unless it would be inequitable to do so (j) The Court may under this head award interest in a suit for money although interest is not specifically asked for in the plaint (k) [see O 7 r 7]

It is well established that no interest can be allowed on damages for any period *prior* to the suit (l) but there is a conflict of decisions whether intere t can be allowed under this se tion on damages from the date of the suit i being h ld in some cases that it can be allowed (m) and in some that it cannot be allowed (n)

Where the High Court has refu ed to exercise its di cretionary power to allow in erest from date of suit the Judicial Committee as a rule will no interfere (o)

III Interest from date of decree to date of payment —The rate of interest from the date of the decree to the date of payment is al o in the discretion of the Court The plaintiff getting *security* of a decree has his interest reduced in

(e) This does not apply to an executing Court *Howarth Sh pping Co Ltd* v *Mul ul Bussan Ka ha Ltd* (19 6) 53 Cal 735 98 I C 2 8 (26) A C 1119

(f) [1893] A C 4 4 see Halsbury Vol 1 pp 37 3

(g) *Willmot* v *Garine* [1901] Ch 548 *Re Duncan* [1900] 1 Ch 0

(h) *Panna Lal* v *Vithal Chand* (19) 6 C W N 737 67 I C 493 (2) A I C 46 [P C]

(i) *Mag irer* v *Dhowtal I* (1886) 1 Cal 583 *Carvalho* v *Nurbib i* (1879) 3 Bom 9 *Umes Chunde* v *Fati a* (1891) 18 Cal 164 180 1 I A 201 The decision to the contrary in *Ramachandra* v *Devu* (1) Mad 485 is no long r law

(j) *O de* v *Skinner* (1880) 3 All 91 106 107 I A 196

(k) *Tip Ram* v *Harni* ((1)) Lah 6 64 I C 848 see al *Lala Ch hajm l Das* v *Brijbhukan Lal* (199 I A 193

(l) *Fra* ... *Co* ... *to na* (18 0) Bor H C A C 83 ... *Hurr sh Ch nde* (1 55) 11 Cal 1

(m) *Pa inal ll* v *Mukhram* (19 4) 3 C L J 54 69 I C (4) A C 63 *Famal aa* v *G l llus* (19 6) I M d L J 948 9 I C 1 (6) A M 10)

(n) *Gre* ... (19 0) 3 Cal L J 39 3 4 60 I C 88

(o) *So rendra Mohan* v *H n Prasad* (19 6) 5 Lat 135 5 I A 418 91 I C 1135 ( ) A P C 0

aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest and a separate suit therefore shall not lie

Scope of the section—This section applies only where the decree is for the payment of money It does not apply where the decree is for the enforcement of a mortgage or charge See notes below under the head Interest in suits for enforcement of mortgage There is no analogy between interest awarded under this section and mesne profits (*b*)

The three divisions of interest—Interest that may be awarded to a plaintiff in a suit for money may be divided into three heads according to the *period* for which it is allowed namely—

(1) interest accrued due *prior to the institution of the suit* on the principal sum adjudged (as distinguished from the principal sum claimed)

(2) additional interest on the principal sum adjudged from the *date of the suit* to the *date of the decree* at such rate as the Court deems reasonable

(3) further interest on the aggregate sum adjudged *i e* the principal sum *plus* interest from the *date of the decree* (i) to the *date of payment* or (ii) to such earlier date as the Court thinks fit at such rate as the Court deems reasonable

Interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head (*c*) It applies only to the second and third heads.

I **Interest prior to date of suit**—Interest antecedent to suit is not a matter of procedure but a brief note on the subject will not be out of place The law on the subject may be considered under the following two heads

(1) where there is a stipulation for the payment of interest at a fixed rate

(2) where there is no stipulation at all for the payment of interest

1 If there is a stipulation for the rate of interest the Court must allow that rate up to the date of the suit however high it may be [Usury Laws Repeal Act 28 of 1855 s 2] subject to the two following exceptions (1) if the rate is penal the Court may award interest at such rate as it deems reasonable [Indian Contract Act 1872 s 74] and (2) even if the rate is not penal the Court may reduce it if the interest is excessive *and* the transaction was substantially unfair [Usurious Loans Act 10 of 1918 s 3].

2 If there is no express stipulation for payment of interest the plaintiff is not entitled to interest except in the following cases —

(i) *Mercantile usage*—Where it is allowed by mercantile usage (*d*)

(*b*) *Dwarkanath* v *Debendra* (1906) 33 Cal 1-3
(*c*) Cranston v Ganesh (1920) 3 Cal L J ... 60 I C 2
(*d*) *Doolubdas* v *Ramlall* (1850) M I A 109 1 6 (Bombay) *Juggomohun* v *Manickchand* (1 9) M I A 63 (Calcutta) *Juggomohun* v *Kaurcech* ... (1 6) ... M I A 760 (Calcutta)

of *damdupat* ceases to operate from the date of the suit (*b*) But this is entirely in the discretion of the Court (*c*) It has been held by the High Court of Madras that the rule of *damdupat* does not apply where interest is claimed under a mortgage governed by the Transfer of Property Act 1882 (*d*) A different view has been taken by the High Court of Bombay (*e*) and Calcutta (*f*) The rule of *damdupat* does not apply where the mortgagee has been placed in possession and is *accountable* for the rents and profits received by him as against the interest due (*g*) See Mulla s Hindu Law Chapter 28

COSTS

35 [Ss 218 221 Jud Act, 1890, s 5 R S C, O 45, r 1]

Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing

(3) The Court may give interest on costs at any rate not exceeding six per cent per annum, and such interest shall be added to the costs and shall be recoverable as such

Subject to such conditions and limitations as may be prescribed.—Prescribed means by rules contained in or made under the Act see sec 2 (16) and (18) The following rules contain express provision as to costs —O 11 r 3 (costs of interrogatories) O 12 r 2 (proof of documents) O 21 r 72 (3) (application to set aside a sale) O 23 r 1 (3) (withdrawal of suit) O 24 r 4 (costs on payment into Court) O 32 rr 4 & 5 (next friends and guardians) O 33 rr 10 11 & 16 (pauper suits) O 35 r 3 (interpleader suits) O 34 (mortgage suits) But nothing in the rules as to pauper suits limits the discretion of the Court under sec 35 to apportion costs (*h*)

The provisions of any law—The discretion to award costs is limited by certain enactments e g the Presidency Small Cause Courts Act 15 of 1882 sec 22 (*i*) the Land Acquisition Act 1 of 1894 sec 27 (*j*)

(*b*) *Dhondi* ... (1898) ... Bo ... 86 *Ha* ... *Lall* ... *in the matter of* (1906) 33 Cal 1 ...

(*c*) ... (1913) 40 I A 68 ... 18 I C 909 [P C]—[no interest given] ... (1915) ... Bom ... R 49 87 I C ... 19 ... A B 36 [Interest allowed at 6 per cent only] Both these were suits for redemption

(*d*) ... (1903) ... Mad 66 The judgment proceeded upon the assumption that the rule of *damdupat* was in force in the town of Madras

(*e*) *Jeevanbai* v ... *ordas* (1911) 35 Bom 199 8 I C 649

(*f*) *K* ... *Naramba* (1915) 42 Cal ... 31 I C ...

(*g*) *Sinduh* ... v *Jav* ... (1900) 4 Bom 114

(*h*) *Jethabai* v ... (1884) 8 Bom ... F B

(*i*) *M* ... *Ab* ... *Zafer* (19..) 6 Cal 434 118 I C ... 36 ... A C 560

(*j*) *A* ... *Collector Salsett* v *Damodardas* (19..) 3 Bom 1 8 114 I C ... A B 63

the generality of cases (p) Where the rate of interest charged and decreed was 24 per cent the Lahore High Court refused to allow interest after decree (q) If the Court awards interest from the date of the decree but no *rate* is specified the decree holder will be entitled to interest at the Court rate which is usually 6 per cent (r) But if no such interest is awarded by the decree it will be deemed to have been refused (s) see sub sec (2) In a case decided by the Privy Council in 1878 it was held that when the decree is silent about future interest it cannot be recovered in execution proceedings but the decree holder may by suit recover damages for the detention of the decretal amount (t) That was a case under the Code of 1859 S 193 of that Code which relates to interest did not contain any such provision as is contained in sub sec (2) of the present section This provision was first introduced by Act 7 of 1888 The Privy Council ruling was followed in a recent Calcutta case but the decision it is admitted is in that respect incorrect (u)

Illustration of the above rules —A lends Rs 5 000 to B to be repaid with interest at the rate of 18 per cent per annum In a suit by A to recover the amount of the loan with interest at the rate aforesaid it is contended on behalf of B that the rate of interest is penal (Contract Act s 74) The Court finds that the rate of interest is not penal nor is the transaction substantially unfair Hence—

(1) as regards interest [on Rs 5 000] from the date of the loan to the date of the suit the Court *must* allow it at the contract rate that is at the rate of 18 per cent per annum Usury Laws Repeal Act s 2

(2) as regards interest [on Rs 5 000] from the date of the suit to the date of the decree the Court *may* allow it at the contract rate that is at the rate of 18 per cent per annum or it may in its discretion allow it at a lower rate or may disallow it altogether

(3) as regards interest from the date of the decree to the date of payment on the aggregate sum adjudged [i e Rs 5 000 *plus* the interest adjudged under the above two heads] the Court may allow interest at such rate as it deems reasonable This rate is usually 6 per cent As to interest on costs see s 35 cl (3)

Interest in mortgage suits —The law on the subject is now codified in O 34 r 11

Rule of damdupat —This is a rule of Hindu law according to which interest exceeding the amount of the principal sum cannot be recovered at any one time This rule is in force in the Bombay Presidency (v) including Sind (w) and in Berar (x) and in the presidency town of Calcutta (y) but it is not recognized outside that town (z) It is also not recognized in the Madras Presidency (a) The meaning of the rule is that *interest must not exceed the principal so if a Hindu lends Rs 500 to another Hindu* and the loan is not repaid till the interest amounts to Rs 600 the lender is not entitled to recover more than Rs 500 for principal and Rs 500 for interest But the Court may *under this section* award further interest to the lender from the *date of the suit* though the aggregate interest may thereby exceed Rs 500 The reason is that the rule

(p) *Umes Chunder* v *Fatima* (1891) 18 Cal 164 150 17 I A 201
(q) *Palaki* v *Jeericha* (1923) 100 I C 416 (8) A L 811
(r) *I Lal* v *Pehari* (19 1) 7 B L R App 30
(s) *Ambi* v *Seul* (1923) 4 Mat L J 687 I C 566 (74) A M 10 [decree silent as to interest on costs see s 35 (3)]
(t) *Cohul Das* v *M a d Z l m* (18 5) 3 Cal 602 5 I A 8
(u) [illegible] (1908) 3 C L J 94 1 C 99 ( ) A C
(v) [illegible] (189) 1 B m 8
(w) [illegible] (1908) 3 L R 10
(x) [illegible] (1914) 10 N L R 91 6 I C 18
(y) [illegible] (188) 14 C 1
(z) [illegible] (1883) 1 C L R 90
(a) [illegible] (18 1) 6 M H C 400

through the Court (a) But though the discretion conferred upon the Courts by this section is wide it is a judicial discretion and must be exercised on fixed principles Where there are no materials before the Court on which it can exercise its discretion it is not justified in depriving a successful party of his costs (b) The following are the leading rules on the subject —

1 *Costs shall follow the event* —The general rule is that costs shall follow the event unless the Court for good reason otherwise orders This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him (c) The Court may not only consider the conduct of the party in the *actual* litigation but the matters which *led up* to the litigation (d) A refusal to go to arbitration is no ground for refusing costs (e) nor is the fact that the plaintiff brought his action without previous notice to the defendant (f) When an offer of compromise is made which the Court considers proper for acceptance but it refused the Court as a general rule relieves the party making the offer from payment of costs incurred after the date of the offer but an offer which the Court considers insufficient is no bar to a plaintiff s right to costs (g) In an account suit costs generally follow the result of the account unless the defendant has falsely denied his liability to account (h) But if the right to claim partition is wrongly disputed the disputing party will be made liable for costs unnecessarily incurred (i) An assignee of a decree made respondent without his consent but who actively supports the decree under appeal will be made liable for costs of the appeal but not of the lower Court (j) A successful party is not to be deprived of his costs merely because the suit proceeds ex parte (k) It has been held to be a good reason for depriving a successful respondent of his costs that the appeal was filed on the strength of a decision which was overruled after the filing of the appeal (l)

It is provided by R S C O 45 r 1 that where any action cause matter or issue is tried with a jury the costs shall follow the event unless the judge by whom such action cause matter or issue is tried or the Court shall for good cause otherwise order It has been held by the House of Lords that the expression the costs shall follow the event means that the party who on the whole succeeds in the action gets the general costs of the action but where the action involves *separate issues* whether arising under different causes of action or under one cause of action the word event should be read distributively and the costs of any particular issue should go to the party who succeeds upon it An issue in this sense need not go to the whole cause of action but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part *A* sued *B* for 164*l* for the price of 34 bags of goat s hair sold to *B* *B* by his defence pleaded (1) that the goods were not according to sample and were

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(a) *G nga Bisl an* v *Murree Brewery Co* (19 8) 10 Lah L J 401 109 I C 4 6 (8) A L 800

(b) *Ct l S rvice C -ope ati Society* v *G l M Nav Co* [1903] K B 7 6 (C A)

(c) *Gha sha* v *Morol* (1894) 18 Bom 4 4 *K pp rami* v *Za d fKal l* (1904) M d 341 *C ope* v *B h lli gl a* (1880) 15 Ch D 01 *I desh d* v *Man op* (1 8) 13 I A 0 31 (successful plaintiff) *Mo h r* v *I oma th* (18 8) 3 ( ) 484 *Bh b es* v *Nilcoo l* (1886) 1 Cal 18 4 1 1 A 13 (successful defendant) *F t r* v *Fu g l r* [1 93] 1 Q B 64 *H rl y* v *West L d Ext ns n Ry Co* (1 9) 14 App Cas 6 3

(d) *B tock* v *Pa ey Urba D t ct Cou c l* [1900] 1 Q B 3 360 affirmed [1900] Q B 616 *Sukumari* v *G pi Moh n* (1916) 43 Cal 190 31 I C 66

(e) *B ckett* v *S t l* (18 8) Tim s Law R p 8

(f) *Goodl rt* v *Hyett* (1883) Ch D 1 *Willm n* v *Oppe* (1 4) C D 60 See in thi co e ti th re rk of North J i *B ate* v *k rff* [189] 3 Ch 4 3

(g) *F* v *D j a i M rt n* (18 6) L T 161

(h) *H nath* v *K i h a* (18) 14 C l 14 13 I A 1 3 *Hy* v *I e jd Sto e C* (1916) 0 C W N 36 3 I C 83

(i) *S tya K* v *at a K rp I* (1910) 10 C L J 03 3 I C 4

(j) *F j* v *Fll* (1) 0 I m 16

(k) *I pr d* v *I we wa* (19 4) C W N 2) 86 I C 3 I ( ) A C 6

(l) *P m m* v *Na ke* v *k s am* (1913) 43 Mad L J 61 3 I C

Costs as penalty—Costs cannot be imposed as a penalty beyond the costs of suit (*k*) It is not according to law to give to a party by way of damages the costs as between attorney and client of the litigation in which the damages are recovered (*l*) The object of awarding cost is to indemnify a party against the expense of successfully vindicating his rights in Court (*m*) As to compensatory costs in cases of false or vexatious claims or defences see s 35A below

Costs of and incident to suits—This expression includes not only costs of suits but costs of applications in suits If there has been an invalid reference to arbitration out of Court the Court cannot make an order for costs incurred before the arbitrator as they are not costs of the suit (*n*) As to costs of *applications* the Court may make an order directing either party to pay the costs of the other or it may make no order as to costs or it may reserve costs or make costs costs in the cause

The general order for costs of the suit does not displace a specific order for costs made on an application (*o*) If the order is costs reserved those costs remain to be dealt at the hearing If the order is "costs costs in the cause" the Bombay High Court at one time held that the Court had a discretion to deal with those costs in any manner it thought fit (*p*) in other words costs costs in the cause stood on the same footing as *costs reserved* except that in the case of costs costs in the cause if nothing was said about those costs in the final judgment they were taken to be included in the costs of the suit (*q*) But these decisions are no longer law and it has now been held that where the costs of an application are made costs in the cause the party to whom the costs of the suit are awarded is entitled as a matter of course to the costs of the application (*r*) If the order is costs to abide the result the Court has a discretion to apportion costs at the hearing but if the order is cost to follow the event or costs to abide and follow the result the Court has no discretion and the successful party is entitled to his costs (*s*)

Costs to be in the discretion of the Court—The section provides that the costs of suit and applications shall be in the discretion of the Court Such discretion must be a judicial discretion to be exercised on legal principles not by chance medley nor by caprice nor in temper (*t*) In the exercise of this discretion the Court is not confined to the consideration of the conduct of the parties in the actual litigation itself but may also take into consideration matters which led up to and were the occasion of that litigation (*u*) The discretion conferred upon the Court by this section is very wide (*v*) Thus the Court may order the costs to be paid by the parties in definite proportion or it may order one party to pay to the other a fixed sum in lieu of taxed costs (*v*) Similarly it may disallow costs to a successful plaintiff as where the rate of interest claimed by the plaintiff and allowed to him under the Usury Laws Repeal Act (*x*) is usurious (*y*) or it may make a successful plaintiff pay the whole costs of the other side ( ) It may also allow the expenses of witnesses though not summoned

(*k*) *Willmott* *Barber* (1881) 1 C D
(*l*) *Cockburn* v *Edwards* (1881) 18 C D 449
4 9
(*m*) *M A Jaw* v *A* (1910) 48 Cal 4 441
60 I C 33
( ) *In re* *h l* *Lo* *Dr vf* (1029) 4 M d
L J 0 I C I (29) A M 3 0
I th *I* *h l v* *I* *m* *Lerme wa* (1) 9
( ) 101 A 113
(*p*) *Templeton* v *La n* (1901) I m 30
(*q*) *J* *T j* (1 8 4) 6 Bom L R
I C 63 (4) A B
( ) *Im* *ram* *Trad g* *Co* v *P rd* *C*
(1 6) 40 Bom 43) 0 I C 133 (6)
A B 58
( ) *Co* *rarth* *Cod* *arth* (191) 39 M 1 4 6
1 C 3
(*t*) *Il sley* v *West Lo d n P* *Py* (1 6) 1
Q B D 3 3 6 *J* *Il* *II* *Pa II*
(1919) 4 C W N 3 3 I C 4 1
( ) *I h gobat* *Mal med* (19) C W N
64 *I p d a* *B ar war* (19 4) 9
C W N) 8 I I C 3 I ( ) A C
569
( ) As to illustration of t xl a m t r see
S f *kh* v *I* *j* *th* (19 1) 3 I m
I R 4 63 I C 3 *J a lu* v *B*
M *hh* (19) Bom L R 3 8 I C
1043 ( ) A B 3
(*w*) *B llm tt* *B rber* (1 81) 1 C D 7 4
M yo *f Itr If d* v *I r If* *t C rpora*
to [1894] 3 C 3
(*x*) Act s 1
(*y*) *C* *ralk* v *N* *rl bi* (1 9) 3 Bom 0
(*z*) *H rris* v *Fathe* *s* (1 9) 4 Q B D 611
I ns v *Fa e* (18 9) 13 C D 288

through the Court (*a*) But though the discretion conferred upon the Courts by this section is wide it is a judicial discretion and must be exercised on fixed principles Where there are no materials before the Court on which it can exercise its discretion it is not justified in depriving a successful party of his costs (*b*) The following are the leading rules on the subject —

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(*a*) *G g Bishan* v *Murree Brewery* Co (19 8) 10 Lah L J 401 109 I C 4 6 (8) A I 800

(*b*) *Civil Service Co-operative Society* v *General St Navigation Co* [1903] K B 6 (C A)

(*c*) *Gha h Morol a* (1894) 18 Bom 4 4 *Kupp am Za d r of Kalah ti* (1904) Mad 341 *C per* v *Whittingham* (1880) 15 Ch D 01 *Jot shu Ma p* (188) 13 I A 0 31 (c s ful plaintiff) *Monoh r K a U* (18 8) 3 C 1 4 4 *Bl tb e t Nil o l* (1886) 1 Cal 18 4 1 I A 13 (successful defendant) *Foster* v *F q* [1893] 1 Q B 64 *H rl v* v *West Lo d Ext s n Ry Co* (1 89) 14 App C 6 3

(*d*) *Bostock* v *Ramsey Urban District Council* [1900] 1 Q B 3 360 affirmed [1900] Q B 616 *Sukumar* v *Gop M han* (1916) 43 C 1 190 31 I C 66

(*e*) *Be k tt* (1888) Tim Law Rep 84

(*f*) *Goodh rt* v *H tt* (1883) Ch D 1 *Wittman Opp h* (1 84) C D 60 S in this connection the remarks f North J in *W lt* v *korff* [189] 3 C] 4)

(*g*) *Fern j D j int Mart n* (1886) 55 L T 161

(*h*) *Ha U* v *K a* (1 89) 14 Cal 14 13 I A 1 3 *Hv* v *Bengal Stone C* (1916) 0 C W N 368 3 I C 83

(*i*) *S t K r* v *S tva K rpal* (1910) 10 Cal L J 503 3 I C 94

(*j*) *P j Hl* (18) 0 Bom 16

(*k*) *Upe d* v *B wswar* (1924) 29 C W N 3 6 I C 3 1 ( ) A C 569

(*l*) *Ram am* v *K Venkatasam* (1919) 43 Mad L J 61 3 I C

consequently worth 24l less (2) that there was an overcharge on the bags for 2l and (3) payment into Court of the balance B succeeded on the first issue but failed on the second The Court of first instance gave judgment for A for 2l beyond the amount paid into Court with costs On appeal it was held by the House of Lords reversing the decision of the Court of Appeal that the issue as to quality (1st issue) was an event within the meaning of the expression the cost shall follow the event and that B was entitled to the costs of that issue (m)

2 Where a party successfully enforces a legal right and in no way misconducts himself he is entitled to costs as of right (n)

3 The fact that a successful defendant has set up the Gaming Act as an answer to the plaintiff's claim is not good cause for depriving him of his costs (o) Nor is the fact that he has pleaded the Statute of Limitations (p)

4 If a plaintiff substantially succeeds he is entitled to his costs though he may not have get the precise form of relief he wanted (q) and even though the damages awarded to him have been reduced (r)

5 If a plaintiff recovers a less (but not a trifling less) amount than he claimed in the plaint his costs should be apportioned according to the amount recovered and not to the sum claimed ( ) As to the rule in Privy Council see the undernoted case (t) The proper mode of apportionment is to calculate the amount of the costs of the suit as laid and then divide the entire sum between the parties according as they have respectively succeeded or failed (u)

6 Where a plaintiff succeeds on part of his claim but fails on the most important and expensive heads of controversy he may be made to pay the whole costs of the suit to the defendant (v)

7 Everything which increases the litigation and the costs and which places on the defendant a burden which he ought not to bear in the litigation is a perfectly good cause for depriving the plaintiff of costs (w)

8 A successful party ought not to be deprived of part of his costs because some of his witnesses were guilty of exaggeration (x)

9 A person wrongfully made a party should get his costs (y)

10 Where both the parties advance pleas far in excess of their legal rights each party will be made to bear his own costs ( )

11 Separate costs should not be allowed to defendants if the defence is common to all or their interests are the same (a)

12 Where two defendants join in defending an action and judgment is entered for one and against the other the successful defendant is prima facie

(m) I I H v I & Co Joseph [191] A C 1 My Ivf (1) Ex D 180 IU v D a (18 1) 6 Q B D 1 IR 4 v I d er (18) 8 Q B D 648 Jon v (l g (18) 13 Q B D c

(n) Cooper v Whittingham (18 0) 1 C D 01 Upm v Io d (1 83) 4 C D 31 (l Serre Co-operative Society v (ral St Na ([19 3] K B 8 (1 A I r mda v I Shaba (191) 4 I 4 1 (c

( ) C l v I rth [1903] I J K B 1 (L A)

(p) I m Helye (1906) W N 114

(q) Cha h m Mor ha (1 94) 1 I n 4 4

( ) Th I q hm Lapp t I (10) 14 C W N 13 6 I C 81

(s) M dh M h v (I I Das (1888) 10 M I A 3 I I v I h m (1894) 1 M I 3 6

(t) (A (h der S h h Lha n (1900) Cal 9 1 I A 110

(u) Le k J y Col d (1891) C L I 114

( ) Porter Farquha [1893] 1 Q B 61

(w) Ju ti H H I a H (1919) 4 C W N 3 3 9 1 (4 1 H I y v B t Lo d n I t Idy (19) 14 A C 6 3

(x) I pm v P lm (1904) W N 133 91 L T 13

(y) I h D vi v B k f L pper I d a (1891) 13 All 0)

(z) P mkum v A I I ma (18) 14 C I 99 108 13 I A 116 I hm hwa v M nowa (1) 19 C L 6 1 I A 4

(a) F wo v Do 4 pos (18) I W R 193 (Common d I re) Ko sell v Behare (1 6) 1 W R 0 (separate t rest) Sh A Makh Lall v h K ((1 6) 1 M I A 1 7

entitled to receive from the plaintiff half the costs incurred in the joint defence (*b*)

13 Where two plaintiffs join in one action claiming for separate and distinct causes of action and judgment is entered in favour of one plaintiff and against the other the successful plaintiff is entitled to recover from the defendant the whole of his general costs of the action and the defendant is entitled to recover from the unsuccessful plaintiff the costs occasioned by his joinder as plaintiff (*c*)

14 Where the decree of the lower Court is confirmed by the appellate Court the mere fact that the grounds upon which the confirmation proceeds are not the same as the ratio decidendi of the Court below is no ground for departing from the rule that the costs shall follow the event (*d*)

15 Where a third party with no sufficient reason appears and defends an action separately he must bear the costs of so doing even though the plaintiff is unsuccessful in the action (*e*)

16 *Costs in an administration suit*—See Williams on Executors 11th ed vol 2 p 1649 *et seq* Ingpen on Executors 2nd ed p 3o2 *et seq* Danniell s Chancery Practice 8th ed p 1075 and the undermentioned case (*f*)

17 *Costs in a partnership suit*—See Lindley on Partnership 9th ed pp 627 629

18 *Costs of mortgagee*—See Fisher on Mortgage 6th ed paras 1894 1897

19 *Costs of trustee*—See Lewin on Trusts 12th ed p 126 *et seq*

20 *Costs of proceedings in Probate Court*—See Ingpen on Executors 2nd ed pp 97 99

Co defendants—The Court may order one defendant to pay the costs of another defendant (*g*) In a suit against a partnership of several partners some of whom admitted and some of whom denied the partnership those who denied were ordered to pay the costs of those who admitted (*h*)

Discretion not to be delegated—*The discretion given to the Court under this* section cannot be delegated to the taxing officer (*i*)

Costs against person not a party to suit—An order for costs cannot be made against persons who are not parties to the suit (*j*) Persons interested on whose behalf a suit is brought under O 1 r 8 cannot be ordered to pay costs (*k*) As regards an action for costs against a third person on the ground that he was the mover of and had an interest in the suit it has been held by the Privy Council that such an action cannot be maintained in the absence of malice and want of probable cause (*l*)

Out of what property—*The Court is not bound to order costs to be paid out* of the estate Such an order is generally made in favour of trustee and in probate suits when the difficulty of construction is caused by the testator (*m*)

Costs where relief is claimed against defendants in the alternative—See note under the same head to O 1 r 3

(*b*) *Beau ... nt v Se...* [1903] 1 K B 8...
(*c*) *... v ... Lo... y* (1886) 1 Q B D 6...
(*d*) *...* (18.3) I L R 6 ... I 3... 413 414 But see *F... cher v K... la... v ... ker* (1860) 8 M I A 1.0
(*e*) *... v M... n ... M... rilal* (19.0) 4 C W N 888 69 I C 581
(*f*) *National Insurance Co Ltd v ...* (19..) 6 Cal 44.4 (...3) A C 4...
(*g*) *T... v ... the Br... h ... Co* (191.) 11.8 I L R 1 3) I C ...
(*h*) *J... goat ... der ... I oopch... d* (1881) 6 Cal 811
(*i*) *L... v ...* (1..6) 3 W R ...
(*j*) *Ja... E... T...er* (1883) I ... 439 ... party ... mitted in the presentation
(*k*) *S... ed ... v ... la dyu ... th* (1.36) I C W N 6...
(*l*) *... v ... Mookerj* (18..) ... 33 ... 3
(*m*) *I... d r K... v ... J... pal* (18.9) 1 Cal 15 I A 1 ... *T... mon Das* (19.0) ... 1 5 3

No separate suit for costs.—Where a Court has jurisdiction to deal with the question of costs no separate suit will lie to recover costs but where it has no jurisdiction to order costs and costs are incurred they may be made the subject of consideration as to damages in a subsequent suit (*n*).

Sub section (2).—If the Court does not abide by the rule that costs should follow the event it should record its reasons (*o*).

Sub section (3).—The Court may allow interest on costs but if the decree is silent as to interest it cannot be given in execution (*p*).

Whether an appeal lies for costs only.—Decisions of a Court of law fall into three classes namely:—

I Decrees [Every decree is appealable (s. 96).]

II Appealable orders [s. 104]

III Non appealable orders [s. 105]

I *It is settled that an appeal lies for costs only when the costs are awarded by a decree if the order as to costs involve a question of principle but it is not settled whether such an appeal lies if no question of principle is involved.*—A decree contains—

(1) a decision on the *rights* of parties hereinafter called item No. 1—and

(2) a direction as to *costs* hereinafter called item No. 2.

A party while appealing from item No. 1 or any part thereof may appeal also from item No. 2. He may at the hearing abandon the appeal from item No. 1 and may proceed with the appeal from item No. 2 (*q*). But can he appeal from item No. 2 alone without appealing from item No. 1? In other words does an appeal lie on a matter of costs only?

All the High Courts are agreed that such an appeal does lie—

(1) *where the order as to costs involves a matter of principle* (*r*) as where a *formal* party to a suit against whom no relief is claimed is made to pay the costs of the suit (*s*); or

(2) *where there has been no real exercise of discretion in making the order as to costs.* This may happen when a successful party is deprived of his costs (*t*) or is made to pay the costs of the losing party (*u*). If the discretion was exercised in fact the appellate Court would not interfere merely because it would itself have exercised the discretion differently (*v*).

(3) *where the order as to costs proceeds upon a misapprehension of fact or law* (*w*).

For brevity's sake we shall describe all the three cases as cases where a question of principle is involved. We may therefore say that it is settled law that an appeal lies for costs only where the order as to costs involves a question of principle. But it is not settled whether an appeal lies for costs only where no question of principle is involved. It has been held by the High Court of Calcutta that no appeal lies on a question of costs

(*n*) *Mahram Das* v. [illegible] (1[illegible]6) 8 All. 4[illegible].

(*o*) [illegible] (19[illegible]) [illegible] Bom. [illegible] 11 [illegible] (1[illegible]) All. [illegible]

(*p*) *Forster* v. *Secretary of State* (18[illegible]1) 3 C. [illegible] 161 4 I. A. 13[illegible].

(*q*) [illegible] (18[illegible]) 16 [illegible] [illegible] (1[illegible]60) B. L. R. [illegible] *Secretary of State* [illegible] (1[illegible]) 11 C. [illegible] 3[illegible] [illegible] (1[illegible]) 34 C. [illegible] *Mahomed* v. [illegible] *Mahomed* (1916) 1 C. W. N. [illegible] 3[illegible] I. C. [illegible] [illegible] (1911) 13 Bom. L. R. 10[illegible]1 [illegible] I. C. 813.

(*r*) [illegible] *Lall* [illegible] (1[illegible]6) [illegible]

(*s*) [illegible] *Society* [illegible] (1907) [illegible] K. B. [illegible] (1908) 1 K. [illegible] *Lalm* [illegible] (1919) 41 All. [illegible] *Damodard* (19[illegible]) [illegible] Bom. 17[illegible]

(*t*) [illegible] (1[illegible]) 1 Cal. [illegible] *Lal* (191[illegible]) 4[illegible] All. [illegible] I. C. [illegible]

(*u*) [illegible] (18[illegible]) [illegible] I. R. [illegible]

(*w*) [illegible] v. [illegible] (1[illegible]) 16 I. [illegible] *H. H.* v. [illegible] (1919) [illegible] C. W. N. 3[illegible] I. C. [illegible]

unless there is a question of principle involved (x) On the other hand it has been held by the High Court of Bombay that an appeal will lie for costs only whether the order as to costs involves a question of principle or not (y) The ground of the Bombay decisions is that every decree being appealable *any part* of it is appealable though it be the part relating to costs whether there is a matter of principle involved or not But even according to the Bombay decisions though an appeal may lie for costs only the appellate Court will not as a rule vary or set aside the order of the lower Court as to costs *unless there is a principle involved and the principle has been violated*

Does a *second* appeal lie on a matter of costs only? It has been held that it does provided there is a question of law or principle involved ( ) see s 100 cl (a)

II *Appeal from a direction as to costs contained in an appealable order* — The law as to appeal from a decision as to costs contained in an order (as distinguished from a decree) is that if the order is itself appealable an appeal will lie from that part of the order which relates to costs (a) But no second appeal lies on a matter of costs awarded by an appealable order for no second appeal lies from any order passed in appeal under s 104 see s 104 (2)

III *Appeal from a direction as to costs contained in a non appealable order* —Since no appeal lies from a non appealable order no appeal can lie from a direction as to costs contained in such order Thus if an order is made adjourning the hearing of a suit and one of the parties is directed to pay the costs occasioned by the application for adjournment he cannot appeal from the direction as to costs for an order adjourning the hearing *of a suit is not an appealable order it not being included in s 104 (1) below (b)*

Letters Patent appeal —An order as to costs is not a judgment within the meaning of clause 15 of the Letters Patent and is not appealable as such (c)

Costs against Secretary of State —The Secretary of State is in an unsuccessful litigation liable to pay costs like any other unsuccessful party (d)

Suit for contribution towards costs — A defendant is not entitled as against a co defendant to contribution in respect of costs to which both are liable unless there *be some equity existing between him and the co defendant (e)*

Review of taxation —On a review of taxation the decision of the taxing master is not absolutely final even on a question of quantum The Court has jurisdiction to interfere with the discretion of the taxing master if he has acted upon any wrong principle or applied any wrong consideration (f)

35A (1) If in any suit or other proceeding not being an appeal any party objects to the claim or defence on the ground that the claim or defence or any part of it is as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward and if thereafter as against the

Compensatory costs in respect of false or vexatious claims or defences

( ) [illegible] *Bhabh* [illegible] (1[illegible]0) [illegible] 6 I [illegible] 334 *B* [illegible] *Nat* (1886) [illegible] (1001) [illegible]

(y) [illegible] (18[illegible]) 16 B [illegible] 6 6 [illegible] (18[illegible]) B 104

( ) [illegible] (188[illegible]) [illegible] 1 9 [illegible] (1[illegible]3) [illegible] 411 33[illegible] [illegible] (1[illegible]1) [illegible] 100 [illegible] (1[illegible]8) [illegible] 38 [illegible] (1[illegible]0) Lat L J 310

( ) *L R* [illegible] (1[illegible]) [illegible] 94 [illegible] 16 [illegible] 41 [illegible] (1[illegible]) 44 411 [illegible] 03 64 [illegible] 90

(b) [illegible] (1[illegible]) 8 C [illegible] 91

( ) [illegible] *Chetty* (1[illegible]0) [illegible] M [illegible] L J 6

(d) [illegible] *Low* [illegible] (1[illegible]0) 5 [illegible] 3 [illegible] 6 [illegible]

( ) [illegible] (1910) 3 411 [illegible] 6 [illegible]

(f) [illegible] (19[illegible]) [illegible] B [illegible] 6) A B 18

objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector, by the party by whom such claim or defence has been put forward, of costs by way of compensation

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act 1887, and not being a Court constituted under that Act, are less than two *hundred and fifty rupees the High Court may empower* such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees

Provided further that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section

(3) No person against whom an order has been made under this section shall by reason thereof be exempted from any criminal liability in respect of any claim or defence made by him

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence

This section was added into the Code by Act 9 of 1922 The section does not come into operation until the Local Government has with the previous sanction of the Governor General in Council by notification in the local Official Gazette directed that the Act shall come into force in the Province on such date as may be specified in the notification

The section provides for payment of costs by way of compensation in cases of false or vexatious claims and defences See notes to s 35 Costs as penalty on p 128 above

An order awarding compensation under this section is appealable under section 104 (ff) But an appellate Court cannot make an order when the original Court has refused to do so See proviso to O 41 r 33

PART II

Execution

GENERAL

36 [*New*] The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders

Application to orders

Execution—*Execution is the enforcement by the process of the Court of its* own decrees The main rule of procedure are enacted in this part of the Code and minor rules are relegated to O 21 These provisions apply to decrees which are capable of execution There is no question of execution in regard to decrees that are purely declaratory

What decrees may be executed—(i) *The decree to be executed is the decree of the Court of first instance until appeal and after that the decree of the Court of last instance*— When the Appellate Court makes a decree the decree of the original Court is merged in that of the superior Court and it is the latter decree alone that can be executed (*g*) If the Appellate Court rejects the appeal under O 41 r 10 its order is not a decree (*h*) n[illegible] if it dismisses the appeal for default of appearance (*i*) or want of prosecution (*j*) n[illegible] the appeal abates (*k*) or is withdrawn (*l*) In all these cases there is no decree of th[illegible] Appellate Court and the decree to be executed is that of the original Court This w[illegible] also seem to be the case when the appeal is summarily dismissed without notice to [illegible] respondent but the cases are conflicting (*m*) But when the appeal is heard O 41 r [illegible] requires that the judgment should confirm vary or reverse the decree from wh[illegible] appeal is preferred (*n*) and the decree capable of execution is the decree of th[illegible] Appeal (*o*) *When the decree of the Court of first instance is confirmed by* th[illegible] Court and the latter decree by Privy Council the decree capable of executi[illegible] decree of Privy Council (*p*)

The question which decree should be executed arises in the following cases —

(a) *Amendment*—The only decree that can be amended is the decr[illegible] to be executed If the Court of appeal confirms varies or [illegible] decree of the lower Court the decree of the Appellate Court is th[illegible] that can be amended (*q*)

(*g*) *Jow d Hussa n* v *Gendin S ngh* (19 6) 53 I A 197 00 6 Iat 4 9 *affmg* 1 Iat 441 *Ha him* v *Martin* (19 6) 4 Rang 6 100 I C 8 ( ) A R 104

(*h*) *Lekl* v *H a* (1896) 18 All 101

(*i*) *I f q* v *Bib T f* (1917) 39 All 393 39 I C 519 *Sh* v *Ma l* v *Sat th* (1916) 44 C 1 9 4 960 38 I C 493

(*j*) *Bat k th* v *M n D* (1914) 36 All 84 41 I A 104 3 I C 644 *Abd l M j l J wal r L l* (1914) 36 All 3 0 3 I C 644 I C

(*k*) *K l ll n* v *J al d l n* (19 4) 51 Cal 715 81 I C 0 (4) A C 530

(*l*) *P ll j* v *G* (1831) I Bom 3 0

(*m*) *I p* v *l j* (189) 1 B m 48 B t see *C a d* v *B nd* (189) 4 C 1 59 *M n a* v *Munis* (18) M d 33 *A m b b* v *A h ed H sa* (1908) 30 All 30

(*n*) *Ka l h Ch dra* v *G j* (191) 39 Cal 9 9 930 14 I C 30

(*o*) *Sho t* v *Bridjm n* (189[illegible]) [illegible] *I ichn n* v *Kul n* (1[illegible] *Do lat* v *Bhul d* (1[illegible] *M m d* v *M k*[illegible] All 3 (F B) [illegible] (1891) 13 All 394 [illegible] *ch a d* (1894) 15 [illegible] *man* v *L appa* [illegible] *Na ha d* v *I uhv* [illegible] *Sat ca j* v *S kharlal* [illegible] 8 I C 4

(*p*) *Bh p I lar* v *B j*[illegible] 4 I A 93

(*q*) *Sharat* v *Bridgman* [illegible] *M hammad* v *A*[illegible] 67 *Sh lal* v *J*[illegible] 54 *Pich a*[illegible] (1) 13 Mad [illegible] *Saba l I am* [illegible] I C 61 [illegible] 3 All 9 [illegible]

(b) *Limitation* —Time runs from the date of the decree capable of execution and that is the decree of the Appellate Court superseding that of the Court of first instance (r) and it has been held that this is so even if the Appellate Court holds that no appeal lies (s)

(c) *Time for payment fixed by the decree* —When a time is fixed for payment by the decree of the lower Court as in a decree for redemption and the decree is affirmed on appeal the decree capable of execution is the appellate decree Nevertheless the time for the performance of the condition is not extended (t) Thus in *Chandyamlal v. Ram Narain* (u) the suit was on a bond in which interest was stipulated at 30 per cent and the decree of the first Court said that if the defendant deposited the money within three months of date of decree he would be liable only for interest at 12 per cent This was confirmed on appeal by the High Court and Privy Council but the defendant was not allowed an extension of time till three months after the decree of Privy Council On the other hand in *Noor Ali v. Koni Meah* (v) a rent decree rendered a tenant liable to ejectment if the rent was not paid within 15 days This was confirmed on appeal and it was held that he would be protected from ejectment if he paid within 15 days of the appellate decree In a more recent case Mookerjee J said that the balance of judicial opinion is in favour of the view that when time is fixed by the decree of the lower Court for the payment of money and the decree is confirmed on appeal time runs from the date of the decree of the Appellate Court (w) It is submitted that the correct view is that the appellate decree not being complete in itself must be construed with reference to the decree of the lower Court and that time is not extended The Appellate Court can however by its decree alter the time of payment and should so frame its decree as to make it clear whether or not it intends to do so (x)

(d) *Mesne profits* —Mesne profits can be ordered from the date of institution of the suit until the expiry of three years from the date of the decree This means the decree capable of execution so that if the decree is confirmed on appeal three years run from the date of the appellate decree (y) But though the decree to be executed is the appellate decree yet the terms of it must be ascertained by reference to the decree of the lower Court Therefore when the original decree gave mesne profits from the date of its decree till the date of delivery of possession and was affirmed by Privy Council and plaintiff got possession subsequent to the latter decree he was entitled to mesne profits from the date of the original decree ( )

(n) *The decree to be executed must be a subsisting decree* —A obtains a decree against B and C B subsequently sues to set aside the decree on the ground of fraud and the decree is set aside as against him A cannot execute the decree as against B for the decree does not subsist as against B But he may execute the decree as against C for the decree is a subsisting decree as against C (a)

( ) Jow 4 H [illegible] Cand [illegible] gh (19 6) 53 [illegible] 6 1 [illegible] affing (19) 1 Pat 444 [illegible] (18) 8 Cal 1 [illegible] 3 Mahomed v Mal [illegible] 34 [illegible] (191) 35 All 641 4 [illegible]

( ) [illegible] (19 1) 43 All 4 [illegible] 61 [illegible]

(t) [illegible] Lal [illegible] (1 06) 18 All 4 [illegible] 1 M [illegible] (1 [illegible] 1 311 [illegible] (1) 31 Mad [illegible] (1) [illegible] 3 (1) A [illegible] 3 [illegible]

[illegible] (1914) 3 [illegible] 1 [illegible] 6 1 [illegible] Mahomed (19) 6 Lal 316 [illegible] 263 [illegible]

( ) (1 3) 31 All 3 [illegible] 364

( ) (1 6) 13 [illegible] 13

(w) [illegible] (19 1) 34 C [illegible] 41 [illegible] 0 [illegible] 6

( ) [illegible] (1) 31 Mad [illegible]

(y) [illegible] (19 1) 3 All [illegible]

( ) [illegible] (1919) 3 [illegible] 1 3 11 43 [illegible]

(a) [illegible] Lal (1 03) [illegible] 15 [illegible] Kora (1) [illegible] 1 3

(iii) *The decree to be executed must be a decree of which execution is not barred by the law of limitation* —See Limitation Act 1908 arts 182 and 183 and see notes to s 48 below

Execution of orders —The term order is defined in s 2 cl 14 as the formal expression of any decision of a civil Court which is not a decree An order under s 34 of the Guardians and Wards Act 8 of 1890 directing a guardian to pay a sum of money out of his ward s estate for the marriage expen es of a per on dependent on his ward is not an order within the meaning of s 2 cl 14 and it cannot be enforced against the ward after he has attained majority and the guardian has been discharged (b) But an order made after the dismis al of a partition suit directing the plaintiff to deposit in Court a certain sum of money as remuneration for work done by the Commi sioners of partition is an order within the meaning of s 2 cl 14 and it may be executed as a decree (c)

Merger of decree —As to merger of decree of the first Court in the decree of the Appellate Court see *Cajraj v Swami Nath* (d) where all the ca es are reviewed See also notes to O 9 r 13 Hearing of application after di posal of appeal

37 [**S** 649 **2nd para**] The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

Definition of Court which passed a decree

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree would have jurisdiction to try such suit

Changes introduced in the section —This ection differs from the corresponding section 649 of the Code of 1882 in that the expression the Court of first instance in clause (a) has been substituted for the expression the Court which passed the decree against which the appeal was preferred As to the effect of thi alteration see notes below

Court which passed a decree —Section 38 indicates the Courts by which decrees may be executed A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution It may also be executed by the Court to which it is transferred under s 24 above (e) The present section explains the meaning of the expre sion Court which pa ed a decree

(b) *P atham al v Clokk l ga* (1918) 41 Mad 41 41 I C 341

(c) *Cha dra K m v Ki sm K mari* (19) Cal 63 84 I C 4 ( ) A C

(d) (191) 33 All 13 36 I C 0

(e) See *M h mmad v Tikam Chand* (19) 4 All 85 I C 46 (25) A 6

The expression Court which passed a decree includes not only the Court which actually passed the decree but the Courts mentioned in clauses (a) and (b) of the present section The following rules are deducible from this section and section 38 —

1 Where the decree to be executed is a decree of a Court of first instance the proper Court to execute it is the Court of first instance

2 Where the decree to be executed is a decree passed by a Court of first appeal the proper Court to execute it is also the Court of first instance

3 Where the decree to be executed is a decree passed by the High Court in second appeal then also the proper Court to execute it is the Court of first instance Thus where a suit is instituted in the Court of a Subordinate Judge and an appeal from the decree is preferred to the District Court and a second appeal is preferred to the High Court the proper Court to execute the decree of the High Court is the Court of first instance that is the Court of the Subordinate Judge Under the Code of 1882 s 649 para 2 of which the present section is in the main a reproduction the Court to execute the decree would be the District Court the expression there used being the Court which passed the decree against which the appeal was preferred As a matter of practice however the Court of intermediate appeal never executed decrees passed by the High Court in second appeal The substitution of the expression Court of first instance in clause (a) of the present section for the expression Court which passed the decree against which the appeal was preferred gives legislative recognition to the practice followed by the Courts when the present Code was enacted

4 Where the Court of first instance has *ceased to exist* the only Court that can execute the decree is the Court which at the time of making the application for execution would have jurisdiction to try the suit in which the decree was passed A Court vested with the powers of a Court of Small Causes ceases to exist as a Court of Small Causes when those powers are withdrawn (*f*) A Court does not cease to exist merely because its head quarters are removed to another place or because the local limits (*g*) or the pecuniary limits of its jurisdiction (*h*) are altered

5 Where the Court of first instance has *ceased to have jurisdiction to execute the decree*.—In this case the Court of execution is the Court which at the time of the application would have jurisdiction to entertain the suit in which the decree was passed But the jurisdiction of the original Court is not entirely excluded A decree is passed by Court X directing the sale of immovable property within its jurisdiction *After* the decree and before the application in execution for sale the property directed to be sold is transferred by the Local Government s notification from the jurisdiction of Court *X* to the jurisdiction of Court Y Has Court *X* jurisdiction to entertain the application for execution and to order the sale of the property? According to the Calcutta decisions both Court X and Court Y have jurisdiction to entertain the application but if the application is made to Court X it should not itself make an order for the sale of the property but transfer the application to Court Y for making and executing the order for sale (*i*) According to an earlier decision of the Madras High Court

(*f*) *Z [illegible] of [illegible] v [illegible] rajadu* (1906) 19 M 1 44

(*g*) *Lat [illegible] v Madhun M[illegible]h[illegible]n* (1881) 6 Cal 513 17

(*h*) *In re [illegible] v [illegible] kat Hussa[illegible]n* (191[illegible]) [illegible] Cat [illegible] J 113 39 I C 63

(*i*) *Lat hm[illegible]n v M[illegible] Moh[illegible]n* (1881) 6 Cal 513 *Premch[illegible]d v Mokhoda* (1890) 1[illegible] Cal 6[illegible] [F B] *Jafar v Kam[illegible] Deb* (1901) 29 Cal 38 *[illegible] Nara[illegible] Mat[illegible]ra [illegible]* (1908) 3[illegible] Cal [illegible]0[illegible]4 The case of *[illegible] v D[illegible] [illegible]th* (1898) [illegible] Cal 31 which is sometimes cited in this connection is not a case of transfer of *jurisdiction* there was in that case an order merely for the *distribution of business* between two Courts each of which had jurisdiction see 8 Cal 38 40- 41 and 3[illegible] Cal 9[illegible] 9

Court *X* has jurisdiction to entertain the application for execution but the question whether it could itself order the sale of the property was not decided (*j*) In a later Madras case the opinion was expressed that Court *X* has no jurisdiction to entertain the application for execution (*k*) but this view was overruled by a Full Bench of the same High Court the Full Bench taking the same view as the Calcutta High Court Wallis C J observed that the power of sending the decree to another Court was sufficient to meet the case The learned C J construed sec 150 as conferring upon the Court of the transferred area jurisdiction to entertain the application for execution but was of opinion that the section could not be read as taking away from the Court which passed the decree the power which it had according to the unbroken current of authorities of entertaining the application (*l*) But a Court to which a decree is transferred for execution has no jurisdiction to order either the attachment or sale of immovable property if at the time of the order such Court had no territorial jurisdiction over the property (*m*)

Cl (b) **Ceased to have jurisdiction to execute** —A Court does not cease to have jurisdiction to execute its decree because it is abolished and re-established (*n*) or merely because its business is transferred by the District Judge under the Act constituting it to another Court (*o*) or because the area in which the judgment debtor resides is transferred from its jurisdiction to that of another Court (*p*) Where an order was made by the High Court of Calcutta rejecting a petition for leave to appeal to the Privy Council and directing the petitioner to pay the respondent s costs but the order was silent as to the Court by which it was to be executed it was held that the circumstance that the High Court on its appellate side does not in practice execute its own decrees and orders did not make that Court as regards the execution of the order a Court that had ceased to have jurisdiction to execute its decree (*q*) [O 45 r 15] Nor does a Court which passed a decree cease to have jurisdiction to execute it because after the passing of the decree a party [*e g* Court of Wards] is added in execution who had he been a party when the *suit* wherein the decree was passed was instituted would have deprived the Court of its jurisdiction (*r*) In a recent Madras case (*s*) the Court said with reference to cl (b) of the section In fact this portion of section 37 of the Civil Procedure Code clearly has reference to transfers of territorial jurisdiction from one Court to another In applying this section the nature of the cause which put an end to the jurisdiction of a Court is immaterial (*t*)

What decrees may be executed —See note under the same head to s 36 on p 135 above

COURTS BY WHICH DECREES MAY BE EXECUTED

38 [S 223 **1st para**] A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution

Court by which decree may be executed

(*j*) *Pi d ra ga v I yth l nga* (1907) 30 Mad 53

(*k*) *Subbiah* *Pa a iall an* (1914) 3 M d 46 4 1 I C 893

(*l*) *S i Vadan v M th s m* (1919) 4 Mad 8 1 83 833 83 84 53 I C 13 *M thu ka ppa v I y* (19 3) 4 Mad L J 10 3 I C 9 0 (4) A M 3 *P iya v lr h la v Je ip* (19) 50 Mad 88 103 I C 4 ( ) A M 6

(*m*) *Veerappa v I a* (19 0) 43 M d 13 3 I C

(*n*) *Khod ij t l v Ha d ar* (19) 4 Pat 688 9 I C 900 (6) A I 900

(*o*) *Kali I ido v D o Nath* (1898) Cal 315 *Jagi nath* *Sheo* *dan* (19 1) 6 Pat. L J 304 6 I C 48

(*p*) *M th k ruppa v P a kar d n* (1923) 45 Mad L J 10 3 I C 9 6 (4) A M 3

(*q*) *H ro l e had v Bl pendro* (1 91) 6 Cal 901

(*r*) *B ndoo v Nara grao* (1914) 38 B m 66 I C 406

(*s*) *Venkat m Naik v S ra u M d l* (1919) 4 Mad 461 464 51 I C 10

(*t*) *Ga kha v Abd l* (1893) 1 Bom. 16

Court which passed a decree —See notes to s 37 on p 137 under the same heading

Court to which it is sent for execution —This would be under sections 39 and 40

Jurisdiction of Court executing a decree —The following are the leading rules relating to the jurisdiction of Courts executing decrees —

RULE I —*No court can execute a decree in which the subject matter of the suit or of the application for execution is property situate entirely outside the local limits of its jurisdiction* —Territorial jurisdiction in other words is a condition precedent to a Court executing a decree (u)

Exception I —The Court which passed a decree for the enforcement of a mortgage of immovable property has power in execution of its decree to order the sale of such property though it may be situate beyond the local limits of its jurisdiction — *A* sues *B* in a Court in district X on a mortgage of two properties one situate in district X and the other in district Y A decree is passed for the sale of both the properties The Court in district *X* having jurisdiction to entertain the *suit* in respect of the property situate in district Y (s 17) has also jurisdiction to sell that property *in execution* of its decree though the property is situate *beyond* its jurisdiction It is *not bound* to send the decree for execution as regards the property in district Y to the Court of that district under s 39 (c) but it *may* do so (v) In the latter case the decree as respects the property in district Y may be executed by the Court of district Y (w) See also notes to s 17

Exception II —Where after the passing of a decree in a suit for the enforcement of a mortgage the whole of the immovable property included therein falls by transfer of jurisdiction within the local limits of the jurisdiction of another Court the application for execution of the decree according to the Calcutta rulings may be made either to the Court which passed the decree (though the property is no longer within its jurisdiction) or to the Court within the local limits of whose jurisdiction the immovable property falls by such transfer but where the application is made to the former Court it should not itself order the property to be sold but should transfer it to the latter Court for passing and executing the order for sale (x) See note to s 37 Court which passed the decree rule 5 p 137

Exception III —The salary of the public officer or of a servant of a Railway company or local authority may be attached by a Court though the disbursing officer may not be within the local limits of the Court s jurisdiction See O 21 r 48 and notes thereto

RULE II —*Where a decree has been passed for the payment of money and the decree holder applies for attachment and sale of immovable property (belonging to the judgment debtor) which forms one estate of part whereof is situated within the local limits of the jurisdiction of the Court executing the decree and part beyond such limits the Court executing the decree has the power to attach and sell the whole estate including the portion situated beyond the local limits of its jurisdiction* See O 21 r 3 and notes thereto

RULE III —*Whether a Court to which a decree has been sent for execution under s 39 has jurisdiction to execute the decree if the amount of the decree exceeds the limits of the pecuniary jurisdiction of the Court?* There is a conflict of decision as to whether the Court of execution is restricted to the pecuniary limits of its jurisdiction To put the question in a concrete form if a decree for Rs 7 000 is sent for execution to a Court whose

(u) *Pr m Cha d* v *Mokhoda Dev* (1890) 17 Cal 699 03 *B gg D nl p & C* v *J ga nath* (1912) 39 C l 104 11 I C 41 *Ambika* v *Ma ilga j Loan Offi e* (19 9) 33 C W N 848

(v) *Maseyk* v *Steel* (188) 14 Cal 661 *Kart k Nath* v *Tul kdhari* (1888) 1 Cal 667 *Gopi Mohun* v *D ybaki* (189) 19 C l 13 *T co* v *Sh b Ch dra* (1894) 21 C l 639 *Jager ath* v *D p R* (189) Cal 871

(w) *Aziz B ksh* v *S ltan Si gh* (1918) I P no 43 p 1 46 I C 9 *J gernath* v *D p I an* (189) 2 Cal 871

(x) *L t hman* v *M ll* (1881) 6 C l 513 *Jahar* v *Kam D bi* (1901) 8 Cal 38 *S Nadan* v *M thusam* (1919) 4 M d 8 1 5 I C 213

pecuniary jurisdiction does not exceed Rs 5 000 can the latter Court execute the decree? Yes according to Madras (y) No according to Calcutta (z) Bombay (a) and Patna (b)

RULE IX —*Where the decree sought to be executed is passed by a competent Court the Court will not be deemed to be incompetent to execute the decree merely because by reason of the amount of interest or mesne profits ascertained for a period subsequent to the institution of the suit the pecuniary limits of the jurisdiction of such Court are exceeded* —*A* obtains a decree against *B* for Rs 4 000 and interest in a Court of which the pecuniary jurisdiction is limited to Rs 5 000 *A* then applies to the Court for execution At the date of the application for execution the total amount of the decree by reason of accumulation of interest exceed Rs 5 000 The Court has jurisdiction to execute the decree All the Courts are agreed on the point (c) for if the Court had jurisdiction at the time of the institution of the suit incidental causes such as the accumulation of profits or interest or a rise in price will not affect its jurisdiction See notes to s 6

RULE X —*A Court to which execution of a decree is transferred has no jurisdiction to order either the attachment or sale of immovable property in execution if at the time of the order such Court had no territorial jurisdiction over the property* (d)

Powers of executing Court—Court executing a decree cannot go behind the decree—A Court executing a decree cannot go behind the decree It must take the decree as it stands (e) It has no power to entertain any objection as to the validity of the decree (f) or that it was obtained by fraud (g) or as to the legality or correctness of the decree (h) e g an objection that the decree sought to be executed was passed against a wrong person (i) or that it was passed against a lunatic or a minor not properly represented (j) The reason is that a decree though it may not be according to law is binding and conclusive between the parties until it is set aside either in appeal or revision (k) For the same reason the Court executing a decree cannot alter vary or add to the terms of the decree (l) even by consent of parties unless it is in adjustment of the decree (m) But a decree passed against a person who was dead at the date of the decree without bringing his legal representative on the

(y) Nara aju v Le I ti (1884) Mad 39 Sha m g v I a nanatl an (1894) 1 Mad 309

(z) Durga v Un tara (1889) 16 Cal 46 Cokul v Aulhd (1880) 16 Cal 4 Sh msundar v An th B dhu (1910) 37 C 1 574 6 I C 97

(a) Sidl eslwar v Ha lar (1888) I Bom 1

(b) Am it Lal v M lidl r (19) 1 Pat 6 1 6 I C 538 ( ) A P 188

(c) Bidjadl r v Mu rdra Nath (19) 53 C 1 14 89 I C 6 ( ) A C 10 6 (F B) ov rr li g In ell ct Bhi pendra v I rna (1910) 43 Cal 6 0 8 I C 34 and Bai I t Mola anda (1919) 4 C W N 34 8 I C 1 0 S da han Das v I an (1911) 33 All 9 I C 383 Arogyi Appa l (190) Mal 543 K ya v I K ta (191) 40 Mad 1 33 I C 439 Sheikl Moh m d v Mal tab (191) Pat L J 394 41 I C 31 D anath v Mat M ja ti (19 1) 61 t L J 54 60 I C 346 Sl v N l ji (18 6) 10 Bom 00 I sw r v D I (1894) 1 Cal 5 0 I ch ram v K oo (1913) 40 C 1 6 I I C

(d) Ve ppa v I a s n (19 0) 43 Mad 13 3 I C 5 3

(e) F mphal v I tm I (1883) 5 All 53 M ttia v I I (188) 10 M d 33 Sheik B da v I m ha dra (188) 11 Bom 53 Ve lat chal I edd v I tira a I edd (1901) 4 Mad 66 Mat r v Abd l (1) 30 C W N 56 59 I C 6 (6) A C 109 Appa la v K ishn (190) M d 53

(f) G mall m v Io a d r (1904) M d 118 I g samy v Thir pati (1905) 28 M d 26 K m ett v S bap tty (190) 30 M d 6 L Iidl r v Chat rbl j (1833) 1 All 7

(g) S dd ndra v B da (1886) 9 M d 80 Dh Ia v L chm wa (1 06) 3 C 1 839

(h) Ch l v Pa h r (190) 6 C W N 96 Crst Cl d v Sho hi Shida hwa (1900) 7 Cal 9 1 96 7 I A 110 1 4 Jai Cob d v Iatc I rt p (190) All W N 6

(i) K dr lla v Lp d a (19 4) 40 C L J 4 84 I C 933 ( ) A C 03

(j) Kal p da v H (191) 44 Cal 6 3 I C 8 6 Lalore B I v Gh It (1 4) 5 Lah 4 8 I C 460 (4) A L 419

(k) Pap I ra I rat pa (1 36) 19 M d 49 3I 3

(l) Udwa t v I klan S gh (1 01) 8 Cal 3 3 3 I A v Secreta y of St te (18 8) 3 C 1 161 4 I A 13 II rro v S rut (18) 8 Cal 33 9 I A I I kwargar C I ma (18) 13 B m 106 S h v K ush (1891) 15 P n 644 I al g v Ku danwo (190) 26 Bom 0 D mbar S gh v Kalian S gh (19) 44 All 3 0 6 I C 99 (22) A A

(m) K hya Lal v The Court f Wards (1871) 16 W 1 5 radha Sitoo (19) 27 C W N 0 1 I C 3 (22) A C 311

record is a *nullity* and it cannot be executed against his estate (n) As to whether a decree passed by a Court without jurisdiction can be executed see notes to s 21 section 21 and execution proceedings As to the powers of a Court to which a decree is transferred for execution see notes to s 42 and O 21 r 7

Construction of decree by executing Court—If the decree is free from ambiguity the Court of execution is bound to execute it whether it be right or wrong (o) But though a Court executing a decree cannot go behind the decree it is quite competent to construe the decree where the terms of the decree are ambiguous and to ascertain its precise meaning for unless this is done the decree cannot be executed The construction of a decree must be governed by the pleadings and the judgment (p) And the Court should if possible put such a construction upon the decree as would make it in accordance with law (q) When a particular construction has been put upon a decree in a former execution proceedings it is not open to the Court in a subsequent application to treat that construction as erroneous See note to s 11 Orders in execution proceedings on p 77 above

39 [S 223, 2nd and 3rd paras] (1) The Court which passed a decree may, on the application of the decree holder send it for execution to another Court,—

Transfer of decree

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court

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(n) *J gi Lall* v *Lall P m* (1919) 4 Pat L J 40 0 I C 5 0 *R p Nara* v *Ramayee* (19 8) 3 C L J 19 *Nar ndra* v *Gopal* (191) 1 Cal L J 634 0 I C 06 *Imd d Ali* v *J gan Lal* (190) 17 All 4 8 *I dha I t L i S I b* (1891) 13 All 53 17 I A 1 0 *J dh* v *I mcha dra* (190) 6 B m 31 *I ular th* v *Lall* (1909) 11 B m L R 10 0 4 I C 137 *S b ama a* v *I aith atha* (1913) 38 Mad 68 31 I C 198

(o) *Pirth i* v *Rup S gh* (1898) 20 All 397 *Udu t* v *T kh S gh* (1901) 28 Cal 3 3 28 I A 7

(p) *Ram K rp l* v *R p K an* (1884) 6 All 269 5 11 I A 37 *K l krish a* v *Secretary of St te* (1889) 16 C l 1 3 183 15 I A 186 *Jagatj t* v *S lj t* (189) 19 Cal 1 9 19 I A 16 *Ja ln i* v *Jwala* (1896) 18 All 344 *Sh l l* v *J m kl l* (1894) 18 B m 54

(q) *Am l k* v *La h* (189) 19 All 1 4 *B k* v *Ldd Na* (1899) 1 All 361 *I dha k l* v *Collect r of J p r* (1901) 23 All 220 8 28 I A 28

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction

Alterations in the section —The words of competent jurisdiction in sub s (2) are new

The Court which passed a decree —See notes to s 37 under the same head on p 137 above

Another Court —The Court to which the decree is sent for execution must be a Court in British India (r) Decrees cannot be sent to Courts not in British India except in the case for which section 45 makes special provision (s)

Jurisdiction of Court executing a decree —See notes under the same head to s 38 on p 140 above

Transfer of decree for execution —A decree passed by one Court may be sent for execution to another Court either on the application of the decree holder on one of the grounds stated in this section or by the Court which passed it of its own motion When a decree is sent by the Court which passed it for execution to another Court the Court sending the decree must send a copy of the decree and other documents mentioned in O 21 r 6 to the Court by which the decree is to be executed The latter Court must on receiving the copy of the decree and the other documents cause the same to be filed (O 21 r 7) An application for transfer of a decree is not an application for execution (t) The decree holder who has applied for execution to the Court *which passed the decree need not make a fresh application to the transferee* Court (u) When he has not applied to the Court which passed the decree he must apply to the transferee Court for execution (O 21 r 10) The Court executing a decree sent to it for execution has the same powers in executing such decree as if it had been passed by itself (s 42)

Clause (a) —This clause provides for transfer of the decree if the judgment-debtor is resident in the jurisdiction of another Court The power of the Court under this clause to transfer a decree is not confined to the case where execution is sought against the person of the judgment debtor The decree holder is not bound to state in the application for transfer the mode in which the decree is to be executed If he satisfies the Court that the judgment debtor resides in the jurisdiction of another Court he may ask for transferring the decree to that Court without stating anything more in his application (v) If the judgment debtor s garnishee is resident in another jurisdiction the decree must be transferred there to serve a prohibitory order upon him (w)

Clause (b) —If the judgment debtor s property is out of jurisdiction the Court which passed the decree cannot attach it but must transfer the decree to the Court within whose local limits *the property may be* (x)

Clause (c) —As stated in rule 1 under sec 38 territorial jurisdiction is a condition precedent to a Court executing a decree If the decree directs the sale of immovable property within the territorial limits of the jurisdiction of another Court it must be sent to that Court for execution There is an exception to this in the case of a decree for the

(r) *Ka turcla i v Pa sla* (1897) 1 Bom 30
(s) *I tin Ll Dxo* (190) 9 Cal 400 *P rce Leslie v I err n l* (191) 40 Mad 1063 4 I C 34
(t) *Kh tp l Tilam Si gh* (191) 34 All 396 14 I C 1 Sc al o *L k b l ry* v *Naran D s* (19) 54 I A 1 9 54 Cal 00 101 I C 4 ( ) A I C 3 approv ing *Ch terp t Si gh v Sut S n* (1916) 43 Cal 903 36 I C 60
(u) *K B D tt v Tarapra a* (19 3) 2 Pat 909 4 I C 3 (4) A I 1 0
(v) *Dwa ka Nath v Imperial Bank f Ind a* (19) 33 C W N 620 (9) A C 9
(w) *B gg D nlop & Co v Jag nath* (191) 3 C I 104 11 I C 417
(x) *Ba k of Be gal v Sarat* (1919) 4 Pat. L. J 141 49 I C 943

enforcement of a mortgage see exception 1 to Rule 1 under sec 38 above As to such decrees the Court may either execute the decree itself or to send it for execution to the Court having local jurisdiction (*y*)

Clause (d)—In a Bombay case the Court expressed a doubt whether clause (d) of this section enabled a Subordinate Judge to transfer a decree for execution to a Small Cause Court where the property attached was within the local jurisdiction of the Subordinate Judge ( )

A decree may be executed simultaneously in more places than one—A Court passing a decree has the power to send its decree to more Courts than one for concurrent execution But this power should be sparingly exercised and when exercised it would be in many cases proper to impose terms on the decree holder that he should not proceed to a sale under all the attachments at once (*a*)

Appeal—An appeal lies from an order rejecting an application for the transfer of a decree The reason is that questions relating to the transfer of decrees are questions relating to execution within the meaning of s 47 (*b*) See s 2 (2)

Madras Village Munsif s Court Act I of 1889—This Act is a complete code of procedure by itself and the provisions of the Civil Procedure Code cannot be imported into it except to the extent provided by the Amending Act 2 of 1920 (*c*)

Award—An award filed under s 11 of the Indian Arbitration Act 9 of 1899 is enforceable under s 15 of the Act as if it were a decree of the Court It may therefore be transferred for execution as a decree under this section to another Court (*d*) So also an award made under rules framed under s 43 of the Co operative Societies Act 2 of 1912 (*e*)

40 [*New*] Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province

Transfer of decree to Court in another province

Executed in such manner as may be prescribed by rules in force in that province—The manner of execution is that of the Court which executes the decree but as to whether execution of the decree is barred by limitation or not it is the law governing the Court which passed the decree that applies (*f*)

41 [S 283 4th para] The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure

Result of execution proceedings to be certified

Certify—The Court of execution must certify the result of the execution to the Court which passed the decree and transferred it for execution When the certificate is sent the transferee Court ceases to have seizin of the execution proceeding until then

(*y*) *K rt k Nath v Tul Idhari* (1888) 1 Cal 66

( ) *Kri l v Bla s* (1894) 18 Bom 61

(*a*) *S rod t Fr ad v L Im p t* (18) 14 M I A ... *Krishto Kul re Iooplall* (188) 8 C L 68 ... *Deb v Chowdh ry* (19) 5 Rang 39 104 I C 133 ( ) A R ... *Dwa ka Nath v Imperial Ba k f I dia* (19 9) 33 C W N 670 ( ) A C ...

(*b*) *Ilat* ... *C* ... *v I tap Ch ira* (1904) 8 C W N

( ) S ... *I a v* ... (19 3) 46 Mad 34 ... 3 I C 9 ( ) A M 6 1

(*d*) *Su I* ... *C I m I lal* ... *d* ((19 1) 43 All 394 61 I C 401

( ) *I uh j* ... *M I dee* (19) 46 Bo 1..9 64 I C 33 ( ) A B 3

(*f*) *T* ... *urn* ... *Dh* ... *ira N th* (1890) 1 C I 4.1 4) ... *K r h r v* ... *ll* ... *b* (1913) 36 Mad 108 11 I C 63

the decree rests in the transferee Court (g) The Oudh Court has held that though the transferee Court ceases after certification to have jurisdiction further to execute the decree it has power to decide an objection taken before it in respect of anything done in the course of the execution proceedings taken by it (h) Mere notification of payments made on account of the decree to the Court which passed the decree does not amount to a certification under this section (i) In a Bombay case it was said that the section only means that the Court of execution should keep the Court which passed the decree informed of what has happened in the execution (j) This is incorrect for the certificate *is a very important step it is a formality which has the effect of determining the jurisdiction of the transferee Court and is only sent after complete failure to execute* or after the Court has executed as far as it can (k)

42 [S 228] The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself

Powers of Court executing transferred decree

Powers of Court executing transferred decree —A Court executing a transferred decree has the same powers as if the decree had been passed by itself Its powers are therefore limited in the same way as they would be if it were its own decree See note under sec 38

Powers of transferee Court in executing decree —The transferee Court can decide all questions arising in execution as if it were its own decree (l) but it cannot entertain an objection to the legality or correctness of the decree (m) or that the decree is defective (n) or that it was obtained by fraud (o) or that it directs a sale of property which is not saleable under sec 60 of the Code (p) It cannot alter vary or add to the terms of the decree it cannot allow future interest where none is allowed by the decree (q) Nor can it question the right of a transferee of a decree whose name is on the record as the person entitled to execution (r)

The transferee Court has no power to question the jurisdiction of the Court which passed the decree (s) There were conflicting decisions on this point which has now been settled by the omission from O 21 r 7 of the words or of the jurisdiction of the Court which passed it which occurred in sec 223 of the Code of 1882

(g) *Altaf Husain v Muzaffar* (1898) 20 All 1 9 *Lilli v Gian* (1923) ... L P 4 3 4 I C 14 (3) A B 3 6 *Shivlingappa v Shidlingappa* (1924) 6 Bom L R 34 80 I C (4) A B 3 9 *Muhammad v Chhittoo Lal* (1936) Pat 318 94 I C 36 (6) A 1 4

(h) *Muhammad Jilani v Abdul Rahman* (1923) 4 Luck 09 11 I C 444 (9) A O 76

(i) *Shivlingappa v Shivlingappa* (1924) 6 Bom L R 345 80 I C (4) A 1 35 *Lilli v Ganesh* (1923) 25 Bom L R 4 3 4 I C 149 (3) A B 39

(j) *M ... am v ... ath* (1923) 6 I C 549 (3) A B 3 1

(k) (1924) 26 Bom L R 345 *supra*

(l) *Stal v Clement Robson & Co* (1921) 43 All 334 338 61 I C 401 *Sawal D v Collector of ...h* (1924) 46 All 580 83 I C 848 (4) A A 00

(m) *Maharaj of Bharatpur v ... Kunwar ... D* (1901) 3 All 181 *... ah ... J m a* (1904) 31 Cal 9 ... *S ... a ... v ... I ... ma* (1 ...) 4 M ... 4 *Lakshmi v ... J ...* (19 ...) 31 Bom L R 400 113 I C ... (9) A ... 1

(n) *P ... v ... n* (188) 11 B ... 8

(o) *P ... v D ... ha* (1 91) 1 P ... 0

(p) *Sadashiv v Jai ...* (1 8) 8 Bom 1 *Madho Lal v K ...* (1) 10 All 130

(q) *Gajadhar v F ... m Ma ...* (19 5) 4 Pat 440 93 I C ... ( ) A P 80

(r) *P ... v M ... o Nath* (1894) 21 W R 141 *M ... v Oudfat* 21 W R 19

(s) *H ... v ...* (1914) 38 Bom 124 23 I C 1 3 *Sheopat ... v Harak ...* (1919) 1 ... 46 I C 419 *Zamindar of Ettiyapuram v Chidambaram* (1920) 43 Mad 6 ... 6 ... I C 8 ...

If the Court which passed the decree has made an order for execution the transferee Court cannot question the legality or propriety of that order (t) It cannot therefore entertain an objection that the execution of the decree was barred by limitation at the time when the order for execution was made (u) but if the transferor Court which passed the decree has made no order for execution the Court of execution has power to decide whether execution is barred by limitation (v) or it may stay execution and leave the objection to be decided by the Court which passed the decree (w)

The Court which passed the decree does not by reason of the transfer altogether surrender its control over the execution proceeding It has power under O 21 r 26 to make an order for stay of execution It may withdraw the execution by calling back the decree (x) The Rangoon High Court has held that without withdrawing the decree it may make an order for simultaneous execution by another Court (y) Again it has jurisdiction to decide an objection as to limitation if referred to it by the transferee Court (z) The transferee Court has jurisdiction limited to the execution of the decree transferred to it and it cannot transfer it to another Court (a) Successive execution applications must be made to it (b) and its jurisdiction continues until (1) the execution proceeding is withdrawn from it or (2) it has certified under section 41 execution or execution as far as possible or failure to execute (c) I has been said that till then it is the only Court which has seizin of the execution proceeding and that an execution application made to the Court which passed the decree is not a step in aid of execution so as to save limitation (d) But it is submitted that this is not correct for as already stated the jurisdiction of the Court which passed the decree is not altogether excluded If the decree is assigned after the transfer the assignee must apply for execution to the original Court (e) If after a decree has been transferred to another Court for execution the judgment debtor dies the Court which made the decree is by s 50 of the Code of Civil Procedure the proper Court to order that the execution shall proceed against his representative But that Court has not exclusive jurisdiction if the Court to which the execution has been transferred makes the order that is merely an irregularity in procedure which can be waived Where the representative having received notice has not objected to that Court making the order and by subsequent applications to it has obtained postponements of the sale he is bound by the order (f)

The mere striking off or rejection of an execution application for some informality in the application does not terminate the jurisdiction of the transferee Court to execute the decree nor render it necessary to send any certificate to the transferor Court (g) On the other hand if the application has been dismissed for non prosecution and a certificate of failure of execution has been sent the only Court which can

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(t) *Mull Abd l v S khi l* (189) 1 Bom 456 *l n L l v Pidhey L l* (198) 7 All 330 *Heerch d r v Maymana* (1890) 6 Cal 736

(u) *Hus v S j* (1891) 15 Bom 28

( ) *Chhotay Lal Pu an Mull* (1896) 3 C 1 33 41 *Iecke v Dan l* (1868) 10 W R 10 F B *h m v S brama i m* (19 8) I ang 5 106 I C 85 (8) A R 40 c f *Ramu Ial v Dayal S gh* (1894) 16 All 390

(w) *Srih n v Mur n* (1886) I Cal 5

(x) *La g v J mra il l* (19 6) 0 Bom 439 94 I C 146 (6) A B 71

(y) *D b v Chardh ry* (19 7) 5 Rang 39 104 I C 133 (7) A R 9

(z) *Srih n v M ari* supra

( ) *Shib v Bepi B hary* (19 8) 3 Cal 12

(b) *Ma orath D u v An bila* (1910) 13 C W N 533 1 I C

(c) *Abd Beg m v M aff r* (1898) 20 All 1 9 *F uth v Ca esh* (19 3) Bom L R 4 3 4 I C 149 (3) A B 396 *Sh l ngapp v Sh dmalappa* (19 4) 26 Bom L R 34 80 I C 5 (24) A B 3 9

(d) *Mah raja of B bbili v Na r ja* (1916) 43 I A 38 39 Mad 640 36 I C 68 affirming (1914) 37 Mad 231 15 I C 738 *J endra Nath v K mar Jogendra* (1923) 2 Pat 47 4 I C 608 (23) A P 384 *Ma or th v Ami* ca supra *Mah m m d v Chhatoo* (19 6) 5 Pat 398 94 I C 36 (6) A P 74

(e) *Fra j v Ratti sha* (187) 9 Bom H C R 49 *Kal r v Ilahi Baksl* (1880) 2 All 28 *Amar Chandra v Guru Proson o* (1900) Cal 488 *Tameshwa v Thakur Prasad* (1903) 5 All 443

(f) *Ja g B had r v Ba k of Upp r Ind a Ltd* (19 8) 55 I A 3 Luck. 314 10 I C 417 (28) A I C 16

(g) *Abda Begum v M z ff r* (1898) 0 All 1 9

entertain a fresh application is the Court which passed the decree (*h*) See note "Certify" under section 41 above

The Court is not bound to certify failure of execution if the decree holder wishes to make another attempt (*i*)

43 [S 229] Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend or by any Court established or continued by the authority of the Governor General in Council in the territories of any foreign Prince or State may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India

Execution of decrees passed by British Courts in places to which this part does not extend or in foreign territory

This section applies to British Courts in Scheduled Districts and to British Courts in foreign territory Such Courts may transfer their decrees for execution to Courts in British India to which the Code applies The Court of the Political Agent Sikkim is a Court referred to in the section and it may transfer its decrees for execution to the Subordinate Judge at Darjeeling (*j*) The application for execution of a transferred decree must shew that the Court is one referred to in this section (*k*)

44 [S 229 B] The Governor General in Council may, by notification in the Gazette of India, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor General in Council, or any class of such decrees may be executed in British India as if they had been passed by the Courts of British India

Execution of decrees passed by Courts of Native States

By notification —For notifications issued under this section see General Statutory Rules and Orders Vol I pp 622 623 and Vol IV pp 682 683 and 685

Decree of Courts of Native States —The section uses the words "Native Prince or State" which are more restrictive than the words "foreign Prince or State" in section 43 and therefore does not refer to foreign Courts outside India But the section does not take Native State decrees out of the category of foreign decrees (*l*) It empowers a Court in British India to execute a decree transferred from a notified Native State Court but the British Court is not precluded from refusing execution on the ground that the Native State Court had no jurisdiction to pass the decree (*m*) or that the decree was obtained by fraud (*n*) The judgment-debtor will have the same defences as if

(*h*) *M th ra v K d r* (1898) 3 C W N c xl

(*i*) *I th v C e h* (19 3) B m L R 4 3 4 I C 149 (3) A B 346

(*j*) *Jam l v M l raja f S kk m* (1913) 38 C l 8 0 11 I C 44

(*k*) *Jad b Cha dra v D a th* (18 0) 4 Beng L R 134 18 W R 1 4

(*l*) *Raj M v P rma d* (1891) 1 Bom 16

(*m*) *Veeraraghava v Muga Sad* (1916) 39 Mad 24 26 I C 2 *J rappa v Jerry* (1916) 40 Bom 551 36 I C 363

(*n*) See 15 L m 16 *supra*

he were sued on the foreign judgment (o) The section was merely intended to alter the procedure for enforcing Native State decrees (p) and must be construed as subject to the same limitations as are contained in s 13

Limitation for execution of Native State decree —The period of limitation for execution of a decree of a Court of a Native State transferred for execution to a Court of British India is not the period prescribed by the law of that State but that prescribed by the law of British India that is three years from the date of the decree [Limitation Act 1908 Sch I art 182] (q)

Execution of decrees foreign territory

45 [S 229 A] So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor General in Council in the territories of any foreign Prince or State to which the Governor General in Council has, by notification in the Gazette of India, declared this section to apply

Court established or continued in Native States —For a list of such Courts see General Statutory Rules and Orders Vol I pp 638 642 and Vol IV p 683

Execution of British decrees in foreign territory —This is the only section which refers to the execution in foreign territory of decrees of Courts in British India Such decrees can only be executed in foreign territory by British Courts established there and empowered by notification under this section It is only when the Court in foreign territory is a Court established and continued by the Governor General in Council in the extraterritorial jurisdiction that there is power to provide for the transfer to them of decrees of British Indian Courts for execution for both in Native States and in other foreign territory execution would be pursuant to the legislative authority or sovereign powe f such State or territory (r)

The two previous sections dealt with the converse case of the execution by British Courts of decrees of—

(a) British Courts in Scheduled Districts s c 43

(b) British Courts in foreign territory including Native States sec 43

(c) Foreign Courts in Native States sec 44

All other decrees of foreign Courts i e Courts outside India and Courts of Native States not notified under sec 44 must be enforced by suit But as regards foreign Courts in Native States a reciprocal arrangement is sometimes effected by treaty for the execution of their decrees in our Courts and our decrees in their Courts Such an arrangement was made with Travancore in 1887 and is referred to in the undermentioned case (s)

By notification —For notifications issued under this section see General Statutory Rules and Orders Vol I pp 618 621

(o) *Pa ch Kan* v *Girdhari Mal* (19) 30 C W N 95 98 I C 40 ( ) A C 9
(p) See 15 Bom 16 *supra*
(q) *Nalabha* v *D yabhai* (1916) 40 Bom 504 36 I C 369
(r) *I ve ce Le l e* v *Perum l* (1917) 40 Mad 1069 10 6 10 9 4 I C 94
(s) (1917) 40 Mad 1069 *supra*

46 [*New*] (1) *Upon the application of the decree holder* the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment debtor and specified in the precept

Precepts

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree holder has applied for an order for the sale of such property

Attachment under precept —It was at one time proposed to do away with the system of execution by transfer of decree under sections 30 to 42 and to substitute another system whereby the Court which passed the decree retained complete control and issued precepts to one or more other Courts to carry on execution under its direction This proposal was abandoned and the system of execution by transfer of decree retained But the proposal led to the insertion of the present section by which the Court which passed the decree can issue a precept of attachment to enure for two months or pending transfer of decree and application for execution The object of a precept is to enable a decree holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree No such attachment however can continue for more than two months except in the two cases mentioned in the section The effect of the proviso is to render re attachment unnecessary

The Court to which a precept is issued derives its authority from that precept and has no power to do anything not authorized thereby but it must be presumed to have inherent powers to deal with all matters that may incidentally arise in connection with proceedings for attachment It cannot therefore be said that the Court to which a precept is issued has no jurisdiction to stay execution if the judgment debtor deposits the decretal amount in Court or gives security for payment of the amount (*t*)

Questions to be determined by Court executing decree

47 [S 224] (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit

Questions to be determined by the Court executing decree

(*t*) [illegible] v *Dina Nath* (1926) 8 Lah L J 164 94 I C 119 ('26) A L 4 3

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court

Explanation—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit

Changes introduced in the section—This section corresponds with s 244 of the Code of 1882 except in the following particulars —

1 Sub clauses (a) and (b) of s 244 which provided for the determination of questions regarding the amount of mesne profits and interest in execution proceedings have been omitted as it was deemed expedient that such questions should be determined by the decree and not in execution See O 20 r 12

2 The words or to the stay of execution thereof which occurred in s 244 after the words execution discharge or satisfaction of the decree have been omitted in the present section As to the effect of the omission see notes Stay of execution

3 Sub section (2) of the present section is new It gives legislative recognition to the practice followed by the Courts under the Code of 1882 See notes below under the head Sub section (2) Court may treat suit as an application

4 Under the old s 244 the Court executing the decree had the *option* when a question arose as to who was the representative of a party itself to determine the question or to stay execution until it was determined by a separate suit Sub section (3) of the present section renders it *obligatory* on the executing Court itself to determine the question as it was considered inexpedient that separate suits should be instituted for the decision of such question See notes below under the head ' Sub-section (3) Inquiry as to who is the representative of a party

5 The Explanation sets at rest a conflict of judicial decisions noted below in the commentary under the head Explanation to the section and parties to suit

To what decrees section applies—This section has no application when the decree is a nullity for such a decree is not a decree at all If the defendant dies after the hearing of the suit is concluded and judgment reserved the decree is binding on his estate see O 21 r 6 This is on the principle that *actus curiae nemini facit injuriam* and judgment is entered up *nunc pro tunc* (u) But if the defendant dies before the hearing is concluded and the decree is passed without bringing his legal representative on the record the decree is a nullity and incapable of execution (v)

(u) *Chet* *Lal Bhadra* (1899) 21 All 314

(v) *Radha Pr* *I v* *Lal S I b* (1891) 13 All 3 1 I A 1 0 *Ja a Dan v Ram hamdra* (1903) 6 Bom 317 *Sripat v Tribe* (1918) 40 All 4 3 4 I C 1 *I dul 4l v J n L I* (190) 17 All 4 8 *Na endra v (pal* (191) 17 Cal L J 634 0 I C 506 *S bra na a v Iaul tha* (191) 38 Mad 60 I I C 668 *J gli Lall v Ladli Ram* (1919) 4 Pat L J 40 0 I C 5 (F B)

If application is made to execute the decree against the legal representative he can challenge the validity of the decree in execution proceedings (*w*) and if his property is taken in execution he can sue to recover it (*x*) Nor does the section refer to declaratory decrees for the rights declared by such decrees can only be enforced by suit If a decree has b en construed as a declaratory decree creating new rights and obligations section 47 does not apply and it can only be enforced by suit (*y*) The section refers only to decrees which are capable of execution

Section to be construed liberally—It is settled law in India that no action will lie on an executable judgment for on such a judgment the only remedy is execution (*z*) The section is so framed as to prohibit in a separate suit any relief being granted which will interfere with the conduct of execution proceedings by the Court executing the decree (*a*) The main principle underlying this section is that matters relating to the execution discharge or satisfaction of a decree and arising between the parties or their repre entatives hould be determined in the execution proceeding and *not by separate suit It matters not whether such question arises before or after the* decree has been executed (*b*) The section provides a cheap and expeditious procedure for the trial of such questions without recourse to a separate suit The Privy Council referring *to the corre ponding section of the Act of 1861 said this enactment was undoubtedly* passed for the beneficial purpose of checking needless litigation and their Lordships do not desire to limit its operation (*c*) Again with reference to the Code of 1882 the Privy Council stre sed the same point in *Prosunno Kumar* v *Kali Das* (*d*) and said It is of the utmo t importance that all objections to execution should be disposed of as cheaply and as speedily as possible Their Lord hips are glad to find that the Courts in India have not placed any narrow construction on the language of section 244 Following these deci ions a wide and liberal construction has always been placed upon *the* section (*e*)

On the other hand the condition which bar a separate suit must not be lost sight of These conditions refer (1) to the questions and (2) to the parties The questions must relate to the execution discharge or satisfaction of the decree The parties must be the parties to the suit or their representatives If both these conditions are fulfilled the question must be determined in execution proceedings and a separate suit will be barred

And not by a suit —whether objection to execution can be raised by way of defence—The section provides that all que tions arising between the parties to the suit in which the decree was passed and relating to the execution di charge or *satisfaction* of the decree *shall* be determined by *the Court executing the decree and* not by a separate suit The words and not by a eparate suit have given ri e to the question whether if a party to a suit fail to rai e an objection to execution in execution proceedings he may rai e it by way of defence in a suit brought against him In *Bhiram*

(*w*) *M n Koer* v *D i ga Pro d* (1917) Pat L J 19 39 I C 1 *Ja jl I ll* v *Iadd P m* supra *Sripat* v *Trite* supra *Sitaj lall I* (19 6) 8 B n L R 1367 98 I C 9 ( ) A B 3 *A w r ul H q* v *Nazar Abbas* (19) 6 Lah 313 88 I C 865 ( ) A L 494 *Ia shotam Das* v *Radha Kishan* (19 9) 10 Lah L J 306 ( ) A L 449
(*x*) *Be i Irasad* v *Mukhtear* (1890) 1 All 316
(*y*) *I s* v *Mithuah* (19) 48 M 48 8 I C 19 ( ) A M 9
( ) *I l* v *J i Ian* (19 1) 43 All 1 0 5 1 C 63 *I ma a* v *M th h* (19 5) 48 Mad 48 8 I C 931 ( ) A M 9
( ) *Arna* v *Matuklal* (1806) 21 Cal 43 *L l D* v *I ulore Das* (1 96) 2 Bom 463
(*b*) *I lad Al* v *J g L l* (189) 1 All 4 8 *Coll cto of J p r* v *I th l D* (190) 4 All 91 *Gopi Pa* v *Ramth jun* (19) 1 Pat 336 65 I C 30 ( ) A P 166
( ) *Cl d u Wahed* v *M t J ee* (18 3) 11 Beng L R 143 152
(*d*) (189) 19 Cal 6 3 6 9 19 I A 166 *Am Cha d* v *I d l* (1916) 30 M d L J 39 3 I C 3 4 (1 C)
(*e*) *Set C edm l* v *Sri th* (1900) Cal 810 813 *Goberda* v *Lal* (1901) 3 All 116 118 *Jam Nath* v *Dharma Das* (1906) 33 Cal *A mar Chandra* v *Sebak Ch d* (190) 34 Cal 642

Ma v. Cop Kanth (e1) the High Court of Calcutta held that he is entitled to raise the objection by way of defence. The ground of the decision was that what is prohibited by the section is the determination of questions relating to execution *by a* separate suit and not their determination *in* a separate suit. *Bharam* ... case and the Calcutta cases which fall with it have been overruled by a recent Full Bench ruling of the same High Court in *Laksh in Chandra v. I an Lat Mondal* (e). The grounds of the decision are (1) that the words "shall be determined by the Court executing the decree" amount to a direction that the executing Court alone shall determine questions relating to the execution discharge or satisfaction of the decree, thus giving the Court executing the decree *exclusive* jurisdiction to determine such questions and (2) that the prohibition conveyed by the words "and not by a separate suit" is a provision in aid of the previous direction. In the Full Bench case the decree was satisfied by an adjustment but the adjustment was not certified to the Court as required by O. r. 2. The decree holder applied for execution and the judgment debtor's property was put up for sale and purchased by the decree holder himself. The decree holder afterwards sued the judgment debtor for possession. The judgment debtor contended that the decree had been satisfied and that the sale was therefore fraudulent and void. It was held that the judgment debtor was precluded by this section from raising this defence. The Full Bench held that it did not make any difference whether the objection was raised by the judgment debtor by a suit of his own or by way of defence in a suit brought against him. Similarly if *A* obtains a decree against *B* as legal representative of *C* and in execution of the decree property alleged to belong to the estate of *C* is sold and purchased by *A* and *A* sues *B* for possession, *B* is precluded by this section from contending that the property belonged to him and that it did not form part of the estate of *C* (e3). *Bharam* ... case has been followed by the High Court of Madras (e4). The Madras decisions require reconsideration in the light of the Full Bench ruling referred to above.

Questions relating to execution discharge or satisfaction.—Questions relating to the execution discharge or satisfaction of the decree arising between the parties to the suit or their representatives are within this section and they must be decided in execution and not by separate suit. The following are examples of such questions:—

1. *Property wrongly taken in execution.* If the decree holder takes in execution land not included in the decree or in excess of the decree the judgment debtor must apply under this section for the recovery of such land, and a separate suit for that purpose will not lie (f).

Property taken in execution of decree subsequently amended. If a mortgagee brings property to sale in execution of a decree for sale and an error in the mortgage amount is subsequently discovered, the judgment debtor claiming a refund of the excess (g) or the decree holder claiming to recover the deficit (h) must apply under this section and a separate suit will not lie.

3. *Property taken in execution of ex parte decree set aside.*—If property is realized in execution of an ex parte decree which is afterwards set aside, the judgment debtor

(e1) (189) ... C ... 955.
( ) (19) ... C W N 95 118 I C 85 (9) ... C ... 4.
(e3) Se ... *Bh* ... (19 9) 56 Cal 46 117 I C 554 (9) A C 4.
(e4) ... (1903) 30 M I J ...
... (19 3) J M I ... (19 9) 41 M L J ...
(f) ... (18 4) 2 W R 415 ... (189) 2 Cal 4 3 ...
All 61 ... (1916) 38 All ...
... (19 0) 44 ...
... (1911) ...
... (19 0) ...
(g) ... All 4 5 ... (1900) All ...
(h) ... (1901) 5 C W N ...

must apply for restitution under this section (i) There is however a conflict of decisions as to whether this case falls under section 144 See note under that section Where the decree is varied or reversed

4 *Injunction granted by decree* —A suit to enforce a permanent injunction granted by a decree is barred by this section The remedy is by execution (j)

5 *Objection to attachment or sale by parties or their representatives* —See notes below under the same heading

6 *Adjustment of decree* —The question whether a decree has been paid or adjusted out of Court is one for the Court of execution to decide under this section If the judgment debtor applies to enter up satisfaction of a decree by a writing in the nature of a compromise and the decree holder objects that the writing was obtained by fraud the question is one relating to the discharge of the decree to be decided by the Court of execution under this section (k) If the adjustment has not been certified by the judgment debtor within the time allowed by law and the decree holder proceeds to execute the decree the dispute no doubt is one relating to the satisfaction of the decree but it cannot be dealt with either under this or any other section relating to execution for an uncertified adjustment cannot be recognized by any Court executing the decree (l) See O 21 r 2 (3)

7 *Agreement not to execute decree* —If the judgment debtor objects that the decree holder had prior to the passing of the decree agreed not to execute it or to execute it only in part the question is one which according to all the Courts (m) except Calcutta (n) and Rangoon (o) should be determined under this section by the Court of execution The Calcutta and Rangoon Court consider that the real question in such a case is whether the decree to be executed is the decree as passed by the Court or as agreed upon by the parties and that such an inquiry is outside the scope of this section for the section presupposes the existence of a decree as to which there is no dispute The Lahore High Court has held that an objection that the decree holder had agreed prior to the decree that the judgment debtor would not be personally liable cannot be heard by a Court of execution for that would be to alter the terms of the decree (p)

8 *Substituted share* —Where a decree gives a right to possession of a share in an ijmali mahal which has prior to the date of the decree been partitioned under the Estates Partition Act (Beng Act 5 1897) the Court in proceedings for execution of the decree has power under this section to put the decree holder in possession of the specific land substituted for his share on partition (q)

9 *Accretion to mortgaged property* —The question whether certain property is an accretion to the mortgaged property is a question to be determined under this section in execution of a decree for redemption obtained by the mortgagor against the mortgagee (r)

(i) *Sı* v *Bl g* (1903) All 441 *S am* v *l ale f e* (19 0) 44 Bom 0 5 I C 1

(j) *S h P d* v *Amarn th* (1919) 46 Cal 103 4 I C 864

(k) *Mula d I a n* v *P kia B ga ı* (1910) 41 All 443 0 I C 6

(l) *Iz a* v *M t k Ial* (1894) 21 C l 43 *I g l* v *B pa a* (18) 15 Mad 30 *D ı o B* v *Har* (1904) 31 C l 4 0 *I t Lal* v *M l* (1) 3 Lah 310 67 I C 503 ( ) A I 4 8

(m) *I ll s* v *K slonl* (1898) Bom 403 *I k a Ar h a ach ry* (1911) 9 M 1 1 T 464 8 I C 10 1 *Subra m a* v *K rar l* (1916) 39 M d 541 33 I C 66 *Chidambara* v *Arı h a* (191) 40 Mad 33 37 I C 838 (F B) *l* v *Arısh as ı* (19 5) 48 Mad L J 8 I C ( ) ( ) A M 591 *S ı jh* (*a*) *Har D s* (1909) 6 All L J 403 I C 604 *l l as bba M l al* (19 6) 40 Mad 13 93 I C 4 8 (6) A M 5

( ) *H n Al* v *C t z Al* (1904) 31 C l 1 9 *I nod* v *B jendra* (190) 3 Cal 810 *Chot Naraın M st K m hear* (190) 6 C W N 96

( ) *M ll* v *M g I o* (19) 4 Ran 118 96 I C 3 ( ) A I 140 *Moolla* v *Chartered Ba k of I d a* (19) 6 Ran 685

(p) *Dılsukh Ra* v *La hhm Das* (19) 9 Lah L J 100 I C 1 6 ( ) A L 534

(q) *Ra j th* v *P ra hna* (1922) 49 I A 132 1 I t 3 63 I C 180 (22) A PC 4

( ) *Motılal* v *B Ma* (19 5) I A 13 47 Bom 233 86 I C 368 (5) A PC 86

Ali v *Gopi Kanth* (e1) the High Court of Calcutta held that he is entitled to raise the objection by way of defence The ground of the decision was that what is prohibited by the section is the determination of questions relating to execution *by* a separate suit and not their determination *in* a separate suit *Bhiram Ali s* case and the Calcutta cases which followed it have been overruled by a recent Full Bench ruling of the same High Court in *Lakshan Chandra* v *Ramdas Mondal* (e2) The grounds of the decision are (1) that the words shall be determined by the Court executing the decree amount to a direction that the executingCourt alone shall determine questions relating to the execution discharge or satisfaction of the decree thus giving the Court executing the decree *exclusive* jurisdiction to determine such questions and (2) that the prohibition conveyed by the words and not by a eparate suit is a provision in aid of the previous direction In the Full Bench case the decree was satisfied by an adjustment but the adjustment was not certified to the Court as required by O 25 r 2 The decree holder applied for execution and the judgment debtor s property was put up for ale and purchased by the decree holder himself The decree holder afterwards sued the judgment debtor for possession The judgment debtor contended that the decree had been satisfied and that the sale was therefore fraudulent and void It was held that the judgment debtor was precluded by this section from raising this defence The Full Bench held that it did not make any difference whether the objection was raised by the judgment debtor by a suit of his own or by way of defence in a suit brought against him Similarly if *A* obtains a decree against *B* as legal representative of *C* and in execution of the decree property alleged to belong to the estate of *C* is sold and purchased by *P* and *P* sues *B* for possession *B* is precluded by this section from contending that the property belonged to him and that it did not form part of the estate of *C* (e3) *Bhiram Ali s* case has been followed by the High Court of Madras (e4) The Madras decisions require reconsideration in the light of the Full Bench ruling referred to above

Questions relating to execution disc arge or satisfaction—Questions relating to the execution discharge or satisfaction of the decree arising between the parties to the suit or their repre entatives are within this section and they must be decided in execution and not by separate suit The following are examples of such questions —

1 *Property wrongly taken in execution*—If the decree holder takes in execution land not included in the decree or in exc ess of the decree the judgment debtor must apply under this section for the recovery of such land and a separate suit for that purpose will not lie (*f*)

2 *Property taken in execution of decree subsequently amended*—If a mortgagee brings property to sale in execution of a decree for sale and an error in the mortgage amount is ubsequently di covered the judgment debtor claiming a refund of the excess (*g*) or the decree holder claiming to recover the deficit (*h*) must apply under this section and a separate suit will not lie

3 *Property taken in execution of ex parte decree set aside*—If property is realized in execution of an ex parte decree which is afterwards set aside the judgment debtor

(e1) (189) 24 Cal 3 5
(e2) (19 9) 33 C W N 9 5 118 I C 857 (19 9) A C 4
(e3) See *Beni Madhab* v *Rai Charan* (19 9) 6 Cal 467 117 I C 558 (19 9) A C 247
(e4) *Ve Kataram acharlar* v *Meenatchisun da a amaiy* (1909) 19 M L J 1 *Thatt u Na ck* v *Kondu P ddi* (1909) Mad 4 *Munishi Ch na Dandasi* v *Munishi I edda Tati h* (19 1) 41 Mad L J 261
(f) *D lyeet* v *Rewal* (1874) W R 435 *B u Mah ta* v *Shya a Churn* (1895) 2 Cal 483 *P atab Si gh* v *Beni P m* (1880) 2 All 61 *Abd l F n Isl i* v *N a B bi* (1916) 38 All 330 343 34 I C 231 *G np tra* v *In lrao* (19 0) 44 Bom 97 55 I C 96 *Sharf* v *Mi Khan* (1919) 1 L h I J 30 *R i ratn m* v *Sheikh H nb* (19 6) 1 M d L J 5 97 I C 1031 (6) A M 968 *Ra th Charan* v *Ka l h* (8) A C 6
(g) *H iam* v *Mul in n l* (190) 27 All 48 *Dhan Tunwar* v *M ltab Si gh* (1900) 2 All 9
(h) *Nilratan* v *Pa Patton* (1901) 5 C W N 6 7

must apply for restitution under this section (i) There is however a conflict of decisions as to whether this case falls under section 144 See note under that section Where the decree is varied or reversed

4 *Injunction granted by decree* —A suit to enforce a permanent injunction granted by a decree is barred by this section The remedy is by execution (j)

5 *Objection to attachment or sale by parties or their representatives* —See notes below under the same heading

6 *Adjustment of decree* —The question whether a decree has been paid or adjusted out of Court is one for the Court of execution to decide under this section If the judgment debtor applies to enter up satisfaction of a decree by a writing in the nature of a compromise and the decree holder objects that the writing was obtained by fraud the question is one relating to the discharge of the decree to be decided by the Court of execution under this section (k) If the adjustment has not been certified by the judgment debtor within the time allowed by law and the decree holder proceeds to execute the decree the dispute no doubt is one relating to the satisfaction of the decree but it cannot be dealt with either under this or any other section relating to execution for an uncertified adjustment cannot be recognized by any Court executing the decree (l) See O 21 r 2 (3)

7 *Agreement not to execute decree* —If the judgment debtor objects that the decree holder had, prior to the passing of the decree agreed not to execute it or to execute it only in part the question is one which according to all the Courts (m) except Calcutta (n) and Rangoon (o) should be determined under this section by the Court of execution The Calcutta and Rangoon Court consider that the real question in such a case is whether the decree to be executed is the decree as passed by the Court or as agreed upon by the parties and that such an inquiry is outside the scope of this section for the section presupposes the existence of a decree as to which there is no dispute The Lahore High Court has held that an objection that the decree holder had agreed prior to the decree that the judgment debtor would not be personally liable cannot be heard by a Court of execution for that would be to alter the terms of the decree (p)

8 *Substituted share* —Where a decree gives a right to possession of a share in an ijmali mahal which has prior to the date of the decree been partitioned under the Estates Partition Act (Beng Act 5 1897) the Court in proceedings for execution of the decree has power under this section to put the decree holder in possession of the specific land substituted for his share on partition (q)

9 *Accretion to mortgaged property* —The question whether certain property is an accretion to the mortgaged property is a question to be determined under this section in execution of a decree for redemption obtained by the mortgagor against the mortgagee (r)

(i) *Sar* v *Bl j a* (1903) All 441 *Sic m n* v *Vale t ne* (1930) 44 Bom 0 5 I C 1

(j) *S h Irsad* v *A narn th* (1919) 46 C l 103 4 I C 864

(k) *Mul m ad Ja n* v *Pt l a Begam* (1919) 41 All 443 50 I C 6

(l) *Az an* v *M t k Lal* (1934) 21 Cal 43 *B g tu* v *D pan a* (190) 1 M l 30 *D* v *B dl u* v *H* (1904) 31 Cal 495 *P n Labl* v *M k lam l* (19) 3 Lah 319 6 I C 93 ( ) A L 4 8

(m) *Laldas* v *K lord s* (1878) Bom 463 *R k a* v *Krish amach ry* (1911) 9 Mad L T 464 8 I C 10 1 *S b mania* v *K m relu* (1916) 39 Mad 541 33 I C 66 *Ch da ba* v *K h a* (1917) 40 Mad 33 3 I C 836 (F B) *I l* v *Krish s* (19) 48 Mad L J 87 I C 97 ( ) A M 91 *Ul* v *Si j* v *C j H D* (1900) 6 All L J 403 2 I C 608 *I l k t Ha* v *Ma k l* (19 6) 40 Mad 13 98 I C 4 8 (6) A M 54

( ) *H a Ali* v *C z Al* (1904) 31 Cal 1 9 *B od* v *Br j l a* (190) 3 Cal 810 *C l* v *m n* v *Mst Ka l r* (190) 6 C W N 98

(o) *M H* v *M i g I o* (19 8) 4 R ng 119 96 I C 73 (28) A R 140 *M llk* v *Ch rt ed Ba k of Ind a* (19 7) 6 Rang 635

(p) *D ruk h I* v *I a l h a D s* (19) 9 Lah L J 100 I C 1 6 ( ) A L 894

(q) *B j ath* v *P m h a* (19) 4 I A 139 1 I t 3 8 63 I C 1 0 ( ) A I C 54

( ) *Mal l k* v *R M l* (19) I A 137 43 Bom 33 86 I C 388 (5) A I C 86

10 *Waste committed by judgment debtor after decree for possession* —The question whether the judgment debtor has committed waste e g cut down trees after a decree against him for possession is one to be dealt with under this section and not by a separate suit (*s*)

11 *Decree for possession* —Where a decree is passed for possession in a suit for pre emption conditional on the plaintiff paying a specified sum of money within a time fixed by the Court and the money is paid but possession is not delivered to the plaintiff his only remedy is by an application under this section A suit for possession is barred under this section (*t*)

Questions not relating to execution discharge or satisfaction —If the question that arises between the parties or their representatives does not relate to the execution discharge or satisfaction of the decree the section does not apply and a separate suit will lie The following are leading cases on the subject —

(1) *Questions as to the validity of the decree* —The Court executing the decree has no power to go behind the decree and question its validity See note—*Powers of Court executing the decree*—under sec 38 *supra* Such a question can only be tried by regular suit (*u*) and the same applies to an objection that the decree was obtained by fraud (*v*) A reversioner against whom a decree is being executed as legal representative of the deceased judgment debtor cannot object in execution that the debt for which the decree was passed was not due but may file a separate suit for a declaration to that effect (*w*)

(2) *Mal administration of judgment debtor s estate* —A decree holder failing to realize his decree by execution against the judgment debtor s executor may file a suit against the executor for the administration of the estate and for an account on the footing of mal administration This is his only remedy for the conduct of the executor is not a matter for the Court of execution (*x*)

(3) *Second suit for redemption* —When a mortgagor is in effect bringing a suit to execute a previous mortgage decree for redemption the suit is barred under this section (*y*) But if the right to redeem was reserved to him by the decree in the previous suit a fresh suit for redemption will lie ( ) The better opinion is that if the former mortgage decree does not extinguish the right of redemption a fresh suit for redemption will not be barred See note *Finality of decree in redemption suits* at page 73 Su h a suit is not an execution of the former decree but a fresh exercise of the same right

Parties to the suit —If the question is one relating to the execution discharge or satisfaction of the decree but does not arise between the parties to the suit the section does not apply and a suit is not barred Parties mean parties who are opposed to each other in the suit though not necessarily as plaintiff and defendant (*a*) for in a partition suit co defendants may be opposed to each other Questions arising between parties who are not opposed to each other or between a party and a stranger do not fall under section 47 The following are illustrations —

(1) *Questions between decree holders inter se* —Disputes between rival decree holders seeking to attach the same property (*b*) or claiming against each other in the distribu

(*s*) *Hari* v *Sakharam* (19 3) ? Bom L R 449 3 I C 443 (3) A B 391
(*t*) *Ramnand* v *J i Ram* (19 1) 43 All 1 0 *S ani* v *Bhima* (19) 1 Pat 1 ( ) A P 40 *Abd l Kar m* v *Islam un nissa* (1916) 38 All 339 34 I C 31
( ) *Chi t man* v *Ch tam* (1898) Bom 4 *Gom than* v *K m dur* (1904) 7 M d 318 *Rang my* v *Th r p ti* (190) 9 M d 6 *K maretta* v *Saba pathy* (1907) 30 Mad 6 *I let apal* v *Shyima* (1904) 3 C l 6 *Lik dhar* v *Ch t rbh j* (1899) 1 All 77 *H ra Lal* v *I ar eshar* (1899) 21 All 3 6
(*v*) *S d dra* v *Budan* (1886) 9 Mad 80 *Dh i P n* v *L chmes* (1896) 3 Cal 639
(*w*) *T llaprag da Boori g pall* (1907) 30 Mad 40 *Ala S gh* v *W s ws* (1913) P R 14 15 I C 2
(*x*) *Sar umani* v *Bala* (1908) 35 Cal 1100
(*y*) *Hari* v *Sh p rj* (1886) 10 Bom 461
(*z*) *Tani* v *Har* (188) 16 B m 6 (F B) *Abd l* v *I aman* (19 1) 45 Bom 1335 63 I C 90
( ) *Mangaija* v *Sr ramulu* (1913) 24 Mad L J 477
(*b*) *Ram Ch nder* v *Ham ran* (1906) 11 C W N 433 *Rama athan* v *Ka i ppa ja* (19 6) 51 M d L J 436 97 I C 10 6 (26) A M. 1104.

tion of assets (c) or between joint decree holders inter se (d) are not within the section

(2) *Questions between judgment debtors inter se*—The Allahabad High Court has held that questions between judgment debtors inter se are not within the section (e) But the Madras High Court has recently held that they are (f) and this has been followed by Rangoon (g)

(3) *Questions between a party and his own representative* are not within the section (h)

A surety is under sec 145 not a party except for purposes of appeal (i) When a party is suing or being sued in a representative capacity [sec 11 Explanation VI and O 1 r 8] all persons whom such party represents are parties Thus if a decree is passed against a karnavan of a tarwad in his representative capacity all members of the tarwad are parties to the suit (j) in their capacity of members of the tarwad (k) A minor (l) or a lunatic (m) not represented by a proper guardian ad litem is deemed not to be a party to the suit An objection however on this ground cannot be taken in execution proceedings against the minor or lunatic for an executing Court cannot go behind the decree but the judgment may be attacked in revision or by appeal or by a regular suit (m) A judgment debtor who objected to a sale of property on the ground that he had acquired a fresh title to it subsequent to the decree was held not to be a party to the suit in respect of that objection (n) A benamidar is neither a party nor a representative of a party within this section (o)

Explanation to the section and parties to suit—Under section 244 of the Code of 1882 the High Courts of Allahabad (p) and Calcutta (q) held that a plaintiff whose suit had been dismissed and a defendant against whom a suit had been dismissed ceased to be parties to the suit On the other hand it was held by the High Court of Madras (r) and Bombay (s) that such persons continued to be parties to the suit The Explanation gives effect to the latter view Objections therefore to attachment or sale by such persons come within this section and not O 21 r 58 (t) In *Krishnappa* v *Periaswamy* (u) the Madras High Court held that a defendant against whom the suit was dismissed on account of misjoinder is not a party In a later case (v) however the same High Court held that a defendant against whom the plaintiff abandoned his case was still a party but that if his name had been struck off the record under O 1 r 10(2) he would not have been a party This was approved of in *Sathu Kanar* v *Ramaswami* (w) which

( ) Sa j ri v Rama a (188) 8 M 1 494

(d) Mu hi Pai v I p v in (19) 6 Lat 386 103 I C 4 ( ) A I 98 B tse Abl l S tar v Chi Doe Rhi (19 6) 4 Rang 418 99 I C 418 ( ) A P 45

(e) Rayor v Mus oorie B nk (188) 7 All 681 Abd l Aziz v Abdul R h m (19 9) All L J 757 (9) A A 91 per S n J

(f) I l a a v M l etc (19 4) 4 Mad L J 4 8 7 I C 148 (4) A M 365

(g) Abd l Sattar v Chi Doe I h (19) 4 Ran 418 93 I C 418 ( ) A R 4

(h) M g nl l v D h (1901) Bom 631 I i10 v M s oo B k (188) All 681 686 Bhag ti v B r Lal (1909) 31 All 8 1 I C 416 (F B)

(i) P ahabar S gh v J t Ind a Bahadur Singh (1919) 46 I A 2 8 236 4 All 1 8 168 Pa k hu v L lla S ngh (19 6) 6 All L J 1160 (8) A A 5

(j) M mil l v I thir (190) 30 M 1 1 A al K ll v Ib ya (1901) 4 Mad 658

(k) Na ay n v Th a 4m a (19) 1 Mad 46 106 I C 30 ( ) A M 1043

(l) Pash l v a v M k ad (1909) 31 All 36 I A 168 3 I C 864

(m) K il pa li v H ri (191) 44 C I 6 7 3 I C 8

(n) Sha i Lal v U ar Pr d (191) 1 Lat L J 19 3 I C 6 5

(o) Te l mma v I rthasarati (19 6) 1 Mad L J 381 94 I C 14 (6) A M 1091

(p) I lla v I l (1901) 3 All 346 Sho I rj l v Na r ngh (1910) 3 All 3 1 51 I C 436

(q) I l dl v Lall Me h (190) Cal 6 Ja l d v J j h (1903) 9 (1 134

(r) I a a) K hr r a (190) 3 Mad 361 (F B)

( ) Conr v I j wa (1 93) 1 Bom 43

(t) J m v K l Frasad (19 1) 34 Cal L J 4 7 Sh kh K loo I hola ath (19 5) 6 Pat L J 5 Musammat Matho v Hazari M l (19 9) 8 Pat 1

(u) (191) 40 M 1 964 34 I C 37 Gowd in l k in v M Hn n (19) Bang 110 101 I C 94 ( ) A R 13

( ) S mma v l dhabhay (191) 41 Mad 418 43 I C 93

(w) (19 6) 49 Mad 494 94 I C 4 ( ) A.M. 4 4

ruled that the ground of exoneration is immaterial and the real test is whether or not the defendant s name remains on the record If the defendant s name is struck off the record he is not a party (x) An order that the other defendants be exempted is equivalent to an order of dismissal of the suit as against them (y)

Representatives —The term representative in this section includes not only legal representative in the sense of heirs executors or administrators but also representative in interest that is any transferee of the decree holder s interest or any transferee of the judgment debtor s interest who so far as such interest is concerned is bound by the decree ( ) It was at one time supposed that a transferee by judicial sale could not be a representative (a) but this view is no longer tenable It was also said that a representative is a person who succeeds to the rights of any of the parties after suit (b) but this is incorrect for a transferee may be bound by the decree on the doctrine of lis pendens (c) The Bombay High Court has recently held that a purchaser lite pendente is not the representative of his vendor (d) but this it is submitted is incorrect A Calcutta case said that to determine whether a particular person is a representative of a party the two tests to be applied are first whether any portion of the interest of the decree holder or of the judgment debtor which was originally vested in one of the parties has by the act of parties or by operation of law vested in the person who is sought to be treated as representative and secondly if there has been a devolution of interest whether so far as such interest is concerned that person is bound by the decree (e) A devisee (f) a legatee (g) and a person taking joint property by survivorship (h) have been held to be representatives The following are illustrations of persons held to be representatives under this section

(1) A transferee of a decree or of the interest of any decree holder in a joint decree within the meaning of O 21 r 16 is a representative of the decree holder (i) A transferee from such transferee is also a representative of the decree holder (j)

A judgment creditor who attaches a decree held by the judgment debtor against another is a representative of the judgment debtor *A* holds a decree against *B* *C* obtains a decree against *A* and in execution attaches the decree held by *A* against *B* *C* is a representative of *A* in proceedings in execution of *A* s decree against *B* (k) See O 21 r 53 (3)

(2) *A* obtains a decree against *B* for Rs 5 000 *B* then sells certain property belonging to him to *C* *C* is not a representative of *B* for the decree is a simple money decree and does not relate to the *specific* property sold to *C* (l)

(x) *Nallaperi al v S k l* (19 8) 54 M d L J 1 108 I C 406 (8) A M 76 But see *Li ga v L k h anan* (19 6) 50 M d L J 387 94 I C 1 3 (6) A M 68 a case where the phr e was wrongly u d

(y) *Sa Fua a d* v *Radhapat* (19 8) 6 All L J 524 (8) A A 34

( ) *Ish n Chander* v *Be i Mah b* (189) 24 Cal 6 *G l ar L l* *Madho R n* (1904) 6 All 447 *Ta a Pra anna* v *Nilmoni* (1914) 41 Cal 418 I C 118

(a) See *G r S d r* v *Hem Chunde* (1889) 16 Cal 33 and *Sabh jit* v *Sri G pal* (189) 17 All

(b) *Fa ir Prasad* v *R m B hadur* (1886) 1 Cal 4 8

(c) *She Naran* v *Ch i l* (1900) 2 All 243 *Copi th* v *Saja i* (190) 10 C W N 40 *G Pra ad* v *R mlal* (1899) 1 All 0

(d) *Basappa* v *Bh nangowda* (19 8) 5 Bom 208 108 I C 1 (3) A B 6

(e) *Ajodh ja Roj* v *Hardw r Roy* (1907) 9 Cal L J 48

(f) *Bhaw i Sla k* v *Nara sh ker* (1839) 3 Bom 536

(g) *Ch tt ar k rm* v *Teo L San* (19) 5 Ran 393 104 I C 1 1 ( ) A R 3

(h) *Pe i L l* *Chan l Ch ra* (1906) 11 C W N 163

(i) *Duar B ksh* v *F t k* (1899) 26 Cal 2 0 *Hidra Na a n* v *J l ulen* (1894) 16 All 483 *She P a ad* v *La l* (19) 4 Pat 1 0 86 I C 564 ( ) A 1 449

(j) *G ja Das* v *Iakub Ali* (1900) 7 C 1 6 0

(k) *Sal Man Mull* v *K jas bapathi* (1893) 16 M d 0 *Fr h am* *Ve k t pathi* (1906) 3 Mad 318 *Peary Moh n* v *Ro nesl* (1888) 1 Cal 3 1

(l) *Mallo D s* v *Ramj* (1894) 16 All 286 *Sh iran* v *J ru* (1889) 13 Bom 34 *Rashb h y* v *S nom y* (1891) 7 C l 403 *Mt B phi l* *Harb khsh S gl* (191) 1 R n 64 p 4 14 I C 40 (gift by judgment-d btor of his entire property)

(3) A purchaser lessee or mortgagee from a judgment debtor of property belonging to the judgment debtor *and attached* in execution of a decree against him is the "representative" of the judgment debtor within the meaning of this section for the property being *under attachment* at the date of the purchase lease or mortgage the purchaser lessee or mortgagee is bound by the decree so far as the interest transferred to him is concerned (*m*) See section 64

(4) *Purchaser of judgment debtor's equity of redemption under a private sale*—*A* obtains a decree against *B* for sale of certain property mortgaged to him by *B* After the date of the decree *B* sells his equity of redemption in the mortgaged property to *C* *C* is a "representative" of *B* the judgment debtor for the property having been purchased after it was affected by *A*'s mortgage decree *C* is to that extent bound by *A*'s decree Hence any question relating to the execution of *A*'s decree and arising between *A* and *C* must be determined by the Court executing *A*'s decree and not by a separate suit (*n*) The same procedure would apply even if *B* had transferred his interest in the property to *C during the pendency of the suit* and *before* the passing of the decree (*o*)

(5) *Purchaser of judgment debtor's equity of redemption at a judicial sale*—*A* obtains a decree against *B* for the sale of certain property mortgaged to him by *B* Before the property could be sold in execution of *A*'s decree X who holds a money decree against *B* brings *B*'s equity of redemption in the mortgaged property to sale in execution of his decree and it is purchased by *C* *C* is a "representative" of *B* the judgment debtor for the property having been purchased after it was affected by *A*'s mortgage decree *C* is to that extent bound by *A*'s decree Hence any question relating to the execution of *A*'s decree and arising between *A* and *C* must be determined by the Court executing *A*'s decree and not by a separate suit (*p*)

(6) *A purchaser of property from a party to a suit in which an injunction has been granted affecting such property is not a "representative" within the meaning of this section*—*A* obtains a decree against *B* restraining *B* by an injunction from obstructing him in the exercise of his right of way to his land over *B*'s land *A* then sells his land to *C* If *B* obstructs *C* in the enjoyment of the right of way *C*'s proper remedy is by way of *suit* against *B* and not in execution under this section The reason is that an injunction does not run with the land and *C* cannot therefore claim the benefit of the decree against *B* (*q*) Note that *C* is not a transferee of the decree but of the property only See notes to s 50 "Decree for injunction"

(7) The *Official Assignee* claiming property on behalf of the *creditors* of an insolvent judgment debtor is not a "representative" of the judgment debtor within the meaning of this section (*r*)

(8) The High Court of Allahabad has held that a *purchaser from a judgment debtor under O 21 r 83* is a "representative" of the judgment debtor within the meaning of this section (*s*) *A* obtains a decree against *B* In execution of the decree certain property belonging to *B* is attached and an order is made for the sale thereof *B* then obtains a certificate from the Court under O 21 r 83 to sell the property by private sale and the property is sold to *C* in pursuance of the certificate *C* is a "representative" of *B* within the meaning of this section

(*m*) *C r I r* [illegible] *I* [illegible] *Lal* (1899) 1 All 20 (sal) *M* [illegible] *v* [illegible] (1901) [illegible] *Mah be* (1 9) 0 Mad 3 9 (m rtg g) *K* [illegible] (1911) 34 M 3 4 0 I C 418 (sal) *V* [illegible] *Seol pp* (110) 1 Mad L J 3 1 (mortgage) *L I Mal* *v* [illegible] (1 9) 19 All 33 *I ha D* *v* *I arn* [illegible] (19) 6 Lah 44 93 I C 30 (6) A L 134 (mortgage)

( ) *M iho Da* [illegible] (1 94) 16 All [illegible]

(*o*) *Sheo Na* [illegible] *v* *Ch* [illegible] (1900) [illegible] All 43

(*p*) *G l a L I Math I* (1904) 6 All 44 *Ishan Chunder v* [illegible] *Madh b* (1 9) [illegible] *Kush* [illegible] (190) 11 C W N 43

(*q*) *J* [illegible] *v* *H* [illegible] *Devi* (1 81) 3 B [illegible] 391

( ) *J* [illegible] *Mall* (1) 7 All [illegible] *H* [illegible] *Lal* (1 0) 30 All 4 6 *Nand* [illegible] (1 36) [illegible] *Frederick Lenwick v Mal* [illegible] *Gopal* (19) 9 [illegible] *Official* [illegible] (19) 4 Mad L J [illegible]

( ) *Gobardi* *v* *Bux* (1 01) 23 All 116

(9) A purchaser from the judgment debtor of an *occupancy holding not transferable by custom* is a representative of the judgment debtor If the holding is sold in execution of the decree against the judgment debtor and he is dispossessed by the auction purchaser he may apply for possession under this section and not under O 21 r 100 (*t*)

(10) A purchaser from a judgment debtor of a portion of a holding is so far as his interest is concerned bound by the decree for rent obtained against the judgment debtor under s 148A of the Bengal Tenancy Act 8 of 1885 and by the sale in execution of that decree He is therefore a representative of the judgment debtor and if he is dispossessed by the auction purchaser he may apply for possession under this section but not under O 21 r 100 (*u*)

(11) A surety for the performance of a decree is not a representative of a party within the meaning of this section (*v*) See s 145 below

Objections to attachment or sale by parties or their representatives — Objections to attachment made by a judgment debtor or his representative must be distinguished from those made by either of them on behalf of a third person In the former case the objection comes under this section and a separate suit is barred The order however operates as a decree and a second appeal lies from it In the latter case the objection is in effect one by a third person and it fall under O 21 r 58 The objector may proceed either by an application under r 58 or by a regular suit If he proceeds by an application under r 58 there is no appeal from the order but he may file a suit as provided by O 21 r 63 Such a suit must be filed within one year from the date of the order

If the judgment debtor objects that the property is not liable to attachment or sale (*w*) or that the decree holder in connivance with a Court peon has misappropriated part of the property attached (*x*) the objection is by the judgment debtor on his own behalf and it must be decided by the executing Court under this section Similarly if property is attached as property of a deceased judgment debtor in the hands of his legal representative and the latter objects that it is not property of the deceased but his own property the case falls under this section for the legal representative is not setting up a jus tertii (*y*) But if the objection is made by the judgment debtor or his representative not on his own behalf but on account of a third party as trustee (*z*) or as sebait of an idol (*a*) or on the ground that the property is wakf (*b*) the objection is under O 21 r 58 and not under this section

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(*t*) *P hrat n v R r S hay* (1918) 3 Pat L J 9 43 I C 969

(*u*) *Bhikh a B j Bih r* (191) 2 Pat L J 4 8 4 I C 6 *Su endra Naran v Cop* (190) 3 Cal 1031 *Krishna Chandra v Dina Nath* (19 8) 54 Cal 1064 10 I C 3 7 (28) A C 94

(*v*) *R ghubar S ngh v Jai Indr Bah dur Si gh* (1919) 46 I A 8 36 4 All 158 166 5 I C 0

(*w*) *Tri ib k v Go nda* (1895) 19 Bom 3 8 *Majed v Ragh ibar* (1900) Cal 187 *Gahar v I a* (1900) Cal 41 *Ayodhia v Mal deo* (19) 10 I C 1 9 (27) A A 574

(*x*) *Gaj dhar v Bab i Arj* (1916) 1 Pat L J 5 8 36 I C 80

(*y*) *Sethchand v Durga* (1890) 1 All 313 *I a chanun v I abia Bibi* (1800) 17 Cal 711 *I al Ch an v Jewat* (1906) 8 All 51 *Ve gapayyan v Farim pa alal* (1903) 6 Mad 501 *M dhusudan v Gob d* (1900) 27 Cal 34 *Mung ja v Hay t Saheb* (1809) 3 Bom 3 *Gok I s ng v K ssen ng* (1910) 34 Bom 46 71 I C 457 *Umeshananda v Mohendra* (1911) 14 C L J 337 11 I C 80 *Ajo Koe v Gor k Nath* (1914) 19 C W N 1 7 I C 321 *D lla v Shib Lal* (191) 39 All 47 36 I C 81 *Bhag a t Ram v Nizam D n* (19 1) 3 Lah L J 406 63 I C 8 3 *Ar nach llam v M u q San Ngwe* (19 4) 2 Rang 168 83 I C 550 (4) A R 3 3 *Ishar Das v Parma Nand* (19) 6 Lah 544 93 I C 30 (26) A L 134 *Ma Shwe v Ma ng Ba* (19 7) 5 Ran 6 9 107 I C 856 (8) A R 29 *Naida v Rajendra* (19 8) 48 C L J 551 *Maria v Pana* (19 8) 30 Bom L R 1447 (28) A B 534

(*z*) *M ngeya v H jat Saheb* (1899) 3 Bom 37 *B drudin v Abdul Rahim* (1908) 31 M d 1 5 *I I mat v Joga har* (1906) 28 All 644 *Roop Lal v Bekani* (1890) 15 C 1 43

(*a*) *Kart ck Chandra v Ashuto h* (1912) 39 Cal 98 1 I C 163 *Upendra Nath v K isum* (1915) 4 C 1 440 27 I C 3 8 Contra *Shah N m v Gi dhari* (19) 2 Luck 145 100 I C 464 (27) A O 1 0

(*b*) *Sheikh Naz r v Muhammad* (19) 1 Pat 637 67 I C 438 (22) A P 196

Objections to attachment or sale by third parties —If the objection to attachment is made by a *third* party he may proceed either under O 21 r 58 or by a regular suit (*c*) and the claim cannot be dealt with under this section (*d*) See notes above Objection to attachment or sale by parties or their representatives

Execution purchaser —We now proceed to consider cases where property of the judgment debtor has been sold in execution of the decree and questions in which the auction purchaser is concerned arise *subsequent* to the sale These questions fall into two classes according to the parties between whom they arise —

A —Questions between the decree holder on the one hand and the judgment debtor on the other hand the auction purchaser being only interested in the result

B —Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand

A Questions between the decree holder on the one hand and the judgment debtor on the other the execution purchaser being only interested in the result —

These questions being essentially questions *between parties to the suit* fall within this section (*e*) It is well settled that *as between the judgment debtor and a decree holder* an objection to the sale in execution can only be taken in execution and sec 244 (now sec 47) prohibits a suit by a party or his representative against an auction purchaser to raise a question which as between the judgment debtor and the decree holder must have been determined under that section (*f*) The fact that the auction purchaser who was not a party to the suit is interested in the result does not prevent the question being a question *between the parties* These questions therefore must be determined by the Court executing the decree and not by a separate suit The leading case on the subject is *Prosunno Kumar* v *Kali Das* (*g*) where their Lordships of the Privy Council said It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244 [now s 47] and that when a question has arisen as to the *execution discharge or satisfaction* of a decree *between the parties to the suit* in which the decree was passed the fact that the purchaser who is no party to the suit is interested in the result has never been held a bar to the application of the section. In *Prosunno Kumar s* case a suit was brought by the judgment debtor against his co sharers and against the judgment creditor and the auction purchaser to set aside a sale in execution on the ground of fraud The fraud alleged was that the judgment creditor had obtained a decree against the judgment debtor and co sharers and in execution of the decree attached the whole of the zamindari which belonged to the judgment debtor and his co sharers that thereafter the judgment debtor paid his quota of the judgment debt and it was arranged with the judgment creditor that the judgment debtor s share should be exempted from sale that pursuant to the arrangement the judgment-creditor sold the shares of the co sharers and obtained satisfaction of his decree but that afterwards the judgment creditor in collusion with the co sharers the decree holder and the auction purchaser got the sale set aside and caused the whole zamindari including the

(*c*) *Ka h ia Lal* v *Nat onal B k of India* (1913) 40 Cal 98 40 I A 56 18 I C 943 *Su der Si g* v *Gha* (1896) 18 All 410 *I ighun th* v *Sarosh* (18[illegible]) 3 Bom 66

(*d*) *Ram n than* v *Lev i* (1900) 23 M 1 19 *I m Lal* v *All h b d Ba k* (19 6) 4 All L J 334 9 I C 14 ([illegible]6) A [illegible] [illegible]44

(*e*) *Ba l I* v *F tt i* (1886) 8 All 146 (F B) *Dl ni I t i* v *Ch l rbh j* (1893) [illegible] All 104

(*f*) *Natarm* v *Veeral hal a* (1911) 34 M 1 41 418 8 I C (4) *G l l* v *Ku n S gh* (1910) 34 Bom 546 I C 45 *M han S gh* v *I hanam* (19) [illegible]3 C 1 83 99 I C 1[illegible] ( ) A C 106

(*g*) (18[illegible]) 19 C 1 683 19 I A 166 *Sadho* v *Abhe and* (1904) [illegible]6 All 101 *Gaya Pra ad* v *F mdh S gh* (1906) [illegible]8 All 681 *M th ra Das* v *Lachma* (190[illegible]) [illegible]4 All [illegible]3[illegible] *Harika Kant* v *Rama la t* (1909) 33 Bom 69[illegible] 4 I C [illegible]3

judgment debtor s share to be attached and sold The Privy Council held that the plaintiff s remedy was by an application under this section and the question being one relating to the execution discharge or satisfaction of the decree a separate suit to se aside the sale was barred under this section

Illustration

A judgment debtor may seek to set aside an execution sale—

[1] on deposit under O 21 r 89

[2] for material irregularity under O 21 r 90

[3] for fraud under O 21 r 90

[4] for other reasons

[1] As to case (1) see note under O 21 r 89 below Appeal

[(2) (3)] As to cases (2) and (3) see notes under O 21 r 90 below Suit to et a ide sale on ground of material irregularity Fraud in publishing or conducting sale Application to set aside sale on other grounds and Appeal

[4] A judgment debtor may seek to set aside a sale on grounds other than those mentioned above A judgment debtor seeking to set aside a sale on any of the following grounds must proceed by an application under this section and not by a separate suit —that the sale is illegal or a nullity for want of notice under O 21 r 22 (h) that the judgment debtor has been adjudged insolvent and the decree gives no charge upon the land (i) that the property is not liable to attachment and sale (j) that the sale is in contravention of O 34 r 14 (k) that the sale was not warranted by the terms of the decree (l) that the property sold did not belong to the judgment debtor (m) that the decree holder had purchased without leave of the Court (n) that the decree had been adjusted (o) that the sale is invalid having been held after a stay order (p) that the decree holder s own property was sold by mistake instead of that of the judgment debtor (q)

B Que tions between th auction purchaser on the one hand and a party to the suit or his representative on the other hand —

One class of cases arising under this head is where the decree holder himself is the purchaser and the judgment debtor claims *to set aside the sale in execution* In such a case the judgment debtor must proceed by an application under this section and not by a separate suit (r)

Another class of cases arising between the auction purchaser on the one hand and the judgment debtor on the other is where the auction purchaser seeks *to recover pos session* of the property purchased by him The question that arises in such cases is whe ther the Court purchaser mu t proceed by an application under this section coupled with

(h) *Imam t n nissa* v *Iiak t H a* (1881) 3 All 4 4 *Sahd o* v *Ghasir m* (1834) 1 C l 19 *R ja Gopala* v *Raman ji chariar* (19 4) 47 Mad 288 80 I C 0 (4) A M 431

(i) 1 *atharan a* v *I ettath* (1916) 30 Mad L J 611 34 I C 8)

(j) *Ram Gop l* v *Khial Ra* (1884) 6 All 448 *Bast P m* v *Fatt* (1886) 8 All 146 *D rga Cl an* v *Kali Proso a* (1899) 6 Cal

(k) *Ash t sl* v *Beh ri Lal* (1908) 3 Cal 61 *Ish a* v *Ish ran* (1907) 30 M d 313 *bl chand* v *R hhoda* (19 1) 4 B m 174 8 I C 31

(l) *Ganga De* v *Ra n I rasad* (19) 23 All L J 8 88 I C 393 ( ) A A 5 1

(m) *Gok lsi g* v *Ki se g* (1910) 34 Bom 546 7 I C 4

(n) *Gen* v *Sakharam* (1898) Bom 2 1 *Durga* v *Balw t* (1901) 3 All 4 8 *I a aghava* v *I e k ta* (1803) 16 Mad 287 *Ba k of Upper Ind a* v *Fitzh lme* (19 8) 108 I C 606 (8) A L 666

(o) *Dha i R m* v *Chatu bh j* (1900) All 86

(p) *S p io Bank* v *B dh Si gh* (19 4) All L J 413 83 I C 10 8 (4) A A 698

(q) *Hafez Uzi* v *\asi nanne sa* (8) A C 86

(r) *G pathy* v *Krish mach y* (1918) 45 I A 4 60 41 M d 403 44 I C 8 5 *Ramabhab a* v *Kad ny sami* (19 1) 48 I A 15 44 Mad 483 63 I C 08 (2) A PC

O 21 r 95 or whether he is entitled to bring a separate *suit* for possession? This depends on who is the purchaser for the property may be purchased by the decree holder himself with the leave of the Court under O 21 r 72 or it may be purchased by a stranger

First where the decree holder himself is the purchaser —Whether the decree holder purchaser must proceed by an application depends upon—(1) whether for the purpose of recovering possession of the property he is to be regarded as a party to the suit within the meaning of s 47 or whether he has *ceased* to be a party to the suit by reason of his purchase and (2) whether the question as to delivery of possession is a *question* relating to the execution discharge or satisfaction of the decree within the meaning of s 47 Upon these points there is a conflict of decisions

According to the view taken by the High Court of Madras (*s*) and by a Full Bench of the High Court of Calcutta (*t*) the decree holder *retains* his character of a party to the suit though he is also the purchaser and the question as to delivery of possession is a question relating to the execution discharge or satisfaction of the decree within the meaning of s 47 The two conditions laid down by the section are therefore satisfied and a separate suit for possession is barred under s 47 The High Court of Madras has also applied sec 47 to an application by a purchaser from a decree holder purchaser resisted by the judgment debtor in obtaining possession the reason given being in one case (*u*) that a purchaser from a decree holder who has purchased at a Court sale is a representative of the decree holder and in another (*v*) that he is a representative of the judgment debtor within the meaning of this section *In two of the cases cited above however the Madras Court observed that if this* question had not already been settled by previous decisions of that Court they would be disposed to hold that proceedings for obtaining possession could not be regarded as those relating to the execution discharge or satisfaction of the decree within the meaning of this section (*w*) In a recent Full Bench case it seems to have been assumed that such proceedings related to the execution of the decree (*x*)

According to the other view which is the view taken by a Full Bench of each of the High Courts of Allahabad (*y*) Patna ( ) and Bombay (*a*) and in recent cases by the High Court of Lahore (*b*) a decree holder purchaser stands on the same footing as a purchaser who is a *stranger* so that he may proceed either by an application under O 21 r 95 or by a separate suit for possession This view proceeds on the ground that sec 47 does not apply either because the question as to delivery of possession is not one relating to the execution discharge or satisfaction of the decree or because a decree holder after he becomes purchaser of the property can no longer be said to be a party to the suit In a recent case a Divisional Bench of the Patna High Court took quite the opposite view on both points (*c*) without reference to the Full Bench

(*s*) *Ka inatl a v Lth na sa* (190) 2 Mad 0 *I atl ijat* v *Ra n* (1903) 6 Mad 740 *Sa II i H a n* (1905) 8 Mad 87 *I j d a tl v May Natin* (19 0) 43 M 1 10 116 4 I C 09 (F B)

(*t*) *Fa lash* v *Gopal* (19 6) 53 Cal 81 95 I C 494 (6) A C 98 approving *M dhus dan* v *Gob la* (1900) Cal 34 *Sara toola* v *Rajk m r* (1900) Cal 0 *I n v I ndi Persl ad* (1904) 31 Cal 3 *Ha (l a M M ha* (1914) 18 Cal W N 0 I C 8 4

(*u*) *Sa dh* v *II a* (190) 8 Mad 8

(*v*) *I i l i M th* v *Ma Nat n* (19 0) 43 M 1 10 1 8 54 I C 09

(*w*) 6 M 1 740 and 8 Mad 8 *pra*

( ) (19 0) 43 Mad 10 54 I C 909 *pra*

(*y*) *Bh gwat* v *I wa i Lal* (1909) 31 All 8 1 I C 416 F B (t nl C J and Kn x J dissent) *B ddhu Mal* v *Bhagirathi* (1918) 40 All 16 4 I C 936 *Mohe* v *Ha der* (19 8) 0 All 6 0 ( ) A A 36

(*z*) *Haj tbd l* v *Ra I m* (1916) 1 Pat L J 23 3 I C 468 *D* v *der Da* v *B kh h* (1919) 3 I L J 1 48 I C 1 9 *Sridh r* v *Jag hera* (1919) 4 Pat L J 16 5 I C 11

(*a*) *Ha gor d* v *Bh la* (19 4) 48 Bom 0 83 I C 93 (4) A B 499 o m lla *Sad l e* v *Narav* (1911) 3 Bom 45 11 I C 948 *Lak hman* v *Govind* (21) 6 Bom L R 843 (4) A B 86 I C 503

(*b*) *Clotha P* v *Karmon B* (1918) 1 I n 8 p 34 44 I C 16 *N amat* v *Nak a B gam* (1919) 1 R no 1 1 p 31 3 I C 460 See also *I a j Lal* v *Darya* (1920) 1 Lah 134 56 I C 4

( ) *Ak ra* v *Pagh ath* (19) 4 Pat 4 85 I C 104 (25) A P 48

decision of the same Court in *Haji Abdul* v *Raja Ram* (d) The Oudh Court has *held (e) that though the decree holder purchaser is a party to the suit yet the question is* not one under section 47 because the act of placing the purchaser in possession does not involve the decision of a question relating to the execution discharge or satisfaction of the decree The cases in which it has been held that an auction purchaser even if he is the decree holder is not a party to the suit require reconsideration in view of the ruling of the Judicial Committee that such an auction purchaser is a party to the suit (*f*)

These two divergent views lead to different results —

(1) According to the first view that is the view taken by the High Courts of Madras and Calcutta a decree holder purchaser who seeks to recover possession from the judgment debtor of the property purchased by him at the auction sale can proceed only by an application under O 21 r 95 which raises a question under sec 47 such application must be made within 3 years from the date on which the sale becomes absolute [Limitation Act Sch I art 181] According to the latter view that is the view taken by the High Courts of Allahabad Patna Bombay and Lahore and the Chief Court of Oudh he may proceed by an application under O 21 r 95 Such an application according to that view does not raise a question under sec 47 therefore if he does not proceed by an application or if he makes the application but it is unsuccessful he may fall back upon his title and sue for possession Such suit may be brought within 12 years from the date when the sale becomes absolute [Limitation Act 1908 Sch I art 138] so that even if the time for an *application* under O 21 r 95 has expired he may proceed by way of suit

(2) According to the other view the application for delivery of possession falls under s 47 and the order made on the application amounts to a decree [s 2 (2)] and is appealable as such According to the latter view s 47 does not apply to the case and the application is entirely one under O 21 r 95 and no appeal lies from an order made upon such application

If the decree holder purchaser is obstructed in obtaining possession by the judgment debtor *and a stranger to the suit* the case does not come within s 47 and he may bring a suit for possession against them (*g*)

When a decree holder at a Court sale obtained possession of land in excess of what was included in the mortgage and the decree the Allahabad High Court held the judgment debtor s suit to recover the excess was not barred as the auction purchaser was not the representative of the decree holder (although he was the same person) (*h*)

Secondly where the purchaser is a stranger —Where a stranger auction purchaser seeks to recover possession from the judgment debtor two questions arise (1) whether the purchaser is a representative of either party to the suit and 2) whether the question of possession is one relating to the execution discharge or satisfaction of the decree The second question has already been discussed with reference to the decree holder purchaser and the conflict of decisions on the subject has been noted With reference to the first question the case does not fall under the section if the stranger auction purchaser is a representative of the judgment debtor for then the question would be between a party and his own representative But it would fall under the section if he were a representative of the decree holder Again the case would not come under the section if he

(d) (1916) 1 Pat L J 3 35 I C 468
(e) *G ja B k h* v *K ar Raj dra* (19 8) 3 Luck 18 110 I C 83 (8) A O 199 (F B)
(f) See *Ga ap thy* v *Kri hnamacha iar* (1918) 45 I A 54 60 41 Mad 403 411 44 I C 8 5
(g) *Gola* v *Sakharam* (19 0) 44 Bom 977 59 I C 366
(h) *B laki Das* v *Kesri* (19 8) 50 All 686 (28) A A 363

was a representative of neither The decisions on all these points are very conflicting The High Court of Bombay has consistently held that an auction purchaser who is a stranger is not the representative of either party to the suit (i) The High Courts of Calcutta (j) and Allahabad (k) have held that he is not the representative of the decree holder but that he is the representative of the judgment debtor In Madras there is a hopeless conflict of opinion The conflict was sought to be set at rest by a reference to a Full Bench in *Veerindramuthu v Maya Nadan* (l) but it cannot be said that the object was attained Oldfield J and Sheshagiri Ayyar J held that a stranger purchaser at a sale in execution of a money decree was a representative of the judgment debtor but not of the decree holder while Abdur Rahim A C J held that whether he was to be regarded as a representative of the one or the other depended upon the nature of the question raised and the right set up by the contesting party The preponderance of authority in Madras seems to be in favour of the view that a purchaser at a sale in execution of a money decree who is a stranger is the representative of the judgment debtor and not of the decree holder with reference to questions relating to the execution discharge or satisfaction of the decree Madras cases cited in footnote (m) decided that a stranger purchaser is not the representative of the decree holder while those in footnote (n) decided that he is Madras cases cited in footnote (o) decided that a stranger purchaser is the representative of the judgment debtor while those cited in footnote (p) decided that he is not The High Court of Lahore has expressed the view that a stranger purchaser is not the representative of the judgment debtor (q) The Oudh Court has adopted the view taken by Abdur Rahim A C J (r)

All the High Courts (s) except the High Court of Madras seem to hold that where an auction purchaser who is a stranger is resisted in obtaining possession by the judgment debtor of the property purchased by him in execution he may apply for delivery of possession under O 21 r 95 or he may bring a regular suit for possession The provisions of s 47 do not apply either because he is not the representative of the decree holder or because the question as to delivery of possession is not one relating to the execution discharge or satisfaction of the decree within the meaning of the section The period of limitation for an application under O 21 r 95 is 3 years from the date when the sale becomes absolute [Limitation Act 1908 Sch I art 181] and that for a suit is 12 years from the same date [*ibid* art 138] He is entitled to bring the suit without making any application under O 21 r 95 and he may sue even after an unsuccessful application The High Court of Bombay has held that an auction purchaser even though a benamidar for the decree holder is a *stranger* for the purposes of this rul (t) In Madras the Full Bench decision in *Veerindramuthu v Maya Nadan* (u) has been taken

( ) *Mag nlal v Doshi Mulji* (1901) Bom 631 63 *L k l jh v Kisa si gh* (1910) 34 Bom 546 7 I C 4 *Bai M v Ja bollal* (19) Bom L R 14 7 I C 6 (3) A B 14

(j) *Isla Ch ler v Ben Math b* (1906) Cal 6 [F B]

(k) *C l arn I v M ho P* (1904) 6 All 44 [F B] *An d K war v Ajudhia Nath* (1908) 30 All 3 9 383 384

(l) (19 0) 43 Mad 10 4 I C 09

( ) *K l v N as tul* (190) 31 Mad 1 *N l n v Vee blatr* (1910) 34 Mad 41 8 I C 4 9 *S bh m a v Ch gi* (1918) 41 Mad 46 47 I C 6 *V d th v Maya Nad n* (19 0) 43 Mad 10 1 1 8 4 I C 00 [*p* Oldfi ld J] *Sorn v Ti uva h p rum l* (1926) 51 Mad 1 J 1 6 96 I C 65 (6) A M 85

(n) *S d v H a* (190) 8 M 1 *Ma k k l j ny li* (1 0) 30 Mad 0 *V l dh v Maya N d n* (19 0) 43 Mad 10 1 4 4 I C 9 [*per* Abd r Rahim A C J]

(o) *I a a la v M habeer* (189) 0 Mad 3 8 *S t ama S as d a* (190) 9 Mad 119 *K ppa a v Kuma a* (1911) 34 Mad 4 0 *V v d m th v M ya Nadan* (19 0) 43 Mad 10 1 9 I C 419 4 I C 09 [*per* Oldfi ld J] *s pra*

(p) *Nadam v Veeradhad* (1910) 34 Mad 41 4 1 8 I C 4 *Ira y v S kk l ya* (1916) I Mad W N 33 I C 84

(q) *H Ka Ch d v C ga Ram* (1919) Punj Rec no 1 p 4 I C 140

(r) *I jh bar S gh v J dra Bahad S gh* (1919) 46 I A 36 23 4 All L J 166 16 5 I C 0

(s) *Ba M Pa k H l* (19 3) Bom L R 14 I C 6 (3) A B 14 *Kashon Moh l v Ch nd N th* (1) 14 Cal 644 *Bh gwati v B wa Lal* (1909) 31 All 1 I C 416 [F B] See also cases cited under the head "First where the decree holder himself the purchaser"

(t) *Ramch dra v G yana* (1920) 44 Bom 3 364 6 I C 31

( ) (1920) 43 Mad 10 4 I C 09

as an authority for the proposition that an auction purchaser though he be a stranger must proceed by an application under s 47 and that he is not entitled to bring a regular suit for possession In the Order of Reference it was assumed that the question as to delivery of possession related to the execution discharge or satisfaction of the decree within the meaning of s 47 The judgments of the learned Judges seem to have been influenced by the observations of the Privy Council in *Prosunno Kumar s* case as to the cheap and speedy disposal of objections to execution sales These observations were appropriate when the question is really between the parties to the suit and the auction purchaser is only an interested spectator but they are altogether irrelevant when the question is between a judgment debtor and a stranger purchaser at an auction sale The scope of the section is expressly limited to questions between parties to the suit and their representatives and the observations of the Privy Council do not and cannot extend the section beyond those limits It is high time that the section be amended and the conflict set at re t

Besides cases under O 21 r 95 questions between an execution purcha er may arise in other ways The High Court of Allahabad has held that where property not included in the mortgage deed or in the mortgage decree is sold and delivered to a stranger purchaser in execution the judgment debtor is entitled to bring a suit against the auction purchaser for recovery of the property and that the provisions of s 47 do not apply to the case (v) But the Madras High Court following the construction put upon the Full Bench decision in *Veerindramuttu* v *Maya Nadan* has held that such a case comes within s 47 and that a regular suit is barred (w) A Full Bench of the Allahabad High Court has held that an auction purchaser under a decree which has been after confirmation of the sale set aside as a result of a separate suit is entitled to apply under s 47 for recovery of the purcha e money from the decree holder (x)

Sub sec (3) Inquiry as to who is the representative of a party—*A* obtains a decree against *B* *B* dies b fore the decree is fully executed and *C* is brought on the record as *B* s legal repre entative under s 50 *D* claims to be the legal representative of *B* Under the Code of 1882 it was competent to the Court under these circumstances either to stay execution of the decree until the question as to who is the representative of *B* was determined by a separate suit or itself to determine the question The present section makes it obligatory upon the Court executing the decree it elf to determine the question (y) The same rule applies when the question arises in execution proceedings as to whether a certain person is a transferee of a decree for a transferee of a decree is as stated above a representative of a party within the meaning of this section An order determining whether a person is or is not the representative of a party is a decree [see s 2 cl (2)] and is therefore appealable (z)

If the transferee of a decree dies pending execution the executing Court has power under this section to inquire whether the transferee was merely a benamidar for another and to allow the real owner to execute the decree (a)

Stay of execution—The words or to the stay of execution thereof which occurred in s 244 after the words execution discharge or satisfaction of the decree have been omitted in the present section *There are two possible views as regards the*

(v) *Mun a L l* v *Collector of Shahjahanpur* (19 3) 4 All 96 4 I C 995 (23) A A 4 0 (f *Imt a* *a a* v *Ch tt n Lal* (19) 47 All 304 84 I C 46 (') A A '36 See also *Nagabhatta* v *Nagappa* (19 3) 46 Bom 914 6 I C 8 (3) A B 6 (judgment debtor estopped as he had not objected to the sale)

(w) *J ulabd* v *Kri l a* (19 1) 41 Mad L J 1 0 63 I C '00

(x) *B d h Jr* v *Bad l S gh* (19 3) 45 All 369 4 I C 8 3 (3) A A 394

(y) *Mt M ina Koer* v *D rga Prasad* (1917) 2 Pat L J 19 39 I C 1 *Babu L l* v *Ja al* (19 6) 48 All 4 94 I C 454 (6) A A 691

(z) *B d Nar* v *J Kishen* (1894) 16 All 483 *Kr h ama* v *App am* (190') ' Mad 45 *Ga g D s* v *Lal* 6 41 (1900) ' Cal 6 0 *Kh m S gh* v *Raghubir* (19 5) 4 All 96 86 I C 1048 ( ) A A 5 8

(a) *Krist m* v *Ja l ama* (19 9) 51 Mad 219 105 I C 405 ( ) A M 903

omission of these words The one is that the words omitted may have been regarded as superfluous for a plea that the execution of a decree may be stayed is equivalent to the plea that the decree should not be executed and it is thus a question relating to the execution of the decree (b) The other view is that those words having been deliberately omitted by the Legislature in the present section questions relating to the stay of execution are no longer within the section and no appeal lies from orders determining such questions (c) The latter view it is submitted is the correct view

Sub section (2) Court may treat suit as an application—This sub section is new It gives legislative recognition to the practice followed by the Courts under the repealed Code It enables the Court to treat an application under this section as a suit or a suit as an application If a suit is brought for the determination of a question which falls under this section the Court has a discretion either to dismiss the suit or to treat the plaint as an application under this section and dispose of it accordingly provided the Court in which the suit is brought has *jurisdiction to execute* the decree (d) and the execution of the decree was *not barred* at the date of the suit (e) The power however is discretionary and the Court may or may not exercise it (f) If the decree under appeal is otherwise in order the Court of Appeal may exercise this power and treat a plaint filed in the lower Court as an application under this section and the decree as an order under this section This is because section 47 affects procedure only and not jurisdiction (sec 99) but it will not do so unless the Court which passed the decree had *jurisdiction to execute* the original decree (g) and the suit was filed within the period of limitation prescribed for *applications* under this section namely the period prescribed by art 181 of the Limitation Act 1908 (h) In a case where a party instead of applying under this section filed a suit which he prosecuted to second appeal the High Court of Allahabad in the exercise of its discretion refused to treat the plaint as an application (i)

In a recent Allahabad case a minor objected in execution proceedings that he had not been represented by a guardian ad litem in the suit and the Court of execution refused to entertain the objection as one affecting the validity of the decree on appeal from the order the High Court of Allahabad treated the proceeding as a suit and made a declaration that the decree was not binding on the minor (j)

Where a sale is sought to be set aside on the ground that the decree was obtained by fraud—It has been stated above that the procedure for setting aside a sale on the ground of fraud in publishing or conducting the sale is by an application under O 21 r 90 and not by a separate suit But an execution sale may also be challenged on the ground that the decree on which it is founded is itself tainted with

(b) *Subr nia* v *Kumara Velu* (1916) 39 Mad 541 54 33 I C 66 *Chul mba am* v *Kr hna* (1917) 40 Mad 33 J 38 37 I C 836

(c) *J dan* v *Maria I* (19 1) 4 Bom 41) I C 3 *H n Bha* v *B iie* (19 4) 46 All 33 83 I C 103 (4) A A 808 *Rajend a K hor* v *Mathu Mohan* (1919) 5 C W N 555 5 I C 9 *Khita Moha* v *Sar t Ch d* (1926) 94 I C 351 (26) A C 830 *Parma a l* v *Raj Devi* (19) 9 Lah L J 193 100 I C 3 ( ) A L 85

(d) *Jhan a Lal* v *K wal Ram* (1900) All 1 1 S *Ila* v *Abh dan* (1904) 6 All 101 103 *Sheod k l* v *Bhaw* (190) 9 All 348 1 e *K ta Kri hnama Krish* *I* (1909) 3 M d 4 4 I C 3

(e) *S la hi* v *N rayn* (1911) 35 Bom 4 461 11 I C 98 *Pha cha d* v *F Ali l d s* (19 1) 45 Bom 1 4 176 58 I C 31

(f) *Sach Pra ad* v *Amarnath* (1919) 46 Cal 103 4 I C 864

(g) *Azi dd* v *Rama gra* (188) 14 Cal 60 *B M h la* v *Shyama Ch rn* (1 9) Cal 483 *Pasupathy* v *Kotha da* (190) 9 M 1 64 *Jot nd a* v *Mahomed* (190) 3 Cal 33 *Debendra Nath* v *I a a Kumar* (190) C. L. J 3 8 *M h S ngh* v *Fanchana* (19) 53 Cal 83 99 I C 180 (7) A C 106

(h) *Lalma Das* v *J ga Nath* (1900) All. 3 6 See also *Sarjan Bil* v *Asho La* (19 7) 54 Cal. 5 4 101 I C 622 ( ) A C 411

(i) *Pura Cha dra* v *Pawa Das* (1900) A W N 196

(j) *Daulat gh* v *M haraj Rajt Lamj* (19 6) 48 All 30 93 I C 3 0 (6) A A 3

fraud and in this case the remedy is by regular suit The following are the leading cases on the subject —

1 A suit will lie to set aside a decree and the sale held in execution of the decree where both the decree and sale are impeached on the ground of fraud (*k*) The reason is that the question of the validity of a decree can only be determined by a regular suit See notes above Note C Non execution question between parties

2 *A* obtains an ex parte decree against *B* In execution of the decree certain property belonging to *B* is sold and purchased by *C* The decree is then set aside under O 9 r 13 *B* thereafter sues *A* and *C* to set aside the sale challenging not only the sale but also the decree on the ground of fraud The suit is not barred under this section *B* is entitled to show that the decree was obtained by fraud and this can only be done in a regular suit (*l*)

Appeal —Sec 2 (2) provides that the determination of any question under sec 47 is a decree unless it is appealable as an order A determination under O 21 r 90 is appealable as an order under O 43 r 1 (j) Such a determination when it is between the parties to the suit or their representatives falls under sec 47 but is nevertheless subject to one appeal only as an order under sec 104 The same observation applies to a decision under O 21 r 2 which also is appealable as an order under O 43 r 1 (j) Similarly a decision under O 21 r 34 is appealable as an order under O 43 r 1 (i) and is subject to one appeal only All other decisions in execution under section 47 are decrees and subject to first and second appeal

As regards appeal therefore orders in execution proceedings may be divided into three classes —

(1) Orders under this section which are decrees and subject to first and second appeal

(2) Orders which whether they fall under this section or not are declared to be orders under O 43 r 1 and are subject to one appeal only

(3) Non appealable orders generally of an interlocutory nature

Attempts are frequently made on behalf of appellants to shew that orders in execution proceedings which are not appealable are appealable (*m*) and that orders that are subject to one appeal only are decree from which a second appeal can be preferred (*n*) Conversely attempts are made on behalf of respondents that orders which are appealable are not appealable and that orders which are subject to a second appeal are subject only to one appeal *e g* that they fall under O 21 r 90 and not under sec 47 (*o*)

Interlocutory orders in execution proceedings —A party is not bound to prefer an appeal from every order in execution proceedings though the order is appealable Whether the order be appealable or not it may be challenged by the party aggrieved in his appeal against the final order which determines the rights of the parties (*p*)

An order in execution proceedings which is merely processual or interlocutory does not come within the section It must be an order determining the rights and liabilities of the parties with reference to the relief granted by the decree and not merely an

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(*k*) *Abd l v M Jom d* (1894) 21 C l 60 *I r n v th v M lesh Ch d a* (180) 4 Cal 346 *M ti Lal v Fus ck Ch d a* (1899) 6 C l 3 6

(*l*) *Fa v a v Sh w Bl n* (1900) 27 Cal 10 *Debe ira Nath v P as a K m* (190) C I J 3 8

(*m*) *Mam o l v Lo l* (180) 0 M d 487 *B jha I n P Fu ar* (1899) 26 Cal 5 9 *Pam ll ar v N r D s* (190) 4 All 19

(*n*) *Bl bo i Mohu v N nd L l* (1893) 26 Cal 3 4 *L Lar ta v Di o N th* (1901) 8 Cal 4

(*o*) *Ra pada v Ka a Ra* (19 6) 44 C L J 16 93 I C 06 (6) A C 1 19

(*p*) *Cha l bala v I r bodh* (1909) 36 Cal 42

incidental order made with reference to the conduct of the proceedings (q) See note Section 47 Execution proceeding under sec 2 and note Appeal under O 21 r 66

Limitation —An application under this section to set aside a sale in execution of a decree must be made within 30 days from the date of the sale [Limitation Act 1908 Sch I art 166] But if the sale is void as where no notice is given as required by O 21 r 22 it is not necessary to apply to the Court to set aside the sale hence the article applicable in such a case is the residuary art 181 which provides a period of 3 years from the date when the right to apply accrues and not art 166 (r) An application under this section by a representative of a judgment debtor to set aside a sale on the ground that the property sold belongs to him and not to the deceased judgment debtor is governed by art 166 and must be made within 30 days from the date of sale (s)

LIMIT OF TIME FOR EXECUTION

Execution barred in certain cases

48 [S 230, 3rd and 4th paras] (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from—

(a) the date of the decree sought to be executed, or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application or

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(q) J [illegible] v Ka[illegible] (190[illegible]) 4 Cal 39 [illegible] (1904) [illegible] Deok[illegible] B[illegible] S[illegible]gh (1[illegible]) 16 C W N 1[illegible] 10 I C 3[illegible] [illegible] (1[illegible]) 34 All 530 1[illegible] I C 50 [illegible] (1911) 38 C[illegible] [illegible] I C 86 [illegible] (1913) 41 Cal 160 [illegible] (191[illegible]) 16 C W N [illegible] I C [illegible] (19[illegible]) 46 All 3[illegible] 40 83 I C 103 [illegible] (1[illegible]0) [illegible] Lah L J 3[illegible] I C 603 [illegible] (19[illegible]0) [illegible] L J [illegible] 61 I C [illegible] M L J [illegible] (19[illegible]) 5 [illegible] 534—[See also (19[illegible]) 5 Lah 641]

(r) Papagopala v [illegible] (19[illegible]4) 47 M [illegible] 80 I C 9[illegible] ([illegible] M 431 [F B] [illegible] Nath v Lachm[illegible] (19[illegible]) 5 Cal 96 1[illegible] I C 65 ([illegible]) [illegible] 60

(s) [illegible] Chan[illegible] v [illegible] Ch[illegible] (1919) 46 Cal 9[illegible] 54 I C 431

fraud and in this case the remedy is by regular suit The following are the leading cases on the subject —

1 *A suit will lie to set aside a decree* and the sale held in execution of the decree where both the decree and sale are impeached on the ground of fraud (*k*) The reason is that the question of the validity of a decree can only be determined by a regular suit See notes above Note C Non execution question between parties

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Appeal —Sec 2 (2) provides that the determination of any question under sec 47 is a decree unless it is appealable as an order A determination under O 21 r 90 is appealable as an order under O 43 r 1 (j) Such a determination when it is between the parties to the suit or their representatives falls under sec 47 but is neverthele s subject to one appeal only as an order under ec 104 The same ob ervation applie to a decision under O 21 r 72 which al o is appealable as an order under O 43 r 1 (j) Similarly a decision under O 21 r 34 is appealable as an order under O 43 r 1 (i) and is subject to one appeal only All other decisions in execution under ection 47 are decrees and subject to first and second appeal

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Attempts are frequently made on behalf of appellants to shew that orders in execution proceedings which are not appealable are appealable (*m*) and that orders that are subject to one appeal only are decrees from which a second appeal can be preferred (*n*) Conversely attempts are made on behalf of respondents that orders which are appealable are not appealable and that orders which are subject to a second appeal are subject only to one appeal *e g* that they fall under O 21 r 90 and not under sec 47 (*o*)

Interlocutory orders in execution proceedings —A party is not bound to prefer an appeal from every order in execution proceedings though the order is appealable *Whether the order be appealable or not it may be challenged by the party aggrieved* in his appeal against the final order which determines the rights of the parties (*p*)

An order in execution proceedings which is merely processual or interlocutory does not come within the section It must be an order determining the rights and liabilities of the parties with reference to the relief granted by the decree and not merely an

(*k*) *Abd l v M ho l* (1894) I C 1 60 ; *Pra N th M h h Ch d a* (189) 24 Cal 546 ; *M i Lal v J s k Cl l a* (1899) 6 Cal 3 6

(*l*) *I N v Sh w Bh ja* (1900) C 1 19 ; *D be l a N th v I ras a K mar* (190) 5 C L J 3 3

(*m*) *Mammod v Lock* (18) 0 Mal 48 ; *B j a Fow I a Fu a* (1899) 6 Cal 5 9 ; *I a Idhar v N D* (190) All 19

(*n*) *Bh bon Mol v N I L l* (18) 6 C 1 3 4 ; *L la la v D Nath* (1901) 8 C 1 4

(*o*) *Rampada Ka a F* (19 6) 44 C L J 16 ; 93 I C 06 ; (6) A C 1 19

(*p*) *Ch ir bala v I r bodl* (1903) 30 Cal 4

incidental order made with reference to the conduct of the proceedings (q) See note Section 47 Execution proceeding under sec 2 and note Appeal under O 21 r 66

Limitation—An application under this section to set aside a sale in execution of a decree must be made within 30 days from the date of the sale [Limitation Act 1908 Sch I art 166] But if the sale is void as where no notice is given as required by O 21 r 22 it is not necessary to apply to the Court to set aside the sale hence the article applicable in such a case is the residuary art 181 which provides a period of 3 years from the date when the right to apply accrues and not art 166 (r) An application under this section by a representative of a judgment debtor to set aside a sale on the ground that the property sold belongs to him and not to the deceased judgment debtor is governed by art 166 and must be made within 30 days from the date of sale (s)

LIMIT OF TIME FOR EXECUTION

48 [**S 230, 3rd and 4th paras**] (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from—

Execution barred in certain cases

(a) the date of the decree sought to be executed, or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment debtor has, by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application or

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(q) *Jogod h r j* v *I a l h* (189) 4 Cal 39 *S aj* v *S l ah a a* (1904) Mad 9 *D k* v *Br S gh* (191) 16 C W N 1 4 10 I C 3 1 *M Kh* v *M q rr b* (191) 34 All 30 15 I C 0 *N nd h K lo l rasad* (1911) 38 Cal 4 9 I C 86 *S a* v *lap D* (1913) 41 C 1 160 20 I C 2 *Pa h* v *Ma* (191) 16 C W N 9 0 1 I C 8 *H Iha* v *B h Shah* (19 4) 46 All 33 3 40 83 I C 103 (4) A A 808 *S n* v *I a n I* (19 0) Lah L J 398 8 I C 603 *l a N th M t* (19 0) Lat L.J 0 6 I C 4 *P M K M S Chin aya* (19 7) 5 R ng 534—[*S e* also (19) 5 Lang 641]

(r) *P ngopala P a p k r* (19 4) 47 Mad 288 80 I C 9 (24) A M 431 [F B] *M matha Nath* v *Lachm* (19 8) 55 Cal 96 105 I C 6 (28) A C 60

(s) *Sat h Chand a* v *N k Ch dra* (1919) 46 Cal 9 5 54 I C 431

(b) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877

Changes made in the section —This section corresponds with the third and fourth paras of s 230 of the Code of 1882 which were as follows —

Where an application to execute a decree *for the payment of money or delivery of other property* has been made *under this section and granted* no *subsequent application* to execute the same decree shall be *granted* after the expiration of twelve years from any of the following dates (namely) —

(a) the date of the decree sought to be enforced *or of the decree (if any) on appeal affirming the same* or

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree

Nothing in this section shall prevent the Court from granting an application *for* execution of a decree after the expiration of the said term of twelve years where the judgment debtor has by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application

The following alterations have been made —

(1) Section 230 applied only to decrees for the payment of money or delivery of other property The present section applies to all decrees except *decrees granting an injunction*

(2) Section 230 applied only where an application for execution had been made under this section and granted The words under this section as also the words and granted have been omitted in the present section The result is that the rule of limitation contained in this section applies whether the previous application for execution was made under a former Code or the present Code and whether the application was granted or not See note below *Orders on applications for execution*

(3) The words or the decree (if any) on appeal affirming the same in sec 230 cl. (a) have been omitted See note below Date of decree

(4) The words or at recurring periods in sub section (1) cl (b) are new They are intended to give effect to certain decisions under s 230 of the Code of 1882 See notes below Date of default

(5) Clause (b) of sub section (2) is new It gives effect to certain decisions under s 230 of the Code of 1882 See notes below Successive applications for execution of decrees of Chartered High Courts

Successive applications for execution of decrees of Courts other than Chartered High Courts —This section deals with the maximum limit of time for execution it does not prescribe the period within which each application for execution is to be made (*t*)

As explained in the next paragraph sub *section* 2 (b) has the *effect of excluding* Chartered High Courts from the operation of the section The section only applies to Courts other than Chartered High Court

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(*t*) [illegible] *pore* (19 4) 48 All 3 [illegible] I C 60 [illegible] A A [illegible]

A decree holder is entitled to present in succession *any number* of applications for executions of the same decree (u) and the Court has no power to refuse execution unless—

(i) the application is barred by virtue of general principles of law analogous to those of res judicata or

(ii) the application is barred under art 182 of the Limitation Act, 1908 or

(iii) the *execution* of the decree is barred under the present section [illegible] the *application* for execution may not be barred under (i) or (ii) above.

(i) —If the first application for execution is dismissed after a hearing on the [illegible] the Court will not having regard to the general principles of law analogous to [illegible] res judicata entertain a subsequent application for execution of the same decree [illegible] See note to s 11 Orders in execution proceedings etc p. 77 above

(ii) —The general effect of art 182 of the Limitation Act 1908 is to require [illegible] application for execution of a decree of a Court other than a Chartered High Court [illegible] made within three years of the decree and each successive application [illegible] within three years of the date of the last application The decree is thus [illegible] any time within the time limit for execution prescribed by this section.

(iii) —This section fixes an outside period after which execution of a decree [illegible] be allowed even though the application may not be barred by the rule [illegible] or by art 182 of the Limitation Act (x) A obtains a decree against B [illegible] 1st January 1910 and applies for execution of the decree within three years [illegible] of the decree Further applications are made for execution of the same [illegible] a period of three years from the date of the next preceding application [illegible] these is made in December 1921 A then makes a fresh application [illegible] 1st January 1924 No order can be made for execution of the decree [illegible] application is not barred under the Limitation Act execution is barred [illegible] as it is made twelve years after the date of the decree Under [illegible] Code of 1882 it was necessary to inquire if a previous application [illegible] granted This is no longer necessary See note below Or[illegible] execution The twelve years period for execution is calculated from [illegible] or from the date of default in respect of any payment or delivery [illegible] decree See note below Terminus a quo for limitation

Successive applications for execution of decrees of Chartered [illegible]

The holder of a decree of a Chartered High Court passed in the [illegible] original civil jurisdiction is entitled to present in succession any [illegible] for execution of the decree and the Court is bound to entertain [illegible] application is barred—

(i) by virtue of general principles of law analogous to the [illegible]

(ii) under art 180 of the Limitation Act 1877 [now art [illegible] Act 1908] that being the article which applies to [illegible] High Courts

There is no bar under this section because it does not limit [illegible] operation of art 183 of the Limitation Act 1908 as it does [illegible] words the twelve years rule does not apply to decree passed by [illegible] Art 183 of the Limitation Act permits a revivor in the case [illegible]

(u) Thak r Pra a[illegible] v F[illegible] (18[illegible]) 1 All 106 111 11 I A 44 S al[illegible] 1 r 11 and Limitation Act rt 1[illegible] cl (4)

(v) D[illegible] kal v P[illegible] (1893) 1 All 84 100

(w) See Dhonkal [illegible]

(x) Lal [illegible] 40 Cal [illegible]

High Courts in the exercise of ordinary original civil jurisdiction or of orders of His Majesty in Council This was inconsistent with section 230 of the Code of 1882 and so that section was held to be independent of the corresponding article 180 of the Limitation Act 1877 (y) These decisions have now been given statutory authority by sub section 2 (b) The twelve years rule therefore does not apply to decree passed by a Chartered High Court in its original civil jurisdiction Such decrees may be kept alive for any number of years and so may orders in Council made in Privy Council appeals ( ) Decrees of Chartered High Courts in the exercise of their Appellate Civil jurisdiction are not within article 183 of the Limitation Act 1908 (a)

Orders on applications for execution—An application for execution may either be—

(1) *granted* or

(2) *refused*—

(a) in circumstances operating as a bar to future execution as where it is refused on the ground that it is barred on the principle of res judicata or barred by the law of limitation or

(b) in circumstances not operating as a bar to future execution as where it is refused on the ground that it is not in accordance with law [O 21 r 17] (b) or

(3) *withdrawn* by the applicant—

(a) in circumstances operating as a bar to future execution as where the withdrawal was with the object of abandoning execution or

(b) in circumstances not operating as a bar to future execution (c)

Under s 230 of the Code of 1882 the twelve years limitation imposed by that section applied only if one at least of the previous applications was *granted* by the Court but not otherwise Under the present section it matters not whether the previous applications have been granted or refused or withdrawn All that the section now provides is that where an application to execute a decree *has been made* no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date specified in the section

Fresh application —The phrase fresh application has been substituted for subsequent application to make it clear that the application referred to in this section is a *substantive* application for execution and not merely an *ancillary* application made with the object of moving the Court to *proceed* in the matter of a *substantive* application already on the file (d) Thus where property has been *attached on an application for execution an application for sale* of the attached property is not a fresh application to execute the decree within the meaning of this section (e) Similarly where a warrant issued for the arrest of a judgment debtor on an application for execution is returned with the remark that the judgment debtor could not be found a subsequent application for the arrest of the judgment debtor is not a fresh application to execute the decree within the meaning of this section but is

(y) *M ; th v Tr bl va das* (18) 6 Bom 29 (path v B la d) (1884) M a 41 *Jog Ira v Sl m Da* (1909) 36 Cal 543 54 1 I C 168

(z) *F ll h Na a Ch dr bati* (1893) 20 Cal. 1

(a) *Kr a K k r v B rrod ca t* (19) 14 M I A 46

(b) *Dho 1 l v Pl H* (1893) 1 All 84 100

(c) *Thak r I r l v F k rullah* (189) 1 All 106 110 111 J A 44 *Ch la an v B l h t* (18) 16 B m 294 301 *S m ma v In l d* (1839) M I 61 *P l ll v I h l Cha d* (1896) 18 All 49 486

(d) *Pal n Al l l Cha d* (1896) 19 All 49 *I am S rup v D ath* (1911) 33 All 1 9 I C 81 *Pa a l v h wh M n* (1891) 9 C L R 9 *t adh n l l v l Ch ra* (19 6) 24 All I J 43 94 I C 613 (6) A A 331

(e) *Chowdhry I oo h l m h l* (1890) 17 Cal 53

merely an *incidental* application to carry on proceedings already commenced (*f*) On the same principle it has been held that an application to revive execution proceedings which have not terminated is not a fresh application within the meaning of this section (*g*) nor an application by the legal representatives of a decree holder for execution on his death pending execution proceedings (*h*) But an application for attachment of property cannot be treated as a continuation of a previous application for arrest (*i*) nor an application for attachment of other property not included in the previous application for attachment (*j*)

An application to transfer a decree to another Court for execution is not an application for execution within the meaning of this section Such an application though made *within* twelve years from the date of the decree will not entitle the decree holder to execution if the application for execution to the Court to which the decree is transferred is made *after* the expiration of twelve years (*k*)

Terminus a quo for limitation—The period of limitation within which a decree may be executed is twelve years from—

(a) the date of the decree or

(b) the date of default in respect of the payment of money or the delivery of property when such payment or delivery has been ordered to be made at a certain date or at recurring periods either by the decree or by any subsequent order

Date of decree—The decree capable of execution is the decree of the Court of first instance until appeal and after that the decree of the Court of last instance see note What decree may be executed under sec 36 above If the decree is that of a Court of first instance the period runs from the date of the decree If there is a preliminary decree and a final decree the two must be read together and the date is the date of the final decree (*l*) If the decree to be executed is an appellate decree the period runs from the date of the appellate decree whether it affirms sets aside or modifies the original decree (*m*) but not if no appeal lies (*n*) or if the appeal is dismissed for default (*o*) The words or of the decree (if any) on appeal affirming the same in section 230 of the last Code have been omitted as misleading being open to the construction that where the original decree was *modified* or *set aside* on appeal the period of twelve years was to run from the date of the *original decree* Where a decree is passed in favour of the plaintiff against the defendant and part of the decree is appealed from and the rest is not the period of 12 years prescribed by this section runs from the date of the *appellate decree* both as regards the application to execute the portion appealed from and the portion not appealed from The reason is that there is only one decree that can be executed and that is the decree of the appellate Court (*p*) Where a decree is passed not jointly but severally against two or more defendants and one of the defendants appeals from the decree the period of 12 years as against the

(*f*) *Jit Mal v Jwal Prasad* (1899) 21 All 1
(*g*) *S l d v Ga e h* (1918) 3 Pat L J 103 44 I C 560 *Chatt r Singh v Kamal Singh* (1927) 49 All 276 *B ij Nath v P n Bl ros* (19) 49 All 509 104 I C 116 (2) A A 16
(*h*) *Baij Nath v Ram Bharo* (19 7) 49 All 509 104 I C 116 (7) A A 165
(*i*) *Met L l v Ah l* (191) 9 All L J 1
(*j*) *S m lado v S bl i a* (19) 5 Mad L J 13 100 I C 0 ( ) A M 34 *H i t s i v Ash i Kl at in* (19 3) 50 C l 43 4 I C 101 (4) A C 131 *I am I att i v I m Dular* (8) A L 808 See also *T i da mart v D i ga nba* (8) A M 11 4
(*k*) *Su tar S ngh v Dor i Sh l r* (1893) 0 All 8 *Nilmo i v B res* (1889) 16 Cal 44 *S ja H ei v Mo oh Da* (18) 2 Cal 9 1 *J eera das v Ran hod las* (1911) 3 Bom 103 8 I C 168 *Kl etpal v T ka S gh* (191) 34 All 376 14 I C 1
(*l*) *Sh iba D rga v Gop* (191) 23 C L J 73 33 I C 180
(*m*) *Mal ed M ld v Moh i Ka ta* (190) 34 Cal 8 4
( ) *Sah i Na dlal v Sah Dharam* (19 6) 48 All 3 94 I C 961 (26) A A 440 distinguishing *P p Na v Sheo Prakash* (19 1) 43 All 40 61 I C 1 9
(*o*) *Ram Adhin v I m Lal* (1918) 4 I C 1 5
(*p*) *Krist ama v Mangammal* (1903) 6 M d 91

barred as the section applies to mortgage decrees and the law of limitation applicable to a suit or proceeding is that in force at the date of its institution (j)

Fraud — Fraud or force on the part of a judgment debtor at any stage of the execution gives a new starting point for the period of limitation (k) The word *fraud in this section should not be narrowly interpreted* (l) The fraud dealt with by this section is such as prevents the execution of the decree within twelve years and judges ought to take a broad view of conduct deliberately adopted by judgment debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections which are dishonest upon the face of them (m) Locking up the house so as to prevent attachment of movable property (n) or evading arrest by any contrivance or dishonestly evading payment by eluding service of warrant (o) is fraud within the meaning of this section So is a fictitious transfer of his property made by a judgment debtor to defeat or delay execution (p) If the judgment debtor presents an application to set aside a decree passed ex parte against him with the sole object of delaying execution proceedings he is guilty of fraud within the meaning of this section (q) But though the Court has the power to grant execution after the expiration of twelve years from the date of the decree on the ground of fraud or force on the part of the judgment debtor the Court should not use that power unless it is satisfied that the decree holder on his part had been diligent in proceeding with execution since the date of the decree (r) It is doubtful whether the fraud of one of several judgment debtors keeps the decree alive against all of them (s)

Limitation Act section 4 —When the twelve years period expired on a day on which the Court was closed the Calcutta High Court applied section 4 of the Limitation Act on the principle that when a party is prevented from doing a thing on a particular day by the act of the Court he is entitled to do it at the first available opportunity (t)

Limitation Act section 15 (1) —Sec 15 (1) of the Limitation Act 1908 cannot be applied in computing the period of 12 years prescribed by the present section (u)

Minority —A decree is passed in August 1897 on behalf of a minor in a suit brought by his guardian for partition and mesne profits Various applications for execution are made by the minor through his guardian within 3 years of each other The period of 12 years prescribed *by this section* expires in August 1909 The minor attains majority in November 1909 and in November 1910 he applies for execution of the decree and claims an extension of the period on the ground of minority Is he entitled to any extension either under sec 6 of the Limitation Act 1908 or under any other law ? The High Court of Madras answered the question in the negative on the ground that sec 6 of the Limitation Act is expressly limited to cases where the limitation is provided in the Limitation Act itself and that there is no law apart from the said sec 6 under which minority is a ground of exemption from the operation of the law of limitation (v) The High Court of Bombay agrees with the Madras High Court in

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(j) *Bej S It v S rri B gam* (19 6) 48 All 1 1 90 I C 4 (6) A A J3 dissenting from *Ka dl v Ishri S gl* (1910) 3 All 4 I C 188 *R sicar v Jasod Lal* (1913) 40 Cal 04 19 I C 331 *G pal d v Trilho* (19 1) 45 Bom 36 3 I C 90 *M f v S Lina* (1916) 1 I L J 914 34 I C

(k) *k y in v I gl a* (18) 9 Mad 3 0 *M I Ali v Man n Al* (1911) 34 All 0 11 I C 6

(l) *I n k n v I gas m* (1883) 6 Mad 36 36 *Lalla Prasad v ... aj K m* (19) 44 All 31 3 4 6 I C R ( ) A A 145

(m) (19) 44 All 31 3 4 6 I C 877 ( ) A A 145 *pra*

(n) *Bh gu I a h b* (18) 9 Bom 318 *k e I yy v I gh a* (18 9) 2 M d 3 0

(o) *Patt la a v P gasan* (1883) 6 M 1 365 *Abd l I h t r v Aha n d* (191) 35 M d 6 0 I I C 6 9 *R a nthan v M h d en* (19 4) 4 M d L J 4 8 80 I C 31 (4) A M 836

(p) *Fu l t) v S r s ka a* (18) 4 Mad 20

(q) *Pa Sham K s v Di ar K n D bi* (1908) 11 C W N 440

(r) *Ibid* But see *Abd l Kh d r v Ahammad* (1911) 3 Mad 6 0 1 I C 6 9

(s) *Abd l Kh d r v Ah d* (1911) 3 Mad 6 0 I I C 6 9

(t) *I ary Moh n v I da* (1891) 18 Cal 631

(u) *S M yan v Nat ja* (19) 4 M d 0 I C 306 ( ) A M 69

(v) *I am Babu* (1914) 37 M d 186, 18 I C 86

holding that sec 6 of the Limitation Act applies only to cases dealt with by the Act itself but differs from that Court in that it holds that the minor is entitled to an extension 4
of the period under the general principle of law that time does not run against a minor (w) The same Court has held that where the decree has been obtained in the first instance by an adult the fact that the decree on his death passes to an heir who is a minor does not extend the period of 12 years prescribed by the present section (x) The latter case was decided under the Limitation Act for it was said that time having begun to run against the decree holder the subsequent disability of the minor heir was under that Act ineffectual to stop it The Lahore Court does not apply section 6 of the Limitation Act on the ground that sec 48 is enacted for the benefit of the judgment debtor in order that he should not be harassed for ever by execution proceedings (y) The High Court of Allahabad has followed the Madras decision (z)

Where decree transferred for execution—The Court to which a decree is transferred for execution has power to determine whether execution is barred under this section (a)

Execution by Collector—The words period of limitation in para 11 (3) of Schedule III to this Code are not confined to periods of limitation prescribed by the Limitation Act The period during which the Collector is acting under that Schedule is excluded in calculating the twelve years period under this section (b)

Dekkhan Agriculturists Relief Act 17 of 1879—In computing the period of 12 years provided by this section the time taken up in procuring a conciliator s certificate as required by the D A P Act is to be excluded (c) A decree for sale on a mortgage passed under that Act does not require to be made absolute hence the period of 12 years is to be computed from the date of the decree and not from the date of the order making the decree absolute (d)

TRANSFEREES AND LEGAL REPRESENTATIVES

49 [S 233] Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment debtor might have enforced against the original decree holder

Transferee

Equity of judgment debtor—This is the same principle as that enacted in sec 132 of the Transfer of Property Act 1882 A right of set off is an equity and if the judgment debtor has the right to set off a cross decree under O 21 r 18 he has this right also against the transferee of the decree holder (e) The section applies to all decrees including mortgage decrees (f)

Illustrations

1 A holds a decree against *B* for Rs 000 *B* holds a decree against *A* for Rs 3 000 *A* transfers his decree to *C* *C* cannot execute the decree against *B* for more than Rs 2 000 (g)

( ) *Mor v I as j* (18) 16 Bom 536

( ) *Li j a t v I aj M la n al* (191) 36 B n 498 1 I (8)

(y) *Ji da v Mohan I l* (18 4) 1 R 1 8

( ) *Ire Nath v Ch t j l* (191) 3 All 638 c 13 All I J 166 I C 86

(a) *N I i ma v S tn mo t* (19) 5 Rang 106 I C 85 (8) A R 40

(b) *h I n v Coll cto of I e s* (19 0) 4 All 118 5 I C 4

(c) *Sh I ja v S t ppa* (1918) 4 Bom 36 45 I C 494

(d) *H ra h i d v Aba* (19) 46 Bom 6 1 67 I C 1 3 ( ) A B 9

(e) *I i Ali Lakh la l* (1 68) 1 Be g L R 23 F B *A dol m n v Ked r* (18) 16 Cal 610 S v e ll j (1903) 6 M d 4 8

(f) *Sheo Prasad v Lali* (19 4) 4 I t 1 5 86 I C 564 ( ) A I 44

(g) *A n U Lakh I nt* (18) 1 B L R 23 F B

2 A obtains a decree against *B* for Rs 5 000 *B* then sues *A* to recover Rs 2 000 Pending *B* s suit *C* obtains a transfer of *A* s *decree with notice of B s suit* A decree is then passed for *B* in his suit against *A* *C* applies for execution against *B* of the whole decree for Rs 5 000 He is not entitled to execute the decree for more than Rs 3 000 as the transfer was taken with notice of *B* s suit (*h*)

The second illustration is the case of *Kristo Ramani* v *Kedarnath* (*i*) in which it was assumed that the assignee must have notice of the equity It is submitted however that it matters not that the assignee was unaware of the equity provided it was existing at the time of the assignment see sec 132 of the Transfer of Property Act 1882 illustration (1) and the case of *Mon Mohan* v *Dwarka Nath* (*j*) In the latter case the Court said Under section 49 of the Code the assignee of a decree stands in no better position than the assignor and takes it subject to all the equities and defences subsisting at the time of the assignment which the judgment debtor could have asserted against it in the hands of the judgment creditor notwithstanding that the assignee may have had no notice thereof

50 [S 234] (1) Where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representatives of the deceased

Legal representative

(2) Where the decree is executed against such legal representatives he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of and for the purpose of ascertaining such liability the Court executing the decree may of its own motion or on the application of the decree holder compel such legal representative to produce such accounts as it thinks fit

Changes in the law —The present section differs from the corresponding section 234 of the Code of 1882 in one respect viz that the words fully satisfied have been substituted for the words fully executed See notes below under the head Before the decree has been fully satisfied

Extent of liability of legal representative —This section enables a decree holder to execute his decree against the legal representative of a deceased judgment debtor The property that can be attached is the property of the judgment debtor *found in the hands of the representative* and the *property of the representative from* whatever source derived to the extent of that which he has wasted out of the assets come to his hands without satisfying the debts of the deceased (*k*)

The liability of a legal representative in *execution proceeding* is confined to the property of the deceased which *has actually come to his hands* If the decree holder seeks to make the legal representative answerable also for the property of the deceased which with due diligence on his part *would have come to his hands* his proper remedy is by way of *suit* against the legal representative and not by proceedings in execution under this section (*l*)

(*h*) *Kristo Ramani* v *Kedarnath* (1889) 16 Cal 619
(*i*) (1889) 16 Cal 619
(*j*) (1910) 1 [illegible] 1 J 31 [illegible]
(*k*) *[illegible] Singh* v *[illegible]* (18[illegible]) 16 Cal 1 *Cl[illegible] Dat* v *Moh[illegible]* (18[illegible]) 3 Cal 4[illegible]
(*l*) *Kh[illegible]* v *H[illegible]* (1887) 11 Bom *[illegible] Debi* v *B[illegible]* (1898) 3 C [illegible] 110

The extent of the liability of the legal representative is decided by the Court executing the decree and the Court may call for an account of the property of the judgment debtor that has come into the hands of the legal representative The decree holder must prove in the first instance that some assets have come to the legal representative and the onus is then shifted to the latter to shew how the assets including rents and profits have been applied (*m*)

A decree-holder is entitled under this section to have the amount of the decree paid out of the assets of the deceased in the hands of the legal representative *which have not yet been duly disposed of* Hence the legal representative is bound to pay to the decree holder the *full* amount of the decree though there may be other creditors of the deceased and the assets may not be sufficient to pay them all in full (*n*)

Legal representative — Legal representative means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased [see s 2 cl (11)] Thus where a judgment debtor dies and a stranger takes possession of his property the decree may be executed against the stranger for he is a legal representative within the meaning of this section see note Legal Representative under sec 2 (11) (*o*) A residuary legatee in possession of the judgment debtor s estate is his legal representative although letters of administration have not yet been issued to him (*p*) The purchaser of the business of a firm against which a decree has been passed is not the legal representative of the firm within the meaning of this section The decree against the firm cannot therefore be executed against the purchaser (*q*)

Before the decree has been fully satisfied —The corresponding section of the Code of 1882 (s 234) provided in effect that if a judgment debtor died before the decree had been fully *executed* the holder of the decree might apply to the Court which passed it to execute the same against the legal representative of the deceased This gave rise to the question as to when a decree could be said to be fully executed ? It was held by the High Court of Madras that a decree could not be said to be fully *executed* until the property attached was *sold* and that if the judgment debtor died *before sale* his legal representatives ought to be brought on the record and if the property was sold without the legal representatives being brought on the record the sale was absolutely void (*r*) On the other hand it was held by the High Court of Allahabad that once the property was *attached* the decree was fully *executed* and that it was not necessary to bring the legal representatives on the record and a sale held in their absence was not void The latter decisions were based on the ground that once a property was attached it was in the hands of the law and the attachment did not abate on the death of the judgment debtor (*s*) At the same time there were cases in which it was held that omission to bring the legal representatives on the record did not vitiate the sale but was at most an irregularity within the meaning of sec 311 of the Code of 1882 [now O 21 r 90] (*t*) It was to remove this conflict of decisions that the word satisfied has been substituted in the present section for the word executed The effect of this alteration in the language is to supersede the Allahabad decisions in so far as they hold that after attachment it was not necessary to bring the

(*m*) *I j of I l h t v I r j j* (1916) 30 M d I J 331 3 I C 9 4

(*n*) *I e l t ra g jan v Kri hnasami* (1899) Mad 194

(*o*) The decision to the contrary in *Ch thakelan v G rinda* (1894) 1 Mad 186 is no longer law

(*p*) *Pro o Ch ndra v Kri t* (18) 4 Cal 34 *Ch t L l v O d* (1903) 30 Cal 1044

(*q*) *Hari h Ch nd a v Ch dpore C Ltd* (1903) 30 Cal 901 *Th Arb thnot s Ind s tr ls Ltd v Muthu Chettiar* (1908) 31 Mad 464

(*r*) *I a s n v B g r th* (1883) 6 Mad 180 *Cro es v Adm nist ator-G er l* (1 99) Mad 119

(*s*) *Sh o P asad v H a Lal* (1890) 1 All 440 [F B] *Abdu l Ama v Sh kar* (1895) 1 All 16 *Stowell v Ajudhia Nath* (1884) 6 All 255

(*t*) *Ibn v Dh du F* (189) 19 Bom 2 6 *N t Lall v Shek A m* (1 96) 23 Cal 686 *Bep B h ry v on Bh an* (1913) 18 C W N 66

legal representatives on the record for a decree cannot be said to be fully satisfied merely because the property was attached Under the present section if the judgment debtor dies after attachment his legal repre entatives may be brought on the record At the same time it has been held that omission to bring the legal repre entatives on the record does not render the sale void but amounts merely to an irregularity within O 21 r 90 and the sale will not be set aside unless substantial injury is proved (*u*)

May apply to execute the decree against the legal representative"—Where execution proceedings have been commenced again t a judgment debtor they can be continued after his death by substituting the name of the legal representative in place of that of the judgment debtor in the application for execution already on the files of the Court It is not necessary to file a fresh application for execution under O 21 r 11 (*t*) See O 22 r 12 At the same time notice should be given to the legal represen tative unde O 21 r 22 If such notice has been served on the legal representative the order substituting his name can be made ex parte (*w*)

The executing Court has power to allow execution against legal representative and to transfer the decree fo execution to another Court without giving any notice to the legal repre entative leaving it to him to raise all just objections to execution in the transferee Court (*w*)

To which Court application should be made—According to the High Court of Bombay (*x*) Allahabad (*y*) and Madras ( ) the application to execute a decree against a legal repre entative must be made to the Court which passed the decree and a Court to which a decree is transferred is not competent to entertain it The Calcutta High Court has held that the application may also be made to the Court to which the decree is trans ferred for execution and that the omission to apply to the Court which pa sed the decree is only an irregularity which is cured by section 99 (*a*) The Lahore High Court has followed the Calcutta view (*b*) The Calcutta view has recently been approved by the Privy Council (*c*)

Death of legal representative—If the legal representative of a judgment debtor against whom execution has been taken out under this section dies before the decree has been fully executed the decree holder may execute the decree against the legal representative of the legal representative to the extent of the as ets of the original judgment debtor that may have come into his hands (*d*)

Legal representative bound by previous proceedings—The legal representa tive is bound by orders pas ed in execution against the deceased judgment debtor A obtains a decree against *B* *A* then transfers the decree to *C* *C* applies for execution against *B* and an *order is made* for execution after notice to *A* and *B* as provided by O 21 r 16 [Code of 1882 s 232] *A* then dies and his legal representative *D* is brought on the record under this section The order for execution having been passed in his lifetime *D* cannot object to execution on the ground that the transfer to *C* was fraudulent (*e*)

(*u*) *Jagadish* v *Rama S da* (1919) 3 C W N 608 *Doraswami* v *Chidambaram* (19 4) 4 Mad 63 5 I C 46 (''4) A M 130 *T r gn i* v *Raj Krishna* (19) 3 C W N 418 (8) A C 7

( ) *Premlall* v *I jba* (1910) 34 Bom 14 4 I C 839 See also *Bhagwa Das* *J q l Kishor* (19 0) 18 All L J 35 5 I C 610 *Nachamma* v *Subr mon n* (19)5 Rang 5 6 806 I C 853 (8) A R 25

(*w*) *Nach a ma* v *S bra a an* (19 8) R ng 106 I C 8 (8) A I 40

(*x*) *H a ha d* v *J sturch d* (1 04) 18 Bom 9 4

(*y*) *S th hap rj* v *Sl I* (189) 1 All 431

( ) *Suram atha* v *I ty th* (190) 8 Mad 466

(*a*) *Sl n Lal* v *Madh nd* (189) Cal 5 8

(*b*) *Mi t Beg* v *B I q Sl l* (19 6) 90 I C 10 0 (6) A L 34

(*c*) *J g B ad r* v *B k of Upper I d a* (19 9) I A 3 Luck 314 109 I C 41 (8) A I C 16

(*d*) *J fri Beg m* v *a B b* (1900) All 36

(*e*) *M I ha d* v *Chh j* (1886) 10 Bom 4 *L latbar* v *Chat rbh j* (1894) 1 All 2

Decree for injunction—An injunction obtained against a defendant restraining him from obstructing plaintiff's ancient lights may on the death of the defendant be enforced under this section against his son as his legal representative by procedure under O 21 r 32 [Code of 1882 s 260] (*f*) But such an injunction cannot be enforced under this section against a purchaser of the property from the defendant for an injunction does not run with the land The remedy of the decree holder is to bring a fresh suit for an injunction against the purchaser (*g*) See notes to s 11 Decree for injunction and res judicata on p 43 above and notes to s 47 Representatives No 6—Purchaser of property etc The Bombay High Court has held that an injunction can be enforced against a person who has purchased while execution proceedings are pending by virtue of the doctrine of lis pendens (*h*)

Procedure in Execution

51 [*New*] Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree holder, order execution of the decree—

Powers of Court to enforce execution

(a) by delivery of any property specifically decreed,

(b) by attachment and sale or by sale without attachment of any property,

(c) by arrest and detention in prison

(d) by appointing a receiver, or

(e) in such other manner as the nature of the relief granted may require

Simultaneous execution—Simultaneous execution both against the property and person of the judgment debtor is allowed under O 21 r 30 But the Court has discretion under O 21 r 21 to refuse simultaneous execution and to allow the decree holder to avail himself of only one mode of execution at a time The Privy Council has said that the difficulties of a litigant in India begin when he has obtained a decree (*i*) and the Court is not justified in refusing execution against the person on the ground that the decree holder should first proceed against the property (*j*)

Receiver in execution proceedings—A receiver may be appointed to realize a decree attached in execution proceedings *A* obtains a decree against *B* In execution of the decree *A* attaches a decree held by *B* against *C* (O 21 r 53) The Court may appoint a receiver to realize the attached decree if that course is likely to benefit the parties more than the sale of the attached decree (*k*) Similarly a receiver may be appointed to realize a debt attached in execution of a decree (*l*) see notes to O 21 r 46 Procedure where garnishee denies debt

(*f*) [illegible] (190) 6 Bom 83
(*g*) *D[illegible] v B[illegible]* (190) 6 Bom 140 *[illegible] v [illegible]* (1893) 1 Bom L R 8 [illegible] see [illegible] *Jamsetji v Hari D[illegible]* (1908) 3 Bom 181
(*h*) *[illegible] v [illegible] ram* (19) 51 Bom 3 100 I C 58 (7) A B 93
(*i*) *Court of Wards v Maharajah Coo[illegible]* (18) 14 M I A 60 1 W R 1 [illegible] I C
(*j*) *[illegible] v [illegible] Singh* (19 6) 6 Lah 548 93 I C [illegible] (6) A I L 110
(*k*) *Partap Singh v D[illegible] and Lord [illegible] Bank* (1908) 30 All 393
(*l*) *Tool v [illegible]* (1 87) 11 Bom 448 *[illegible] v [illegible]* (19) 3 Lang 23 8 I C 94 (2) A I 318 (rent to [illegible])

Receiver of future maintenance—The Privy Council has held that though a right to future maintenance cannot be attached [s 60 (1) (n)] the Court may in a proper case *e g* where provision is made for the maintenance of the judgment debtor out of the income of villages appoint a receiver for realizing the rents and paying thereout to the judgment debtor a sum sufficient for his maintenance and the balance to the decree holder (*m*)

Appeal—*A* obtains a decree against *B* By consent of parties *C* is appointed receiver to take charge of certain properties for the execution of the decree *A* then applies to the Court for the discharge of *C* as receiver but the application is refused The order is one relating to execution within the meaning of s 47 and is therefore appealable (*n*)

Clause (e)—This clause does not authorize a Court to read into a decree a supplementary or alternative relief which is not in the decree Thus where a decree in a suit for redemption directs the defendant mortgagee to deliver to the plaintiff mortgagor the documents of title relating to the mortgaged property but does not provide for an alternative relief the Court has no power under this clause to award damages in execution (*o*) This conclusion might have been arrived at on the simple ground that a Court executing a decree has no power to add to the terms of a decree

Enforcement of decree against legal representative

52 [S 252] (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property

(2) Where no such property remains in the possession of the judgment debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally

Scope of the section—Section 50 provides for the case where a decree has been passed *against a party* and the party dies before the decree is fully satisfied and the decree is sought to be executed against his legal representative The present section provides for the case where a *decree* is passed *against the legal representative* of a deceased person In the latter case the legal representative is the judgment debtor (*p*) and if the decree is for the payment of money out of the property of the deceased the section allows the decree to be executed *against the property of the deceased* in the hands of the legal representative But in so far as the property of the deceased which has come into the hands of the legal representative has not been duly applied by him the decree may be executed *against the legal representative* as if the decree was to that extent

(*m*) *I j dra v S ndir B l* (19) [A r 4 All 384 8 I C (5)] ... 1 6 *I l ty v Krish* (191) 40 Mad 30 34 I C 381 [Receiver not ... Intell *Secretary of State Tripura* (19 6) 49 Mad 56 94 I C 54 6) A A 6

(*n*) *Pa ... S gh v H ... d a S gh* (1918) 3 I L J 513 46 I C 6 5

(*o*) *M ath ... S h* (19) 4 Mad L J 3 6 0 I C 5 9 ( ) A M 19

(*p*) *B rdich d ... B d ... h b* (19 7) 8 Bom L R 13 ... 08 I C 941 (7) A B

passed against him *personally* An executor or administrator under the Indian Succession Act 1925 s 323 is bound to pay the creditors of the deceased equally and rateably if he fails to do so he cannot be said to have applied the assets duly within the meaning of this section and he will be personally liable to the extent to which he has not done so To ascertain whether the assets have been duly applied the Court of execution may direct an inquiry into the accounts of the executor or administrator (*q*) The executor or administrator may shew that he is not liable as he has duly applied the property of the deceased which has come into his possession This is called in English law the plea of plene administravit In an Allahabad case (*r*) Ashworth J differing from Mukerji J held that the plea could be raised in the suit itself But it is submitted that Mukerji J was right and that in Indian law the plea is confined to execution S

If the legal representative is the heir of a deceased Hindu or Mahomedan every payment by the heir on account of debts due by the deceased would be a *due* application of the asset whether the debts were paid rateably or not There is no analogy between the case of an *executor* or *administrator* governed by the provisions of the Indian Succession Act and of an *heir* as a legal representative under the Hindu or Mahomedan law (*s*)

Legal representative — Legal representative means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued (*t*) See s 2 (11) and notes

As to how far a decree passed against one of several Mahomedan heirs binds the other heirs see Mulla s Principles of Mahomedan Law 9th ed p 21

As to the liability of Hindu sons for their father s debt see s 53 below

Out of the property of the deceased —The expression property includes the *income* of immovable property though it cannot be both attached *and* sold (*u*)

Decree against wrong person as heir and legal representative —A decree obtained against an *executor* or *administrator* of the estate of a deceased person is a decree against the estate of the deceased A decree against a karnavan as representative of the deceased binds the estate and this is so even though there has been a disposition by will of which the plaintiff was not aware (*v*) But a decree obtained against the *heir* of a deceased Hindu or Mahomedan as his legal representative is not a decree against the *estate* of the deceased even if the decree provides for the payment of the decretal amount out of the property of the deceased in the hands of such heir Therefore a decree obtained by a creditor of a deceased Hindu against a wrong person as his heir cannot be executed against estate of the deceased in the hands of the rightful heir in possession The creditor must obtain a fresh decree against the rightful heir (*w*)

Decree against executor who has not intermeddled or proved — A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either administered that is intermeddled with the estate or proved the

(*q*) *D w Tok v Mauny I a H* (19) 5 1 a g 44 101 I C 431 (-7) A R 127
(*r*) *Tamu B no v Nand Kishore* (19 7) 49 All 615 101 I C 507 (-7) A A 459
(*s*) *Veer oli aj v I piah* (1903) 6 Mad 9 *H ji S boo v d ck v Alli Maho ed* (1906) 30 Bom 2
(*t*) *D amo Cha dh r v El d t Khan* (1904) 8 C W N 843
(*u*) *Kal vel sam v Th F t Development C po tion* (19 4) 47 M 1 411 80 I C 163 (-4) A M 30 [F B]
(*v*) *K laremath v M dhan* (19 7) M W N 894 103 I C 409 (-8) A M 243
(*w*) *Kaliappa v I a adi aj l* (1910) 33 Mad 5 3 I C 737 *ang aj v Soma nar* (19) 98 I C 613 ( ) A M 19

will Where a decree is obtained against such person and property belonging to the estate of the deceased is sold in execution of the decree the sale does not bind the estate (x)

Liability of ancestral property

53 [*New*] For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative

Scope of the section—The section has been enacted to enforce the recognized rule of the Hindu law namely that members of a joint Hindu family may not escape the payment out of the joint family property of any *debt* incurred and decreed against *their father before his death provided that such debt is not tainted by* immorality The section does not apply where the joint family property passes by survivorship to a collateral *e g* a nephew as he is under no obligation to pay his uncle s debts (*y*)

Decree —The High Court of Madras has held that the term decree in this section is not confined to money decrees but also includes a decree obtained against a Hindu father for possession of joint family property which the father could sell and which is liable to be sold for his debts (z) The term decree however does not include a decree for an injunction against a Hindu father restraining him from obstructing the plaintiff from using a water tank for such a decree cannot after the father s death be enforced in execution against the sons (*a*)

Liability of ancestral property in execution proceedings—This section is new It settles a question of procedure on which there was a conflict of judicial decisions To understand the precise scope of the section it is necessary to bear in mind the rule of Hindu law that where a son or grandson takes any ancestral property by survivorship he is bound to pay out of such property all debts including judgments of his ancestor not incurred for immoral or illegal purposes The question is by what *procedure* is this liability to be enforced ? We proceed to consider the subject under the following four heads —

1 *Where a money decree has been passed against the father and the father dies before issue of execution* — A and his sons *B* and *C* constitute a joint Hindu family owning an ancestral house *D* obtains a decree against *A* for Rs 5 000 A dies and on his death *B* and *C* take the ancestral property *by survivorship* *D applies for execution* of the decree against *B* and *C* by attachment and sale of the whole of the family house (*b*) Is he entitled to do so or must he institute a fresh suit against *B* and *C* to recover the debt ? According to the procedure prescribed by this Code *D* should bring *B* and *C* on the record as the legal representatives of A under s 50 and then apply under that section to the Court which passed the decree to execute it against *B* and *C* to the extent of the ancestral property come to their hands The words in s 50 are to the extent of the

(x) *Mohamed v Lutchey* [1894] A C 437

(*y*) *Jagarnath v Moti Lal* (1903) 4 All 4 3 5 I C 9 9 (3) A A 39 *Sheikh K v I m hica Sao* (1921) 6 Pat L J 451 462 6 I C 905 (3) A I 143

(z) *Meyappa v Meyappa* (19 4) 46 Mad L J 471 83 I C 09 ( ) 4 M 5 1

(a) *Ch ll B M* (1918) 4 Bom 01 46 I C 743

(*b*) D r ... ly is not confined to the one-third share of the father ... *v* ... (19) 49 Bom 113 8 I C 181 (5) A B 103

property of the deceased which has come to his [legal representative s] hands According to the present section the ancestral property in the hands of *B* and *C* being liable under Hindu law for the payment of *A* s debts is deemed for the purposes of s 50 to be the *property of the deceased* which has come to the hands of *B* and *C* as the legal representatives of *A* If *B* and *C* object that the debt in respect of which the decree was passed was tainted with immorality the question is one relating to the *execution* of the decree between the decree holder and the representative of the judgment debtor within the meaning of s 47 and it should be determined by the Court executing the decree (*c*) This coincides with the view taken by the High Courts of Bombay and Calcutta under the Code of 1882 (*d*) According to the Madras and Allahabad decisions under that Code a decree against a Hindu father could not be executed against ancestral property in the hands of the sons even to the extent of the father s interest in the property and the only remedy of the decree holder was to institute a *regular suit* against the sons This view proceeded on the ground that the question whether the debts were tainted with immorality was not one that could be gone into in execution proceedings and that the sons were not the legal representatives of their father so far as the ancestral property was concerned within the meaning of s 234 of the Code of 1882 (*e*) These decisions are no longer law

2 *Where a money decree has been passed against the father and the father dies after attachment but before sale of the ancestral property* —All the High Courts are agreed that where the father dies after *attachment* of the ancestral property the proceedings in execution can be continued against the sons (*f*) In fact having regard to the provisions of the pres nt section a separate suit against the sons would be barred by s 47

3 *Where a mortgage decree has been passed against the father and the father dies before sale of the mo tgaged property* —Where a decree is obtained against the father for sale of ancestral property *mortgaged* by him and he dies before sale the proceedings in execution may be continued against the sons But the sons not being parties to the suit are entitled to raise in execution proceedings such questions as they could have raised if they had been made parties (*g*) They can dispute the *factum* of the debt or they can show that the debt was incurred for immoral purposes and is not therefore binding on the property (*h*) See notes to O 34 r 1 Mortgage of joint family property

4 *Where a decree has been passed against the sons in respect of their father s debt for payment of the debt out of the ancestral property* —In such a case the decree holder may proceed to execute the decree by attachment and sale of the ancestral property come to the hands of the sons The proceedings would be under s 52 The expression property of the deceased in that section would be construed in the light of the present section In fact s 53 is an *Explanation* to ss 50 and 52 explaining the meaning of the expression property of the deceased

It will be seen from what has been stated above that a creditor can now follow the property in the hands of the sons or grandsons in *execution* not only in cases (2) (3) and (4) but also in case (1)

(*c*) S I a a d v Ch t y *Lal* (19) 20 All L J 909 71 I C 417 (3) A A I 4

(*d*) *Um l G m n Bla ji* (1896) 0 I om 385 Sh ra S kha n (1909) 33 B m 39, 1 I C 4 9 1 *ar Ch dr v S bak Cha d* (1907) 34 C l 64 S H t (h (1919) 43 L m 61 at 1 6 6 51 I C 61

(*e*) *P I ra v K* (18) 5 M l 3 *In t d a v D* (18 8) 11 Mad 413 *I e* *th* *mi* (1904) 7 Mal 43 48 (F B) I *kata a n* v *S th el* (1890) 13 M 1 6 *Lach* *kar n v K ji Lal* (1 94) 16 All 449 *J g ath v S I I* (1889) 11 All 30 *N gha v Lal* (1901) 23 All 206

(*f*) *Si ayn Z m la v Teru eng da* (1884) 7 Md 333 *La hmi Na n v Kunj Lal* (1894) 16 All 449 *I eary Lal v Ch nd Cha a* (1906) 11 C W N 163

(*g*) See Ch der l er h d v I m kor (1906) 33 C 1 6 6 *Umam h wa a v S gaperum l* (188) 8 M d 376 See also *H a Lal* v *I rme ha* (1899) 21 All 356

(*h*) See *I mk h a v I av k* (1910) 34 Bom 3 4 5 I C 967 *I da I al v Imperial Ba k* (1915) 37 All 214 23 I C 93

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment debtor and who according to the customs of the country does not appear in public, the officers authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing may enter the room for the purpose of making the arrest

Provided, fourthly, that, where the decree in execution of which a judgment debtor is arrested, is a decree for the payment of money, and the judgment debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him

(2) The Local Government may by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf

(3) Where a judgment debtor is arrested in execution of a decree for the payment of money and brought before the Court the Court shall inform him that he may apply to be declared an insolvent, and that he *may* (w) be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force

(4) Where a judgment debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court that he will within one month so apply, and that he will appear when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court *may* (x) release him from arrest, and if he fails so to apply and to appear the Court may either direct the security to be realized or commit him to civil prison in execution of the decree

See O 21 r 40 [proceedings on appearance of judgment debtor in obedience to notice or after arrest]

(w) The word may was substituted for will by Act 3 of 19 1

(x) The word may was substituted for shall by Act 3 of 19 1

Changes introduced by the section—This section corresponds with s 336 of the Code of 1882 except in the following particulars —

1 Any *outer* door of a dwelling house may now be broken open to effect the arrest of a judgment debtor in execution of a decree But the dwelling house *must be in the occupancy of the judgment debtor* See sub section (1) proviso (2)

2 The security under sub sec (4) must not only be for the filing by the judgment debtor of a petition in insolvency but also for his appearance when called upon in any proceeding upon the application in insolvency or upon the decree in execution of which he was arrested See notes below Discharge of surety

3 A power has been conferred on the local Government to exempt certain persons from arrest See sub section (2)

Breaking open of outer door—Under the Code of 1882 the breaking open of any *outer* door of a dwelling house was strictly prohibited This prohibition has now been removed to this extent that where a dwelling house is *in the occupancy of the judgment debtor* and he refuses or prevents access thereto the officer authorized to make the arrest may break open any outer door of *such* dwelling house But this does not authorize him to break open the outer door of a dwelling house merely because the judgment debtor is to be found in that house The prohibition above referred to as well as the *prohibition against entering a dwelling house after sunset for effecting an arrest* are to be traced to the maxim of English law that a man s house is his castle Referring to this maxim Bentham wrote more than a century ago This poetical expression is certainly no *reason* for if a man s house be his castle by night why not by day ? The course of justice is sometimes interrupted in England by this puerile notion of liberty (y)

Sub section (2)—This sub section is new It is intended to cover the cases of certain persons or classes of persons whose summary arrest might as in the case of railway servants be attended with danger or inconvenience to the public

Sub section (4)—Insolvency after order for arrest—*If a judgment debtor* against whom an order for arrest has been made is adjudicated insolvent without a protection order the adjudication does not prevent his arrest and the Court of execution must require the judgment debtor to give security under the latter part of sub section (4) that he will appear when called upon in any proceeding in insolvency or upon the decree in execution of which he was arrested (z)

Sub section (4)—Within one month—The Court has no power to extend the period of one month for applying for adjudication Sec 148 does not apply to such a case (a)

Sub section (4)—Discharge of surety—*Under the Code of 1882 the security* required was that the judgment debtor will appear when called upon and that he will within one month apply under section 336 to be declared an insolvent It was held upon the construction of those words that where a security bond provided that the surety would produce the judgment debtor when the Court should direct him to do so the surety was released from his obligation under the bond when the judgment debtor filed a petition to be declared an insolvent Neither the withdrawal of the petition nor failure to proceed with the petition nor even failure on the part of the judgment debtor to appear in Court when the direction to appear was made *subsequent* to the filing

(y) Bentham Theory of Legislation nd edn

(z) M L A ushwa than v Abd l M j d (19) 3 Rang 187 89 I C 381 (5) A R 305

(a) Nara mha Ra ga hari (19?0) 50 Mad L J 47 9 I C 444 (6) A M 6 9

of the petition was held to affect the surety s discharge (*b*) And this was so even when a surety undertook that the judgment debtor would appear before the Court when called upon and would within one month file a petition to be declared an insolvent (*c*) These decisions are no longer law Sub section (4) now makes it clear that where a security bond is passed in the terms of that sub section that is where a surety undertakes (1) that the judgment debtor will within one month apply to be declared an insolvent and (2) will appear when called upon in any proceeding upon the application or upon the decree in execution of which he was arrested the security will be realized when there is a failure to comply with either condition (*d*) The surety however is not released by the mere filing by the judgment debtor of the petition in insolvency the security continues until a final order is made on the petition (*e*)

A surety under this section is discharged by the death of the judgment debtor before breach of either of the two conditions mentioned above (*f*) But the death of the judgment debtor after the first condition has failed namely the undertaking to apply to be declared an insolvent within one month cannot affect the surety s liability with regard to that condition (*g*) A surety is also discharged if the execution proceedings are struck off (*h*) but not if liability had already accrued under the bond by a breach of either of the two conditions before the proceedings were struck off (*i*)

Sub sec (4) provides that if the judgment debtor fails to apply or to appear the Court may either direct the security to be realized or commit the judgment debtor to prison This does not mean that the Court may proceed both against the surety and the judgment debtor for if the surety is proceeded against and *the amount is recovered* from him under the conditions of the bond then the judgment debtor cannot be committed to jail in execution and if the judgment debtor *is committed to jail* the state of affairs is just the same as if the surety had never come forward But the mere issue of a warrant against the judgment debtor the warrant remaining unexecuted is not sufficient by itself to discharge the surety (*j*)

Realization of security—See s 145

Prohibition of arrest or detention of women in execution of decree for money

56 [S 245 A] Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money

Security for costs—This section provides that a woman shall not be arrested in execution of a decree for the payment of money At the same time if the plaintiff is a woman and her suit is for the payment of money she may be required to give security for the defendant s costs See O 25 r 1 (3)

(*b*) *Kosil sh Chand* a v *Christophoridi* (1888) 15 C 1 1 *Ram at* v *Ge rd* (1891) 13 All 100 *Dwarkadas* v *Isabhai* (189) 19 Bom 10 *Kri h a y* v *Krishnas my* (1903) 6 Mad 366

(*c*) *Banna M l* v *Jamna Das* (1893) 15 All 183 *Imb l n* v *Lalji* (1901) 4 Mad 560

(*d*) *Honour Commercial Bank* v *Kaja Ma oop* (19 6) 5 Mad L J 5 3 101 I C 5 (6) A M 1081

(*e*) *Abdul* v *M tri* (19) 46 Bom 70 64 I C 648 ( ) A B 340

(*f*) *Krishn n* v *Ilt nan* (1901) 4 Mad 637 *Nab n Ch d a* v *Mirtu joy* (1914) 41 Cal 50 19 I C 981

(*g*) *Makanj* v *Bhukanda* (19 4) 48 Bom 500 86 I C (24) A L 4 8

(*h*) *Lalji* v *Odoya* (1887) 14 Cal 757

(*i*) *D dh aj* v *Mahabi* (19 0) 5 Pat L J 417 4 0 57 I C 303

(*j*) *Maka ji* v *Bh kandas* (19 4) 48 Bom 500 86 I C 57 (4) A B 4 8

57 [S 338] The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment debtors

Subsistence allowance

See O 21 r 39 [subsistence allowance]

58 [Ss 341, 342] (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

Detention and release

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and,

(b) in any other case, for a period of six weeks

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii) without the order of the Court

(2) A judgment debtor released from detention under this section shall not merely by reason of his release be discharged from his debt but he shall not be liable to be re arrested under the decree in execution of which he was detained in the civil prison

Period of detention in jail—The first part of sub section (1) up to the words six weeks corresponds with s 342 of the Code of 1882 The phraseology of that section however has now been altered to make it quite clear that the period of detention shall be (1) six months where the amount of the decree exceeds Rs 50 and (2) six weeks in any other case and that the Court has no power to fix shorter periods than those prescribed in the section (k)

(k) See *S budhi* v *S ngi* (1890) 13 Mad 141

Re arrest—The immunity of a judgment debtor from a second arrest depends not only upon his having been *arrested* but upon his having been detained *in jail* under the arrest Thus where a judgment debtor while acting as a pleader in Court was arrested and discharged on the ground that he was exempt from arrest under s 642 of the Code of 1882 (now s 135) it was held that he was liable to be re arrested in execution of the same decree against him (*l*) Similarly where a judgment debtor was arrested but was liberated owing to non payment of subsistence money it was held that he was liable to be re arrested in execution of the same decree (*m*) Sub section (2) refers to release from detention in jail

Interim protection order—*A* is arrested and committed to jail in execution of a decree against him While in jail he files his petition in insolvency and obtains an *interim* protection order for one week and is thereupon released from jail He then applies for a further protection order but his application is refused Is *A* liable to be re arrested in execution of the same decree? The Calcutta High Court has held that he is not liable to be re arrested on the ground that a judgment debtor once discharged from jail cannot be arrested a second time in execution of the same decree (*n*) On the other hand the High Court of Bombay has held that *A* is liable to be re arrested as the only cases in which a judgment debtor is exempt from re arrest are those specified in this section and that release under an *interim* protection order is not one of them (*o*) The Calcutta decision it is submitted is not correct

Contempt of Court—This section does not apply to cases of imprisonment for contempt of Court (*p*)

59 [S 653] (1) At any time after a warrant for the arrest of a judgment debtor has been issued the Court may cancel it on the ground of his serious illness

Release on ground of illness

(2) Where a judgment debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison

(3) Where a judgment debtor has been committed to the civil prison, he may be released therefrom—

(a) by the Local Government on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness

(4) A judgment debtor released under this section may be re arrested but the period of his detention in civil prison shall not in the aggregate exceed that prescribed by section 58

(*l*) *R je dra* v *Ch nder Moh n* (1896) 3 Cal 1 8
(*m*) *Habibi l Pahman* v *Ram Salai* (1904) 26 All 317
(*n*) *Bol e Ch nd* v *h matter of* (1893) 0 C l 874 *S cretary of State* v *Judah* (1886) 1 Cal 5
( ) *Sh mji* v *Poonja* (190) 26 Bom 65 *S aj Din* v *Mahabir Prasad* (1911) 33 All 79 8 I C 743
(*p*) *Martin* v *Lawrence* (1879) 4 Cal 655

ATTACHMENT

60 [S 266] (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf

Property liable to attachment and sale in execution of decree

Provided that the following particulars shall not be liable to such attachment or sale, namely —

(a) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman,

(b) tools of artizans, and, where the judgment debtor is an agriculturist, his implements of husbandry and such cattle and seed grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him,

(d) books of account,

(e) a mere right to sue for damages

(f) any right of personal service,

(*g*) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Gazette of India by the Governor General in Council in this behalf, and political pensions,

(*h*) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty,

(*i*) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (h), while on duty, to the extent of—

(i) the whole of the salary, where the salary does not exceed forty rupees monthly,

(ii) forty rupees monthly, where the salary exceeds forty rupees and does not exceed eighty rupees monthly, and

(iii) one moiety of the salary in any other case,

Provided that where the decree holder is a society registered or deemed to be registered under the Co operative Societies Act, 1912, and the judgment debtor is a member of the society, the provisions of sub clauses (i) and (ii) shall be construed as if the word ' twenty ' were substituted for the word ' forty ' wherever it occurs and the word ' forty ' for the word ' eighty '

(*j*) the pay and allowances of persons to whom the Indian Articles of War apply,

(*k*) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment,

(*l*) the wages of labourers and domestic servants whether payable in money or in kind,

(*m*) an expectancy of succession by survivorship or other merely contingent or possible right or interest,

(n) a right to future maintenance,

(o) any allowance declared by any law passed under the Indian Councils Acts, 1861, and 1892, to be exempt from liability to attachment or sale in execution of a decree, and

(p) where the judgment debtor is a person liable for the payment of land revenue, any movable property which under any law for the time being applicable to him is exempt from sale for the recovery of an arrear of such revenue

Explanation —The particulars mentioned in clauses (g), (h), (i), (j), (l) *and* (o) *are exempt from attachment or sale* whether before or after they are actually payable

(2) Nothing in this section shall be deemed to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land

Changes introduced in previous law —This section corresponds with s 266 of the Code of 1882 except in the following particulars —

1 In cl (a) the words cooking vessels beds and and such personal ornaments as in accordance with religious usage cannot be parted with by any woman have been added See notes below

2 The latter portion of cl (b) relating to agricultural produce is new

3 *Cl (c) stood as follows in s 266 of the Code of 1882 — The materials of* houses and other buildings belonging to agriculturists

4 In cl (g) the words or payable out of any service family pension fund notified in the Gazette of India by the Governor General in Council in this behalf have been added

5 Cl (h) is new See notes below

6 In cl (i) the words or allowances equal to salary and while on duty have been added See notes below

7 Cl (k) is new *See notes below*

8 In cl (l) the words whether payable in moneys or in kind are new

9 The alterations in sub section (2) cl (a) correspond with the alterations in sub section (1) cl (c)

Subsequent amendments of the section —Sub sec (2) as it originally stood contained a clause (b) which ran thus (b) to affect the provisions of the Army Act or of any similar law for the time being in force That clause was repealed by Act 10 of 1914 Sch II See notes below Salary of Army officers

In clause (i) the word forty was substituted for twenty and the word eighty for forty by Act 26 of 1923

The proviso to clause (i) was added by the Amending Act 20 of 1925

In execution of a decree"—The expression decree in this section refers to a money decree and not a mortgage decree for attachment is not necessary in mort gage decrees The result is that the exemptions from attachment and sale contained in the proviso to this section do not apply to a mortgage decree for sale (*q*)

Saleable property —Subject to the proviso to sub section (1) all saleable property which belongs to the judgment debtor may be attached and sold in execution of a decree against him The equity of redemption of a mortgagor in mortgaged pro perty is saleable property within the meaning of this section and is therefore liable to be attached and sold in execution of a decree against him (*r*) The share of a partner in a partnership business is saleable property and can be attached and sold in execu tion of a decree obtained against him by his creditor (*s*) The right to claim specific performance of a contract to sell land is also attachable and saleable (*t*) A life interest in trust funds is attachable and saleable in execution of a decree against the life tenant (*u*) Similarly a vested remainder can be attached and sold in execution of a decree against the remainderman (*v*)

The word saleable in this section means saleable by auction at a compulsory sale under the orders of the Court It has no reference to property made non trans ferable by an agreement between the parties to a transaction It has accordingly been held that a condition in a permanent lease that the landlord would re enter if the tenant made any transfer of the land demised does not make the land unsaleable in execution The lease forbids a sale by the tenant but does not prevent a sale by the Court (*w*) Country liquor is saleable property within the meaning of this section though the permission of the Collector may be necessary to the sale under the Abkari Act (*x*)

Security for performance of duty —Money or other valuable security deposited as security for the due performance of duty by a servant with his master may be attached in execution of a decree against the servant but the attachment will be subject to the lien which the master has upon the deposit and the deposit cannot be sold until the same is at the disposal of the servant free from the lien of the master at the expiration of the period of employment (*y*)

Land assigned for maintenance —Where land was assigned to a Hindu widow for her maintenance with a proviso against alienation it was held that she had no saleable interest in the usufruct ( )

Non transferable offices —A religious office is not saleable property (*a*) Similarly the right of managing a temple of officiating at the worship conducted in it and of receiv ing the offerings at the shrine is not saleable (*b*) The right to officiate at funeral cere monies is also not saleable (*c*) The property of a temple cannot be sold away from the temple But there is no objection to the sale of the right title and interest of the servant of a temple in land belonging to the temple which he holds as remuneration for his service the interest sold being subject in the hands of the alienee to determination

(*q*) *Mubarak* v *Ahmad* (19 4) 46 All 48 84 I C 749 (4) A A 3 8 (F B)
(*r*) *Parashram* v *Govind* (1897) 1 Bom 6
(*s*) *Jagat Chunder* v *Isu r Chunde* (1893) 0 Cal 69 See O 1 r 49
(*t*) *R dra* v *Krish a* (1887) 14 C 1 241
(*u*) *Abdul Lateef* v *Doutre* (1889) 12 Mad 50
(*v*) *An aj* v *Chand abai* (1893) 17 Bom 503
(*w*) *Keshab* v *Aj har* (1914) 19 C W N 118 8 I C 837 *Golak Nath* v *Mathuranath* (1893) 20 Cal 3
(*x*) *Purshottam* v *Balvant* (1908) 10 Bom L R 13
(*y*) *Karuthan* v *Subramanya* (1886) 9 Mad 03
(*z*) *Diu li* v *Apaji* (1886) 10 Bom 34 See also *Gulab Kuar* v *Ba s dh r* (1893) 1 All 371 and *Bansidh r* v *Gulab Kuar* (1894) 16 All 443
(*a*) *Tuppa* v *Dorasami* (1883) 6 Mad 6 *Narasimma* v *Anantha* (188) 4 Mad 391 *Panga ami* v *R ga* (1893) 16 Mad 146 *Ma haram* v *I anshankar* (188) 6 Bom 98 300
(*b*) *Durga B b* v *Chanchal* (188) 4 All 81 *Rama Varma* v *Ramanna r* (188) 5 Mad 89 *Rajah V rmah* v *Ravi Vurmah* (18 6) 1 Mad 23 4 I A 76 *Gnana ba da I nd a Sannadh* v *Velu Pa da am* (1900) 3 Mad 71 7 I A 69 *Srimati* v *R tanmani* (1897) 1 C W N 493 *Shoil j ni d* v *Peary* (190) 9 Cal 4 0
(*c*) *Jh immu i* v *Dinoon th* (18 1) 16 W R 171

by the death of the original holder or by his removal from office for failure to perform the service (*d*)

Service of a public nature —Land burdened with the performance of a service of a public nature *e g* land held on Swastivachakam service tenure is inalienable and cannot be attached (*e*)

Restraint upon anticipation —The income of property subject to a restraint upon anticipation accruing due after the date of the judgment cannot be attached in execution of a decree against the separate property of a married woman passed under s 8 of the Married Women s Property Act 1874 (*f*)

Right of residence —The right of a widow under the Hindu law to reside in her hu band s family house is a purely personal right and cannot be transferred Such right cannot be attached in execution as it is not saleable property (*g*) For other kinds of property which cannot be alienated, see Transfer of Property Act 1882 s 6

Burmese marriage property —The interests of parties to a Burmese Buddhist marriage in the marriage property is an indeterminate interest and not saleable within the meaning of this section (*h*)

Property —*A* sues *B* for partnership accounts The question of accounts is then referred to arbitration with the consent of the parties Before the award is made *X* a creditor of *A* applies for attachment of the rights and interest of *A* in the award. The attachment cannot be allowed for the expectant claim under an inchoate award is not property within the meaning of this section (*i*) Money paid into Court as a fine in a criminal case against a judgment debtor is after the order imposing the fine is set aside attachable under this section as money belonging to the judgment debtor even before the issue of a refund certificate (*j*)

The doors and windows of a building cannot be *separately* attached, for they have no separate existence as *property* (*k*) An unascertained right in unascertained property could not be the subject of attachment (*l*)

Disposing power —A property may not belong to a judgment debtor and yet he may have a *disposing power* over it exercisable *for his own benefit* In such cases the property is liable to attachment and sale subject to the proviso to this section.

Trustee of a charity —A trustee of a religious endowment has no disposing power over the *corpus* of the trust estate exercisable for his own benefit hence the *corpus* cannot be attached (*m*)

Life interest —Where under a compromise with a reversioner a Hindu widow was allowed to keep certain property for her life and she agreed not to alienate it and on her death the prop rty was to pa s to the reversioner it was held that she had no disposing power over the property (*n*)

Bonus sanctioned by railway company —A bonus sanctioned by a Railway Company to its servant is virtually a gift which must be completed either by a regi tered document or by actual payment as required by s 123 of the Transfer of Property Act A Railway Company sanctioned a bonus to *A* and the amount was forwarded to the District Pay master of the Company for payment to *A* *Before* the amount was paid to *A* it was attached in the hands of the Paymaster by a creditor of *A* It was held that the amount

(*d*) *Lott la v B ag* (188) 6 I m 596 s e also *B slen Ch d v Nad r Hosse n* (1 88) 15 C 1 3 0 I A 1

(*e*) *A ry l v l en jop la* (19) 45 M 1 6 1 0 I C 466 ( ) A M 19

(*f*) *Go dkoi v 1 nr t* (190) 0 M 1 8

(*g*) *Sal kshi v Lak hm y e* (1909) 31 M 1 500

(*h*) *Ma Lai v M u g l e Hpa* (19 Rang 4 8 104 I C 516 ( ) A I 4

(*i*) *Syud Taff al v I ujloo ath* (1 1) 14 M I A 40

(*j*) *H rnam S gh v S I j P m* (191) P R No 91 313 16 1 C 9

(*k*) *Peru Ion* (1883) 11 Cal 164

(*l*) *P b e Tokai v Darod* (18 6) 6 M I A 10

(*m*) *B hen Cha d v N d r Hossein* (1888) 51 Cal 9 15 I A 1

(*n*) *B o gowda v Irp wdatti* (19 3) 4 Bom 59 3 I C 196 (3) A B 2 6

could not be attached for the gift was not complete and *A* had therefore *nó disposing pouer* over the money (*o*)

Delivery to post office —*A* sends a cover containing currency notes to the Post Office for delivery to *B* the addressee Can the cover be attached while it is still in the Post Office by a creditor of *B*? It has been held that it can be attached the reason given being that the cover is in the *disposing pouer of B* When once the letter has been posted the property in it becomes vested in the addressee (*p*)

Auctioneer —An auctioneer has no disposing power over the whole of the sale proceeds of goods sold by him but only over that portion of it which represents his commission Hence the whole of the sale proceeds in the hands of an auctioneer cannot be attached in execution of a decree against him but only so much of it as represents his commission (*q*)

Life policy —Where a married man effects a policy on his own life and the policy is expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them then in cases to which the married Women s Property Act 1874 applies the simple declaration on the face of the policy that the policy is for the benefit of his wife or children amounts to a trust for them and the policy cannot be attached by his creditors [see s 6 of the Act] But in cases to which that Act does not apply such a declaration is not sufficient to create a trust and the insured has a disposing power over the policy for his own benefit and the policy may be attached by his creditors unless it has been assigned as provided by s 130 of the Transfer of Property Act 1822 or a trust has been declared in respect thereof as provided by s 5 of the Indian Trusts Act 1882 There was a conflict of opinion as to whether s 6 of the Act applied to Hindus for it was held by the High Court of Madras that it did (*r*) and by the High Courts of Bombay (*s*) and Calcutta (*t*) that it did not But the Act has now been amended [see Act 13 of 1923] and the provisions of that section are made applicable to policies of insurance effected by Hindus Muhammadans Sikhs or Jains in Madras after the 31st day of December 1913 [being the year of the Madras decision] and in other parts of British India after the 1st day of April 1923 but nothing contained in the Amending Act is to affect any right or liability which has accrued or been incurred under any decree of a competent Court passed before the 1st day of April 1923

Debts —Debts are expressly mentioned in the section and they are liable to attachment and sale A debt is an *obligation* to pay a *liquidated* (or specified) sum of *money* (*u*) Money that has not yet become due does not constitute a debt for there is no *obligation* to pay that which has not yet become due The word debt in this section means an actually existing debt that is a perfected and absolute debt Rent which has not become due is not a debt and cannot be attached (*v*) A sum of money which might or might not become due or the payment of which depends upon contingencies which may or may not happen is not a debt (*w*) A money claim that *has already become due* is a debt and it may be attached as such though it may be *payable* at a future day but a money claim *accruing due* is not a debt and cannot be attached *The attachment must operate at the time of the attachment and not be anticipatory so as to fasten on a claim that may ripen into a debt at some future time* (*x*) A mere right to receive profits the profits not having yet accrued due is not attachable (*y*)

(*o*) *Janki Das* v *East Indian Ry* (1884) 6 All 634 *Natha* v *Schiller* (19?3) 25 Bom L R 599 (4) A B 88 87 I C 312

(*p*) *Narasimhulu* v *Adiappa* (1890) 13 Mad 24

(*q*) *Smith* v *Allahabad Bank* (1901) 23 All 135

(*r*) *Balamba* v *Krishnayya* (1914) 37 Mad 483 0 I C 934 [F B]

(*s*) *Shankar* v *Umabai* (1913) 37 Bom 471 19 I C 736

(*t*) *Esha Dasi* v *Gopal* (1914) 18 C W N 133 I C 236 *Krishna* v *Mst Promila* (19 8) 5 Cal 1315 (8) A C 518

(*u*) *Webste* v *Webster* (186) 31 Beav 393

(*v*) *Lachm n* v *J bu d n* (19 8) 0 All 507 108 I C 2 9 (8) A A 193

(*w*) *Haridas* v *Ba oda K shore* (1900) 7 Cal 38

(*x*) *Syud T fo?ul* v *Rughoonath* (1871) 14 M I A 40 50 *Sher Singh* v *Sri Ram* (1908) 30 All 246

(*y*) *Jagarnath* v *Kishen* (1867) 7 W R 66 *Sher S ngh* v *Sri Ram* (1908) 30 All 246 *Nawab Khajeh Habibula* v *Kaviraj* (19 8) 33 C W N 282 (9) A C 35

A debt that is enforceable only by a foreign Court is not liable to attachment under this section (z)

Illustrations

1 *A* delivers goods to his agent *B* for sale *B* sells the goods and receives the sale proceeds The sale proceeds in the hands of *B* constitute a debt due to *A* and they may therefore be attached while in *B* s hands in execution of a decree against *A* *Madho Das* v *Ramji* (1894) 16 All 286

2 *A* is bound under a deed to pay a monthly allowance to *B* for *B* s maintenance *C* who holds a decree against *B* attaches in August the allowance for September The attachment is not valid for the allowance can only be attached as a debt and the allowance for September was not a debt due to *B* at the time of attachment in August *Haridas* v *Baroda Kishore* (1900) 27 Cal 38 *Nilkunto* v *Hurro* (1878) 3 Cal 414

3 *A* agrees to sell his property to *B* for Rs 2 000 to be paid to *A* on the execution of the conveyance The purchase money payable to *A* is not a debt owing to him by *B* *until* the conveyance is executed Hence it cannot be attached *before* the execution of the conveyance in execution of a decree against *A* *Ahmaduddin* v *Majlis Rai* (1881) 3 All 12 But once the sale is completed the amount representing the purchase money may be attached in the hands of *B* and it does not make any difference that the whole is payable in one sum or by instalments or in the shape of periodical payments *Har shankar* v *Baijnath* (1901) 23 All 164 As to attachment of right to claim specific performance see note above Saleable property

4 Maintenance allowance that has already become due *private* pensions that have already become due and the wages of private servants [other than those mentioned in cl (1)] that have already become due are debts within the meaning of this section *Kasheeshuree* v *Greesh Chunder* (1866) 6 W R Mis 64 (maintenance) *Bhoyrub* v *Madhub Chunder* (1880) 6 C L R 19 (private pensions) *Ayyaiayyar* v *Virasami* (1898) 21 Mad 393 *Devi Prasad* v *Lewis* (1908) 31 All 304 (wages of private servants)

5 *A* agrees to advance Rs 5 000 to *B* on a mortgage of *B* s property *B* advances Rs 3 000 only *C* who holds a decree against *B* seeks to attach the balance of Rs 2 000 payable by *A* to *B* as a *debt* due by *A* to *B* *C* cannot attach the balance for it is not a *debt* due by *A* to *B* It is clear that if *A* fails to pay the balance *B* is not entitled to specific performance and his only remedy against *A* is by way of *damages* for non pay ment of the balance *Phul Chund* v *Chand Mal* (1908) 30 All 252

As to the mode in which a debt may be attached see O 21 r 46 See also O 21 r 49

Clause (a) ornaments —Ornaments on the person of a Hindu wife forming part of her *stridhan* cannot be attached in execution of a decree against the husband even though the Hindu law concedes him a personal right of user (a) The *mangalsutra* a neck ornament which is worn by a Hindu married woman during the lifetime of her husband without ever removing it is also exempted from attachment (b)

Clause (b) implements of husbandry —Charaks kadhais and planks of timber used by an agriculturist for extracting sugar juice from sugarcane which he has grown on his field and for turning it into jaggery are implements of husbandry within the meaning of cl (b) and are exempt from attachment (c)

Clause (c) houses occupied by agriculturists —The term agriculturist includes *persons engaged in cultivating the soil for remuneration* although they may have no interest in the soil either as proprietor or tenant (d) It means a small holder who

(z) *Chimnaji* v *Bhau* (1881) 5 Bom 19

(a) *Tukaram* v *Gunaji* (1871) 8 B H C A C 129

(b) *Appava* v *Tuljaramma* (1885) 9 Bom 106

(c) *Lakshman* v *Narhari* (1923) 2 Bom L P 1 11 81 I C 6 9 (1) 4 B 21

(d) *Dnyaneshwar* v *Laxman* (1917) 41 Bom 4 3 39 I C 632

tills the soil and cultivates it and not a large landed proprietor even though his sole income is from land (e) The Code of 1882 (s 266) exempted from attachment only the *materials* of houses occupied by agriculturists But it was held that even a *house* occupied by an agriculturist could not be attached provided it was occupied by an agriculturist as *such* (f) that is to say it was occupied by him *bonâ fide for the purposes of agriculture* (g) The burden of proving that it was so occupied lies on the agriculturist debtor and it must be proved by him in *execution proceedings* (h) The exemption extends after the death of the agriculturist to his representative occupying the house in good faith as an agriculturist (i) But if by a consent decree an agriculturist agrees in consideration of time being given to him that his house may be attached and sold on default in payment of the decretal amount the house may be attached and sold on default (j) for the privilege is one that may be waived (k)

If a house occupied by an agriculturist is specifically mortgaged it is not protected from sale in execution of a decree upon the mortgage Clause (c) does not prohibit the sale of property *specifically mortgaged* though it may be occupied by an agriculturist as such unless he is prohibited by law from mortgaging or selling it (l)

Clause (e) right to sue for damages — Mesne profits are in the nature of damages and the right to sue for mesne profits is a right to sue for damages Such a right cannot therefore be attached and sold in execution of a decree against the person entitled to the right Thus if *A* is entitled to claim mesne profits from *B* for wrongful dispossession of his lands *A* s right to claim mesne profits from *B* cannot be attached and sold in execution of a decree against *A* If the right is attached and sold and purchased by X *X* is not entitled to sue *B* for the mesne profits the sale to him being void (m)

Clause (f) right of personal service —A *vritti* is a right to receive certain emoluments as a reward for personal service and is therefore exempt from attachment and sale (n) But a priest s share in the *utpat* or net balance of the offerings to a deity may be attached and sold (o) The *birt Maha brahmans* or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district is a right of personal service and cannot therefore be attached (p) *Jatri bahis* which merely contain the names and addresses of pilgrims who are clients of the judgment debtor and which are of use to him to perform personal service to the pilgrims are not attachable (q)

Clause (g) gratuities allowed by Government —The gratuity referred to in this section is a bonus allowed by Government to its servants in consideration of past services It may be allowed to one who is not a pensioner or it may be allowed to a pensioner in addition to his pension. In either case it is exempt from attachment (r)

Stipends payable out of service family pension fund notified in the Gazette of India —For notifications issued under this clause [i e cl (g)] see General Statutory Rules and Orders vol IV p 69

(e) *M thu Ve kata ama* v *Off cial Rece er* (19 6) 49 Mad 2 7 9 I C 398 (6) A M 3 0

(f) *Radhakisan* v *Balvant* (1883) 7 Bom 530

(g) *Ji an* v *Hira* (1888) 12 Bom 363

(h) *Pandurang* v *Krish ji* (1904) 28 Bom 1 See also *Jamna Prasad* v *Raghunath* (1913) 35 All 307 19 I C 1 5

(i) *Radl akis n* v *Balvant* (1883) 7 Bom 5 0

(j) *U ir* v *Haradeb Das* (19 0) 24 C W N 575 57 I C 49

(k) *Ganga Bishun* v *Jagmol an* (19 7) 6 Pat 254 10 I C 616 (27) A P 33

(l) *Bhag a d s* v *H tl bai* (1880) 4 Bom 5 *Bl la Nath* v *Kisl ori* (191?) 34 All 11 I C 646 *Mubarak* v *Al mad* (19 4) 45 All 489 84 I C 749 (4) A A 3 8 [F B]

(m) *Shyam Cla d* v *Land Mortgage Bank* (1883) 9 Cal 69

(n) *Ganesh* v *Shanka* (1886) 10 Bom 39 *G v nd* v *Ramkrishna* (1888) 1 Bom 366 *P j r m* v *G nesh* (1899) 23 Bom 131

(o) *Digamber* v *Hari* (19 7) 9 Bom L R 10 100 I C 1008 (27) A B 143

(p) *Du ga I asad* v *Shambhu* (1919) 41 All 656 51 I C 539

(q) *Lacl man* v *Bald o* (19) 1 Pat 619 68 I C 944 (2) A P 556

(r) *B can Das* v *Mul Chand* (1884) 6 All 173 *Mul mmad* v *Ca l er* (188) 5 Mad 272 (d cided under th Code of 1877 which did not include gratuities)

Political pensions —All pensions of a political nature payable directly by the Government of India are political pensions A pension which the Government of India has given a guarantee that it will pay by a treaty obligation contracted with another sovereign power is a political pension (s) Arrears of political pension due to a pensioner and lying in the hands of Government at the time of his death do not lose their character of political pension by reason merely of the pensioner s death The character of the funds remains unchanged so long as it remains unpaid in the hands of Government and it is not liable to attachment in the hands of Government in execution of a decree against the deceased But once the fund has passed out of the hands of Government into the hands of the legal representative of the deceased it may be attached like any other portion of the deceased s estate (t)

A grant of a Zamindari by Government as a reward for past services rendered by him to Government is not a *pension* but a *gift* and may therefore be attached in execution of a decree against the grantee The word pension in this section implies *periodical* payments of *money* by Government (u) Allowances granted to the Candyan pensioners of Ceylon (v) to the members of the family of the King of Oudh (w) to the members of the Mysore family (x) and to the descendants of the Nawab of Carnatic (y) or paid by a foreign State by an arrangement with the Government of India to a deposed Maharaja ( ) are instances of political pensions

Private pensions —Private pensions as distinguished from Government pensions are not exempt from attachment and they may be attached either as debts or as property belonging to the judgment debtor within the meaning of this section But they neither constitute debts nor property belonging to the judgment debtor until they have become due and payable Hence they cannot be attached *before* they have *become due* and payable Pensions granted by Railway Companies to their servants are private pensions (a)

Clause (h) allowances being less than salary of a public officer while absent from duty —This clause is new The allowances (being *less* than salary) of a public officer [s 2 (17)] *while absent from duty* are now *wholly* exempt from attachment Under the Code of 1882 it was held in the absence of any specific provision as to these allowances that they stood on the same footing as the salary of a public officer *while on duty* and were exempt from attachment only to the extent to which such salary was exempt and no more [see cl (i)] Thus where an officer was on sick leave *on half pay* which was Rs 150 it was held that the decree holder could attach Rs 75 (b) Under this clause the whole of Rs 150 is exempt from attachment

Clause (i) salary of public officer while on duty —The salary of a public officer [s 2 (17)] can be attached only *partially* except where it does not exceed Rs 40 monthly in which case the *whole* of it is exempt from attachment The object of the exemption appears to be to enable a public officer to maintain himself and his family in a position suitable to his rank This exemption did not occur in the Code of 1859 hence the salary of a public officer and of the other persons mentioned in this clause was attachable to the extent of the whole as debt And since it could only be attached as a debt it was not attachable until it had *become due* (c) Under the Codes of 1877 and 1882 and under the present Code the salary to the extent to which it is attachable

( ) *Bistamb v Imdad Al* (1 91) 18 Cal 16 17 I A 181 *M th san v I ce Al ja* (1903) 6 M d 4 3
(t) *F l a v Anuja* (1903) 6 M d 69
( ) *La hmi Narain v M hu d* (1904) 6 All 61
( ) *M tu ami v I rince Alagia* (1903) 6 Mad 4 3
(w) *B hamba Nath v Imdad Al* (1 91) 18 Cal 16 17 I A 181
(x) *Ma amed v M ham d* (186) 7 W R 163
(y) *Mahom d v C ma d r* (1 69) 4 M H C
( ) *Do g cha d v Madho S gh* (19) 30 Mad 711 1 3 I C 9 ( ) A M 604
(a) *E yrub v Madr s & S nder* (18) 6 C L R 19
(b) *E d v Egerton* (1) 6 Mad 1 9
(c) *T j am v Au a* (18 0) B H C A C 110

may be attached *in advance* (d) It is no valid reason for refusing the attachment that the attachment if allowed would not leave the officer enough to live on (e) As to the salary of Army officers see notes below under the head Salary of Army officers See note above Amendment of the section

Salary of private servant—The salary of a private servant can be attached as a debt hence it cannot be attached *before* it has *become due* (f)

Clause (j) Indian Articles of War—The Indian Articles of War apply only to soldiers and followers of the Native Army see Act V of 1869 as amended by Act XII of 1894 Both these Acts have been repealed by the Indian Army Act 8 of 1911 and the reference to the Indian Articles of War in this clause must be read as referring to Act 8 of 1911 The pay of soldiers and followers of the Indian Army is under section of that Act exempt from attachment (g).

Clause (k) compulsory deposits in Provident Funds—The expression compulsory deposit is defined in s 2 (a) of the Provident Funds Act 19 of 1925 as being a subscription to or deposit in a Provident Fund which under the rules of the Fund is not until the happening of some specified contingency repayable on demand otherwise than for the purpose of the payment of premia in respect of a policy of life insurance and includes etc By s 3 of the Act it is provided that a compulsory deposit in any Government or Railway Provident Fund shall not be liable to attachment under any decree or order of any Civil Revenue or Criminal Court in respect of any debt of liability incurred by the subscriber or depositor A compulsory deposit cannot be attached so long as it retains the character of compulsory deposit A deposit which when it was made was a compulsory deposit continues to retain that character *so long as it remains in the hands of the Railway Company* It does not lose that character though the employee may have ceased to be in the service of the Company by retirement resignation or dismissal and though he may have become entitled in that event to be *paid the amount due to his credit in the Provident Fund* *But once it is paid out* by the Company on the happening of any of the above events it loses the character of compulsory deposit and it may be attached in the hands of the party to whom it has been paid (h) The same principle applies to the case of an optional subscriber who cannot under the rules demand payment of his deposits at his option (i)

Clause (l) wages of labourers—A labourer is a person who earns his daily bread by personal manual labour or in occupations which require little or no art skill or previous education Thus persons who agree to spin cotton and to receive a certain amount of money for a certain quantity of cotton spun by them are labourers and their wages cannot be attached (j)

Clause (m) expectancy of succession etc—The interest which a Hindu reversioner has in the immovable property of a deceased Hindu on the death of the deceased s widow is an expectancy of succession by survivorship in other words it is an interest *expectant* on the widow s death to which the reversioner could only succeed if he *survived* the widow (k) The interest in the pre empted property of a successful

(d) *Beard* v *Egerton* (1883) 6 Mad 179 *Bhoyrub* v *M dhub Chunder* (1880) 6 C L R 19

(e) *Deb Pra ad* v *Lewis* (1918) 40 All 13 43 I C 984

(f) *Ayya ayyar* v *Virasami* (1898) 21 Mad 93 *Debi Prasad* v *Lewis* (1909) 31 All 304 1 I C 186

(g) *Browne* v *Pearce* (19 6) 48 All 73 39 I C 88 (26) A A 1 (2)

(h) *Veerchand* v *B B & C I Railway* (190) 29 Bom 259 *Sett Manna Lal* v *Gainsford* (1908) 35 Cal 641 *H ndley* v *Joy Na ain* (1919) 46 Cal 962 54 I C 439 *Secretary of State* v *Raj kuma* (19 3) 50 Cal 347 7 I C 10 5 (23) A C 585 *Debi Prasad* v *Secretary f State* (19 3) 45 All 554 74 I C 746 (24) A A 68 See also *Off cial Assignee f Madras* v *Mary Dalg irns* (1903) 26 Mad 440 and *Vagindas* v *Ghelabhai* (19 0) 44 Bom 673 56 I C 450 [insolvency of railway servant] *Gauri Shankar* v *R J DeCruz* (1926) 1 Luck 313 92 I C 673 (27) A O 2 [insolvency of railway servant]

(i) *Jagannath* v *Tara* (19 4) 3 Pat 74 80 I C 424 (24) A P 5 4

(j) *Jechand* v *Aba* (1881) 5 Bom 13

(k) *Ram Chunder* v *Dhurmo* (1871) 15 W R F B 17 *Anandibai* v *R jaram* (1898) 22 Bom 984

pre emptor who *has not yet paid the pre emption price* fixed by his decree is a merely *contingent interest* which cannot be attached (l) see O 20 r 14 *But the interest* which a coparcener has in money awarded to him on partition is a vested interest although payment is deferred (m)

Clause (n) right to future maintenance —If *A* is entitled to a monthly maintenance allowance under an agreement the allowance cannot be attached until after it has become due (n) It cannot be attached prospectively that is before it has become due (o) In other words *arrears* of maintenance may be attached but not the right to *future* maintenance A hereditary grant of an allowance of paddy out of the melwaram of certain land is not a right to *future* maintenance so as to be exempt from attachment under this section (p) Where a person holds villages under a deed which provides that he is to hold them and receive the profits in lieu of maintenance without power of transfer the interest of such person in the village is a right to future maintenance (q) But an annuity is not a right to future maintenance and it may be attached and sold (r) See note to s 51 Receiver of future maintenance

Salary of Army Officers —Sub sec (2) of the present section as it stood originally was as follows —

(2) Nothing in this section shall be deemed—

(a) to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and neces ary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house building site or land *or*

(b) *to affect the provisions of the Army Act or of any similar law for the time being in force*

The italicized words and letters were replaced by the Repealing and Amending Act 10 of 1914 sch II

It is provided by s 136 of the Army Act 1881 [stat 44 and 45 Vict] amended by the Army (Annual) Act of 189 that the pay of an officer or soldier of His Majesty s Regular Forces serving in India shall be paid to him *without deduction* unless the Legis lature in India has directed to the contrary in that behalf Under section 60 of the Code as it stood before the amendment above referred to questions arose as to the extent of application of the Army Act As regards officers in the *British* Army it was held that they were officers of His Majesty s Regular Forces within the meaning of s 136 of the Army Act and that their salary therefore could not be attached at all (s) As regards officers in the *Indian* Army there was a conflict of decisions The High Courts of Calcutta and Madras (t) held that an officer in the *Indian* Army was not an officer of His Majesty s Regular Forces within the meaning of s 136 of the Army Act and that his salary therefore was liable to be attached to the extent mentioned in s 60 (1) (i) On the other hand it was held by the High Court of Bombay (u) relying on s 190 sub s (8) of the said Act that an officer in the *Indian* Army was an officer of His Majesty s Regular Forces and that his salary therefore could not be attached at all

(l) *Koral Singh v Sidh Gopal* (1906) 3 All 383

(m) *Alagirisami v Lakshma n* (19 6) 50 Mad I J 9 9 I C 10 1 (6) A M 3 1

(n) *E l l e ure l Chund* (1866) 6 W R Mis 64

(o) *Hand I l F lore* (1900) 7 C 1 33 *Asad Ali Ha d r Ali* (1911) 38 C 1 13 6 I C 8 6 *Jai La iu v Arisl* (1917) 40 Mad 30 34 I C 381

(p) *I iya tha v Eyy a* (1907) 30 Mad)

(q) *Raj d a Narain v Sundi a B b* (19 5) 5 I A 6 4 All 384 87 I C 935 ( ) A I C 1 6 See also *B ns dhar v G l b Ku* (1 34) 16 All 443 in app from *G l b K v B ndia* (1893) 1 All 71 [Hindu wid w]

(r) *Sa dar B bi v Raj l da* (19 1) 43 All 617 63 I C 181

(s) *Velcha d v Fo h er* (1913) 3 Bom 6 17 I C 13 *Lecky B k f Upper I dia* (1911) 33 All 5) 9 I C 10 3 See also *O ler & Co Ltd D sra cue* (1911) P R no 10 p 0 5 I C 80

(t) *Calcutta Trad Associat n v Fyland* (1890) 1 Cal 1 *Watson v Ll yd* (190) 5 Mad 40

(u) *A g Ki g & C v D ndson* (1914) 33 Bom 66 3 I C 5

Cl (b) of sub s (2) having been repealed the question arises whether the salary of an officer of His Majesty s Regular Forces can be attached under this section as salary of a public officer to the extent mentioned in cl (i) of sub s (1) It has been held by the High Courts of Allahabad (v) and Bombay (w) that it can be so attached. These cases must be distinguished from a Bombay case in which the question was whether the salary of a First Class Warrant Officer can be attached under the provisions of the Code of Civil Procedure in execution of a decree for maintenance obtained against him by his wife It was held that it would not be attached under the Code The ground of the decision was that a First Class Warrant Officer was a soldier as defined by s 190 of the Army Act that under s 145 of the Act no execution can issue against his pay in respect of the maintenance of his wife but a specified sum may be deducted for such maintenance from his pay and that an order had already been made for such deduction by the Commander in Chief (x)

Objection that property not liable to attachment and sale when to be raised—*A* obtains a decree against *B* and applies for execution of the decree by attachment and sale of certain property belonging to *B* The property is attached and sold and purchased by *C* *B then* applies to the Court to set aside the sale on the ground that the property was not liable to attachment and sale Can the application be entertained? It has been held that if *B* was a party to the order for sale or was aware of it and did not appeal against it he is precluded from questioning the propriety of the order *after* the sale and he cannot therefore impeach the sale A judgment debtor who might have raised objections *prior* to the sale but who has refrained from doing so and who might have appealed against the ord r for sale has no right *after* the sale has been carried out to prefer an objection that the property sold was not legally saleable (y) But if *B* was not aware of the proceedings in attachment of the property or of the proceedings in connection with the sale thereof the application to set aside the sale may be entertained even after the sale is confirmed (z) The same rule applies where a sale effected by the Collector is sought to be set aside on the ground that the property was not ancestral and therefore could not legally be sold by the Collector (a)

Partial exemption of a ri cultural produ e

61 [*New*] The Local Government may, by general or special order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree

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(v) *Haj v Ram Chanda* (1917) 39 All 308 39 I C 9 [case of an officer of the Indian Army]

(w) *Kering Rupch d & Co v Murray* (1919) 43 Bom 716 50 I C 683

(x) *Duckworth v Duckworth* (1919) 43 Bom 368 50 I C 427 *Browne v Pearce* (19 6) 48 All 73 89 I C 88 (26) A A 122 (2)

(y) *Ramchha bar Misr v Bechu Bhagat* (188) 7 All 641 *Umed v Jas Ram* (1907) 29 All 612 *Pa durang v Krishnaj* (1904) 28 Bom 1 5 *Dwa kanath v Tarini Sankar* (1907) 34 Cal 199 *Lala Ram v Thakur Prasad* (1918) 40 All 680 47 I C 947

(z) *Du ga Cha an Kali Prasanna* (1899) 26 Cal 727 73

(a) *Daulat S ngh v Jugal Kishore* (1900) 22 All 108 See s 69 and Sch III to the Code

Be exempted from liability to attachment or sale —These words are wide enough to include agricultural produce which has been hypothecated See s 60 cl (b)

As to attachment of agricultural produce see O 21 rr 44 45 As to sale of such produce see O 21 rr 74 75

62 [S 271] (1) No person executing any process under this Code directing or authorizing seizure of movable property shall enter any dwelling-house after sunset and before sunrise

Seizure of property in dwelling house

(2) No outer door of a dwelling house shall be broken open unless such dwelling house is in the occupancy of the judgment debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe any such property to be

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw, and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions to prevent its clandestine removal

Changes introduced in the section —This section corresponds with s 271 of the Code of 1882 except that the prohibition against breaking open any *outer* door of a dwelling house has been relaxed where the dwelling house is in the occupancy of the judgment debtor See note to s 55 Breaking open of outer door

Dwelling house —A shop or a godown is not a dwelling house within the meaning of this section (b)

63 [S 285] (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no

Property attached in execution of decrees of several Courts

(b) *Damodar v Ishwar* (18 9) 3 Bom 89

difference in grade between such Courts, the Court under whose decree the property was first attached

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees

Changes introduced in the section—This section corresponds with s 285 of the Code of 1882 except in the following particulars —

(1) The words is under attachment have been substituted for the words has been attached See notes below under the head Is under attachment

(2) Sub section (2) is new See notes below

Object of the section—The object of this section is to prevent different claims arising out of the attachment and sale of the same property by different Courts in other words it is to prevent confusion in the execution of decrees (c)

Application of the section—*A* attaches certain property in execution of a decree obtained by him against *B* in the Small Causes Court at Surat The same property is subsequently attached by *C* in execution of a decree obtained against *B* in the Court of the Subordinate Judge at Surat The Court of the Subordinate Judge is a Court of higher grade than the Small Causes Court and it is therefore the proper Court under this section for deciding objections to the attachment for determining claims made to the property and for ordering the sale thereof and receiving the sale proceeds (*d*)

Sub section (2)—This sub section is new It declares in effect that a proceeding in execution shall not be deemed to be invalid merely because it was taken by a Court which having regard to sub section (1) ought not to have taken it Under the Code of 1882 there was a conflict of decisions on the question whether the rule contained in s 285 of that Code [now sub sec (1)] was a rule of *procedure* only or whether it affected *jurisdiction* The High Courts of Calcutta (*e*) Bombay (*f*) and Madras (*g*) held that the rule was merely a rule of procedure and did not oust the jurisdiction of the inferior Court in proceedings in execution of its own decree On the other hand the High Court of Allahabad held that the section affected jurisdiction that is to say it took away the jurisdiction of the inferior Court in the several matters specified in the section (*h*) The result was that where a sale was effected by a Court of lower grade in a case where it ought to have been effected by a Court of higher grade the sale according to the Calcutta Bombay and Madras decisions was not for that reason invalid but according to the Allahabad decisions it was absolutely void as one made without jurisdiction Sub section (2) gives effect to the Calcutta Bombay and Madras decisions (*i*)

There is yet another point which may be considered in the form of an illustration *A* obtains a decree against *B* in the Court of a Subordinate Judge In execution of the decree certain property belonging to *B* is attached by the Subordinate Judge s Court *C* obtains a decree against *B* in a District Court The same property is then attached by the District Court in execution of *C* s decree The

(*c*) *Ram Narain* v *Mina* (1898) 2 Cal 46 48 *Bykant Nath* v *Rajendro Narain* (1886) 1 Cal 333 338

(*d*) *Turmull l* v *Kalyandas* (189) 19 Bom 177 *Ballu Ram* v *Raghubar* (1894) 16 All 11

(*e*) *Bykant Nath* v *Rajendro Narain* (1886) 1 C 1 333 *Ram Narain* v *Mina* (1898) Cal 46 *Gopi Chand* v *Kasimunnessa* (1907) 34 Cal 836

(*f*) *Abdul Karim* v *Thakordas* (1898) 2 Bom 68 *Turmull lal* v *Kalyandas* (183) 19 Bom 1 7 *Pat l Naranji* v *Haridas* (1894) 18 Bom 458

(*g*) *K nhaj n* v *Ith kutti* (1899) 2 Mad 9

(*h*) *Chi anji* v *Ja ah r* (1904) 26 All 538 *Ha Prasad* v *Jag n Lal* (1905) 7 All 56 *D rpat* v *B bi Ram ach Pal* (1909) 31 All 5 7 3 I C 31

( ) *Sr u isa hariar* v *Appavoo* (1924) 47 Mad L J 0 7 84 I C 265 (4) A M 889 *G rus* v *Sri Krishna* (19 3) 38 Cal L J 66 69 75 I C 3 5 (4) A C 169

property is sold by the Subordinate Judge in execution of *A* s decree although the proper Court to sell the property is the District Court and it is purchased by *X* Subsequently the same property is sold by the District Court in execution of *C* s decree and it is purchased by *Y* Which of the two purchasers has the better title? According to the decision of the Calcutta High Court in *Bykant Nath* v *Rajendro Narain* (j) *X* the first purchaser would take an indefeasible title (1) if the sale was held by the Subordinate Judge s Court in ignorance of the attachment by the District Court *and* (2) the purchase was made by X without notice of the attachment by the District Court but if the sale was held by the Subordinate Judge s Court after notice of the attachment by the District Court or the property was purchased by *X* with notice of that attachment the purchase of *X* would be liable to be defeated by the purchase of *Y* According to the decision of the Bombay High Court in *Abdul Karim* v *Thakordas* (k) it is quite enough to give an indefeasible title to *X* if he purchased without notice of the attachment by the District Court The Bombay Court does not regard any notice which the inferior Court may have of the attachment by the superior Court as of any consequence for the simple reason that the jurisdiction of a Court cannot depend upon notice A similar view has been taken by the Madras High Court (l) Under the present section it seems *X* would take an indefeasible title to the property whether or not he or the Subordinate Judge s Court had notice of the attachment by the District Court

The result therefore is that where property is under attachment by two Courts of different grade and the property is sold by the Court of lower grade in contravention of the provisions of sub section (1) the sale is not thereby rendered invalid though the Court selling the property and the purchaser at the Court sale may be aware of the irregularity The course to be adopted by the Court of higher grade in such a case is to accept the sale made by the lower Court and to call for the proceeds of the sale and to distribute them rateably amongst all the decree holders (m) Where both the Courts are subordinate to the District Court the procedure according to the Bombay High Court (n) is for the *party interested* to apply to that Court to have the sale proceeds transferred *to the Court of higher grade* according to the Calcutta High Court (o) *the Court of higher grade* should move the District Court for that purpose In a recent case the Bombay High Court held that it is competent to the petitioner to apply to the Court of the higher grade for a transfer of the sale proceeds to that Court and that Court is competent to make the order (p)

If the same property is attached by a Munsiff and by a Subordinate Judge and is then sold by the Munsiff to X the sale is valid But if after the sale the decree holder in the Subordinate Judge s Court applies to that Court for sale the question arises whether *X* is entitled to apply to the Subordinate Judge under s 47 to stop the sale on the ground that the title to the property has passed to him According to the Madras High Court he is the reason given being that he is the representative of the judgment debtor within the meaning of s 47 (q) According to the Calcutta High Court he is not the reason given being that he is not the representative of the judgment debtor (r)

Is under attachment —These words have been substituted for the words has been attached to make it clear that the provisions of this section do not apply unless there are two or more attachments *existing at the same time* (s)

(j) (1886) 12 Cal 333
(k) (1898) ‥ Bom 88
(l) See *Kunhajan* v *Ittukutti* (1899) ‥ Mad 9
(m) See *Bykant Nath* v *Rajendro Na n* (1886) 1 Cal 333 338 *P t I N j* v *H ridas* (1894) 18 Bom 458 463 *Nilkanta* v *[illegible] to* (1919) 46 Cal 61 44 I C 49 *K rupan* v *Somasundaram* (1926) 51 Mad 601 98 I C 6 9 ( ) A M 6
(n) (1894) 18 Bom 458 *s pra*
(o) (1919) 46 Cal 61 68-69 44 I C 49 *supra*
(p) *Dee Kappa* v *Chabhasappa* (1925) 49 Bom 655 80 I C 950 (5) A L 4 0
(q) *Srin vasacharlar* v *Apparoo* (19 4) 47 Mad L J 7 0 84 I C 6 ('24) A.M 659
(r) *Mah deo Lal* v *Darsan* (1911) 15 C W N 54 9 I C 194
(s) See *tow ll* *Ajudhia* (1 4) 6 All 5

Decrees of more Courts than one —This section applies only as between Civil Courts of different grades or as between Revenue Courts of different grades It does not apply where one decree is that of a Civil Court and another that of a Revenue Court Hence where the same property is attached by a Civil Court and a Revenue Court and it is sold by the Revenue Court the purchaser is entitled to the property and it cannot be sold in execution of the decree of the Civil Court (*t*)

Rateable distribution —See notes to s 73 Court to which application for execution should be made

64 [S 276] Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment

Private alienation of property after attachment to be void

Explanation —For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets

Section 276 of the Code of 1882 was as follows —

When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid any private alienation of the property attached whether by sale gift mortgage or otherwise and any payment of the debt or dividend or a delivery of the share to the judgment debtor during the continuance of the attachment shall be void as against all claims enforceable under the attachment

Private alienation of property after attachment to be void

Changes introduced by the present section —The present section differs from the corresponding s 276 C P C 1882 in the following respects —

(1) The words by actual seizure or by written order duly intimated and made known in manner aforesaid after the words where an attachment has been made in s 276 have been omitted as being mere surplusage (*u*) See notes below Where an attachment has been made

(2) The words during the continuance of the attachment which occurred in s 276 have been omitted and the words contrary to such attachment have been substituted for them See notes below Contrary to such attachment

(3) The explanation to the section is new See notes below Explanation to the section etc

Object of the section — A sues *B* for Rs 5 000 *B* owns a house worth Rs 5 000 and he has no other property *B* may sell or mortgage the house notwithstanding the institution of the suit against him and he may sell or mortgage it even after a decree has been passed against him in the suit and the sale or mortgage in either case will be perfectly valid and pass a good title to the transferee (*v*) But if the property is *attached*

(*t*) *F shan L l v Muham ad* (19 1) 43 All 612 63 I C 909

(*u*) *Sinnoppan v Arun chalam* (1919) 4 Mad 844 851 8 53 I C 0

(*v*) *P llen Chetty v Pamal nga Chetty* (18 0) 5 M H C 368

in execution of the decree any private transfer of the property by *B* contrary to such attachment shall be void as against *all claims enforceable under the attachment* The object of the section is to prevent fraud on decree holders (*u*) and to secure intact the rights of the attaching creditor against the attached property by prohibiting private alienations *pending attachm nt* (*x*)

Where an attachment has been made —An attachment to render a subsequent alienation invalid must be made in the manner prescribed by the Code Thus a promissory note must be attached by actual seizure as provided by O 21 r 51 and not by the issue of a prohibitory order The mere issue of a prohibitory order does not amount to an attachment within the meaning of this section (*y*) Similarly in the case of immovable property the attachment to render a subsequent alienation invalid must be made in the manner prescribed by O 21 r 54 (*z*) An attachment made under that rule operates as a valid prohibition against alienation from the date on which the necessary proclamation is made and a copy of the order of attachment is affixed as provided by that rule and not from the date of the order of attachment (*a*) In *Muthia Chetti* v *Palaniappi* (*b*) Lord Shaw said — A fasciculus of clauses beginning at O 21 r 41 and applicable to attachment of property shows instance after instance that attachment is a real thing with a variety of real applications suited to the nature of the property to be attached These instanc s go to show that under the Civil Procedure Code in India the most anxious provisions are enacted in order to prevent a mere order of a Court from effecting attachment and plainly indicating that the attachment itself is something eparate from the mere order and is something which i to be done and effected before attachment can be declared to have been accomplished Their Lordships need not repeat in another form these propositions The *order* is one thing the *attachment* is another No property can be declared to be attached unless first the order for attachment has been issued and secondly in execution of that order the other things prescribed by the rules in the Code have been done

Attachment before judgment —An alienation of property made after attachment before judgment is void to the same extent as an alienation made after attachment under a decree (*c*) The attachment however must be made in the manner prescribed by the Code and in the ca e of immovable property as prescribed by *O 21 r 54* (*d*) The High Court of Madras has held that an alienation of property after it is attached pursuant to an order for attachment before judgment is void under this section even though the property was not actually attached until after the pa sing of the decree (*e*) but this deci sion is of doubtful authority See Notes above Where an attachment has been made

Private transfer —The expression private transfer means a voluntary sale gift or mortgage in contravention of the attachment and not the enforced execution of a conveyance or assignment in obedience to a decree of a Court competent to pass it (*f*) The decree may be one on an award (*g*) Releasing an easement by the

(*w*) *Sh il ngappa* v *Chanbasappa* (1906) 0 Bom 337 339

( ) *D obun thu* v *Jogmaja* (190) 9 Cal 1 4 0 I A 0

(*y*) *Si b m a* v *Ch ll l ga* (19 3) 46 Mad 41 (3) A M 31 I C 18

( ) *Nur Alm i* v *Alt f Alt* (18 8) All 58 *G g D n* v *I h shah* (18) All 09 *Saty ( ) n Madh b* (190) 9 C W N 03 *Ah d l ar* v *B se* (19 5) 7 Lah L J 501 88 I C 3 1 ( ) A I 5 3 *Bharat Chandra* v *Ca ji* (19 8) 55 Cal 545 104 I C 340 (7) A C 88

(*a*) *P valid* v *I ya* (1919) 4 M d 56 0 I C 61 *p* v *Aru a h lam* (1919) 4 M d 844 53 I C 07 (F B) *M l I* v *J m d* (19 3) 4 Lah 11 I C 45 (3) A L 423

(*b*) (19 8) I A 0 109 I C 6 6 (8) A PC 139

(*c*) *Ga n* v *Jang Lal* (1890) 6 Cal 531 *Sh lal* v *T am* (19 8) 3 Bom L R 1136 1141 ( ) A 1 444 *T ak Nath* v *N l* (19 9) 33 C W N 8 (9) A C 494

(*d*) *Bh t* v *Ga a ga* (19 5) 5 Cal 4 104 I C 340 ( ) A C 84

(*e*) *Ve k t sub h* v *Venk ta S sha ya* (1919) 4 Mad 1 4 I C 3

(*f*) *Q ba Al* v *A h af Al* (18) 4 All 19 5

(*g*) *Na y a* v *E v n* (192) 4 M 1 103 109 110 68 I C 6 3 ( ) A M 271 *S ealw nl* v *Muda a dt* (19) 46 Mad L J 361 80 I C 358 ( ) A M 610

dominant owner to the servient owner is a transfer within the meaning of this section (h)

Contract for sale—A contract of sale entered into before attachment does not create any interest or charge on the property which can prevail over the attachment (i)

A private transfer under this section is not absolutely void that is void as against all the world (j) but void only as against claims enforceable under the attachment —

(1) In execution of a decree obtained by *A* against *B* certain property belonging to *B* is attached During the pendency of the attachment *B* mortgages the prop rty to *C* The property is then sold in execution of the decree and purchased by *D* Here the mortgage having been made contrary to the attachment is void as against *A* s claim and *D* is entitled to take the property free from the mortgage created by *B* (*k*) This illus tration shows the operation of the section See note below Private sale of property attached to decree holder

(2) *B* s property is attached in execution of a decree obtained by *A* against him While the attachment is pending *B* sells the property to *C* and pays out of the sale proceeds the amount of the decree into Court and the attachment thereupon ceases [see O 21 r 55] The sale to *C* is *valid* the decree having been satisfied by payment into Court and *there being no claim outstanding which is enforceable under the attachment* (*l*) Moreover an alienation by means of which the decree in execution of which the attachment was made is satisfied can scarcely be regarded as an alienation *contrary* to the attachment (*m*)

(3) On the same principle where *A* attaches *B* s property in execution of a decree obtained by him against *B* and applications are thereafter made by other decree holders *C D* and *E* for rateable distribution without attaching the property in execution of their decrees and subsequently *B* sells the property to *F* and pays off *A* (the attaching creditor) the other decree holders namely *C D* and *E* are not entitled to question the aliena tion to *F* In the first place the alienation can hardly be said to be an alienation *contrary to the attachment* within the meaning of this section for the alienation was the means by which the decree in execution of which the attachment was made was satisfied In the next place it cannot be said that the claims of *C D* and *E* are claims for the rateable distribution of assets within the meaning of the Explanation to the section for to bring s 73 [which provides for rateable distribution] into play certain conditions are necessary and one of them is that there should be *assets held by the Court* In the case now under consideration no assets came into the hands of the Court at all Therefore *C D* and *E* are not entitled to question the alienation by *B* to *F* and the alienation is perfectly valid (*m1*)

(4) A decree holder though entitled to rateable distribution as contemplated by the Explanation to the section is not entitled to question a private alienation under this section unless his claim be one *enforceable under the attachment* within the meaning of this section The attachment referred to in this section is *the attachment under which the execution sale is made* Therefore a claim enforceable under the attachment means a claim enforceable under the attachment under which the execution sale is

(h) *Kri lodhone* v *Nandar n* (1908) 35 Cal 889
(i) *Tarak Nath* v *Sanat* (19 9) 33 C W N 805 (29) A C 494
(j) *Anund Lall* v *Jullodhur* (187) 14 M I A 543 549 *D nend onath* v *Pamkumar* (1881) 7 Cal 107 118
(k) See *Srinava a* v *Vellayan* (1926) 51 Mad L J 143 97 I C 718 (26) A M 966
(l) *Umesh Chu der* v *Raj Bullub* (188) 8 Cal 279 *Anund Loll* v *Jullodhu* (1872) 14 M I A 543 550 *Abdul Rashid* v *G ppo Lal* (1898) 20 All 4 1 See also *Kh shalchand* v *Nandram* (1911) 3 Bom. 516 12 I C 57
(m) *Annamalai* v *Palamala* (1918) 41 Mad 65 276 43 I C 539 [F B]
(m1) *Annamalai* v *Palamala* (1918) 41 Mad 265 276 285 43 I C 539 [F B]

made (n) A claim under any other attachment is not a claim enforceable under the attachment within the meaning of this section The result is that—

if *A* obtains a decree against *B* and *B* s property is attached in execution of the decree and

B subsequently alienates the property to *C* and

the property is thereafter attached and sold in execution of a decree obtained by *D* against *B* and it is purchased by *F*

and *C* sues *F* for possession

C s title is to be preferred to *F* s title and *C* is entitled to possession of the property *D* cannot object to the alienation to *C* for the alienation to *C* was *prior* to his attachment Nor is *A* entitled to question the alienation for *the sale in execution was not made under his attachment* but under *D* s attachment The sale having been made under *D* s attachment *A* s claim cannot be said to be a claim enforceable under the attachment within the meaning of this section The result would be the same even if we substitute *A* for *D* that is even if the decree hoder in both cases was the same person This is the effect of the decision of their Lordships of the Privy Council in *Mina Kumari* v *Bijoy Singh* (o) a case under s 276 of the Code of 1882 which did not contain the Explanation which now occurs at the end of the present section But the decision proceeded on the assumption that *Sorabji* v *Govind* (p) considered in the notes below was good law an assumption which involved the proposition now quoted in the Explanation *Mina Kumari* s case therefore would also govern cases under the present section

If in the case put above the property was sold by the Court under *A* s attachment instead of *D* s and *D* had applied for execution before the Court received the proceeds of the sale the alienation to *C* would be void it being contrary to *A* s attachment and further *D* would be entitled to rateable distribution under s 73

The attaching decree holder may agree with a purchaser of the property from the judgment debtor pending the attachment that he will not bring the property to sale in execution of his decree Such an agreement has the effect of rendering the alienation valid as against the attaching creditor (q)

Contrary to such attachment —These words have been substituted for the words during the continuance of the attachment which occurred in s 276 of the Code of 1882 The words during the continuance of the attachment were too wide in that they comprised alienations that could not possibly prejudice the rights of an attaching creditor as where property is mortgaged by *A* to *B* and the equity of redemption is subsequently attached at the instance of *C* in execution of a decree obtained by *C* against *A* and pending the attachment the mortgage is transferred by *B* and *A* to *D* In such a case the transfer of mortgage though made *during the continuance of the attachment* cannot prejudice *C* the attaching creditor for the effect of the transfer is merely to substitute *D* for *B* But the transfer having been made during the continuance of the attachment it came literally within the old section 2 6 though it was not *contrary to the attachment* and it was accordingly contended in a case before the Judicial Committee under s 276 that the transfer was void as against *C* But this contention was overruled Their Lordships held that the object of s 2 6 was merely to prohibit alienations *contrary to the attachment* and that an alienation such as the above by *B* and *A* to *D* cannot in any sense be said to be *contrary to the attachment* (r) The words contrary to the attachment have now been substituted for the words during the continuance of the

(n) *A* la v *I l al* (1918) 41 Mad 6 6 35 43 I C 39 [F B]

(o) (1917) 44 I A 7 44 Cal 60 40 I C 4?

(p) (1890) 16 Bom 91

(q) *G ga j* v *Venkt t m ya* (1923) 44 Mad L J 80 I C 833 (3) A M 3)

(r) *Di bu dlu* v *Jog i ya* (1901)) Cal 1 4 166 9 I A 9 16 *Sri ras* v *Vell y* (19 4) 4 M I L J 913 916 917 8 I C 349 (5) A M 333 (where the mort gage to the attachment was not kept) *Prakasa*) *lamart* (19 6) 51 Mad L J 358 97 I C 93 (6) A M 1 See also *Q rba Ali* v *Ash af Ali* (1 4 All 19 5

attachment and they give effect to the Privy Council ruling noted above. Similarly a renewal though pending the attachment of a mortgage already existing on the property is not a transfer contrary to the attachment. But if the amount secured by the renewed mortgage exceeds the amount due under the original mortgage at the date of the attachment the additional security is to that extent void (s).

Explanation to the section: Claims for rateable distribution of assets under s 73 are claims enforceable under an attachment within the meaning of this section.—The Explanation to the section is new. *A* obtains a decree against *B* and in execution of the decree attaches Rs 7 000 belonging to *B* in the hands of a Railway Company. *B* then assigns the said sum in the hands of the Railway Company to his attorneys for costs due to them subject to *A*'s attachment. After the assignment *C* another creditor of *B* obtains a decree against *B* and in execution of his decree attaches the said sum in the hands of the Railway Company. Thereafter the Company pays the said sum to the Sheriff of Bombay. The assignment by *B* to his attorneys though made prior to *C*'s attachment is void as against *C*'s claim for *C*'s claim is a claim for rateable distribution of assets [Rs 7 000] within the meaning of s 73 and therefore a claim enforceable under the attachment of *A* by virtue of the Explanation to this section. *C* is therefore entitled to be paid in priority to *B*'s attorneys. This is the law under the present Code and it is in accordance with the view taken by the Bombay High Court in *Sorabji* v *Govind* (t) decided under s 276 of the Code of 1882. The view taken by the other High Courts was that *C*'s claim being a claim merely *for rateable distribution* cannot be said to be a claim enforceable under the attachment but this view is no longer law (u). The Explanation gives effect to the Bombay decision. But the Explanation does not apply unless the claim of the subsequent decree holder can be said to be a claim for rateable distribution within the meaning of s 73. Now the essential condition of enforcement of claims for rateable distribution under s 73 is that there should be assets held by the Court [see s 73 below] and that condition was satisfied in *Sorabji* v *Govind*. *But if there be no assets received by the Court* as would be the case if no payment was made by the Railway Company to the Sheriff and *A*'s attachment came to an end [O 21 r 55] by *B* satisfying *A*'s decree out of Court and then certifying it to the Court under O 21 r 2 *C*'s claim cannot be enforced as a claim for rateable distribution and the assignment to the attorneys will prevail over any claim that may be made by *C* under his subsequent attachment (v). The Explanation to the section protects only those decree holders who are entitled to rateable distribution under s 73 and no decree holder can be entitled to rateable distribution under that section unless there are assets held by the Court (w). At the same time it must be noted that it is not enough that a decree holder is entitled to rateable distribution under s 73 to bring the Explanation into play; it is also necessary that his claim must be one enforceable under the attachment within the meaning of the present section (x): see ill (4) on p 208 above. The result is that a decree holder is not entitled to the benefit of the Explanation and is not entitled to question a private alienation unless—

(1) he is entitled to rateable distribution under s 73 for which it is absolutely necessary that there should be *assets held by the Court* and

(s) *Mahadevappa* v *Srinivasa* (188) 4 Mad 417

(t) (189) 16 Bom 91 referred to in *Mina Kumari* v *Bijoy Singh* (1917) 44 I A 72 79 44 Cal 66 673 40 I C 4 and followed in *Chunilal* v *Karamchand* (19) 46 Bom 89 69 I C 161 (22) A B 241 *Pratapa* v *A E L Mission* (19 6) 49 Mad 38 9 I C 496 (6) A M 307

(u) See *Manohar* v *Ram Auta* (1903) 25 All 431 *Kunhi* v *Makki* (1900) 23 Mad 4 8 *Durga Churn* v *Monmohini* (1888) 15 Cal 771

(v) *Jetha Bhima & Co* v *Lady Janbai* (1912) 37 Bom 138 17 I C 6 *Mina Kumari* v *Bijoy Singh* (191) 44 I A 78 44 Cal 66 673 40 I C 24 *Annamalai* v *Palamalai* (1918) 41 Mad 65 7 8 43 I C 539

(w) *Annamala* v *Palamala* (1918) 41 Mad 6 275 8 43 I C 539 *Chandha* v *Chhaganlal* (19 8) 30 Bom L R 1488 (28) A B 545

(x) *Mina Kumari* v *Bijoy Singh* (1917) 44 I A 7 79 44 Cal 662 673 40 I C 4?

(2) where there has been a sale in execution his claim is one enforceable under the attachment under which the sale was made as explained in ill (4) under note A private transfer under this section etc

As regards the first condition it is obvious that it cannot be present if the judgment debtor satisfies the claim of the decree holder out of Court and that is what happened in the undermentioned cases (y) In the Privy Council case of *Mina Kumari* v *Bijoy Singh* ( ) the first condition was satisfied or assumed to be satisfied but the second condition was not

Private transfer under O 21 r 83—The High Court of Bombay has held that a private transfer of his property by a judgment debtor made pursuant to the provisions of O 21 r 83 is absolute notwithstanding the provisions of this section even against claims enforceable under the attachment (a) The contrary has been held by the Madras High Court (b)

Attachment raised and subsequently restored—Where the property of a defendant is attached and the attachment is subsequently raised by the executing Court but the attachment is restored by the High Court on appeal the order of the High Court relates back to the date when the attachment was first made with the result that an alienation of the property made by the judgment debtor between the date on which the attachment was raised and that on which it was restored is void as against all claims enforceable under the attachment (c) The same principle applies where the property attached is released from attachment and subsequently re attached by the same Court in execution of the same decree (d)

Private sale to decree holder—A obtains a decree against *B* In execution of the decree *B* s property is attached Pending the attachment *B* sells the property to *C* *A* then buys the same property from *B* Is the sale to *C* *void* under this section? No because *A* bought the property not at a Court sale but by private treaty with *B* The title obtained by the purchaser on a private sale of property in satisfaction of a decree differs from that acquired upon a sale in execution Under a private sale the purchaser derives title through the vendor and cannot acquire a title better than his Under an execution sale the purchaser notwithstanding that he acquires merely the right title and interest of the judgment debtor acquires that title by operation of law adversely to the judgment debtor and freed from all alienations and incumbrances effected by him after the attachment of the property sold (e)

Effect of striking off execution proceedings or of removing them from the file—An attachment is not necessarily *at an end* because the execution case is struck off or removed from the file The effect of such a proceeding depends on the circumstances of each case Where after an attachment has been made the proceedings in execution are struck off or removed from the file *under circumstances which render a fresh attachment necessary* to bring the judgment debtor s property to sale a private transfer of the property by the judgment debtor made after the proceedings are struck off is *valid* though the same property may subsequently be re attached in execution of

(y) *Jetha Bhima & Co* v *Lady Janbai* (191) 37 Bom 138 17 I C 6 5 *Annamalai* v *Palamalai* (1918) 41 Mad 65 43 I C 539 [F B] *J gi Ram* v *Ganga* (1919) 1 Ran 5 p 93 49 I C 134 *Bhup l* v *Kundan Lal* (19 1) 43 All 399 160 I C 846 Another case in which there may be no assets held by the Court is where the decree holder is given leave to bid and to set off the amount of the decree against the purchase money under O 21 r 72 and the former exceeds the latter *Mina Kumari* v *Bijoy Singh* (1917) 44 I A 8 44 Cal 66 673 40 I C 4

(z) (191) 44 I A 7 44 Cal 66 40 I C 4

(a) *Shirlingappa* v *Chanbasappa* (1906) 0 Bom 337

(b) *Thirariyam* v *Lakshmana* (1915) 41 Mad 616

(c) *Aziz Bakhsh* v *Kaniz* (191) 34 All 490 15 I C 49 *Gopal* v *Kashi* (1920) 4 All 39 5 I C 343

(d) *Budhu* v *Barkat Ram* (19 0) Lah L J 99 103

(e) *Dinendronath* v *Tarakchandra* (1881) 7 Cal 107 *Budhu* v *Barkat Ram* (1920) 2 Lah L J 99

the same decree on a fresh application for execution But if the execution proceedings are struck off or removed from the file *under circumstances which do not render a fresh attachment necessary* the transfer is *void* as against all claims enforceable under the attachment and the mere fact that a fresh application for attachment is subsequently made in execution of the same decree will not render the transfer valid The reason is that in the former case the proceedings in execution are deemed to have *terminated* on their being struck off or removed from the file and the attachment s deemed to be at an end and the transfer having been made after the *termination* of the attachment it cannot be affected by the subsequent attachment In the latter case however the proceedings in execution are merely *suspended* and the first attachment is therefore deemed to *subsist* and the second application for attachment is a superfluity (*f*) Whether the execution proceedings have been struck off or removed from the file under these or those circumstances is a question of fact in each case (*g*) But where a fresh application for attachment is made the presumption is that the first attachment has *ceased* and the burden of proof is on the party alleging that the first attachment was still *subsisting* when the second application was made and that the second application was superfluous (*h*) *B* s property is attached in execution of a decree obtained against him by *A* The execution proceedings are then struck off *B then* sells the property to *C* The property is again attached on a fresh application by *A* Is the sale valid ? There being a fresh application for attachment the presumption is that the first attachment *ceased* from the moment the proceedings were struck off The ale would therefore be valid and the second attachment inoperative unless *A* showed that the first attachment was still *subsisting* at the date of transfer and that the second application was superfluous

The above cases would not have arisen if the Courts instead of making an order for striking off proceedings or removing proceedings from the file had made an order either dismissing the application or adjourning the proceedings where the Court was by reason of default on the part of the decree holder unable to proceed further with the proceedings in execution The practice of striking off proceedings or removing proceedings from the file had no justification under any of the previous Codes To put a stop to this practice it is now expressly provided by O 21 r 57 that where any property has been attached in execution of a decree but by reason of the decree holder s default the Court is unable to proceed further with the application for execution it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a further date upon the *dismissal* of such application the *attachment shall cease* Cases like the above are not likely to ari e under this Code if the procedure prescribed by O 21 r 57 is strictly followed

Attachment does not create a charge —Attachment creates no charge or lien upon the attached property (*i*) It merely prevents and avoids private alienations it does not confer any *title* on the attaching creditors (*j*) There is nothing in any of the provisions of the Code which in terms makes the attaching creditor a *secured* creditor or creates any *charge* or *lien* in his favou over the property attached (*k*) But an

(*f*) *Kulen Lal* v *Charat Singh* (1901) 3 All 114 *Juddomo ee Dosee* v *Muthooranath* (1874) 1 B L R 411 *Peary Lal* v *Cha di Charan* (1906) 11 C W N 163 *Shaikh Kamar ud-din* v *Jaw h Lal* (1905) 3 I A 10

(*g*) *Mohunt Bhaguan* v *Khetter Mon* (1896) 1 C W N 617 *Pa gasami* v *Perias m* (1894) 17 Mad 58 *M ngul Pe shad* v *Grij Ka t* (188) 8 C l 51 8 I A 1 3 *Sri ic sa* v *S m Rau* (1894) 17 M 1 180 *Mahomed* v *I wlori Mohu i* (189) Cal 909 I A 1 9 *Daud Al* v *Iam Prasad* (1915) 37 All 54 30 I C 787 *Yakub Ali* v *D ga* (1915) 37 All 518 30 I C 877

(*h*) *Hafiz* v *Abdullah* (1894) 16 All 133

(*i*) *Sarkies* v *Bun tho B e* (1869) 1 N W P H C Rep 17 *Soobul Chu der* v *Russick Lall* (1888) 15 Cal 20 *Zeminda of Jarret g r* v *Trust e of T rumalai* (1909) 3 Mad 4 9 I C 18 *Frederick Peacock* v *Madon Gopal* (190) 9 Cal 428

(*j*) *Motilal* v *K rab ld n* (1898) 25 Cal 179 4 I A 170 *Raghun th Das* v *Sund r Das* (1914) 42 Cal 7 41 I A 51 4 I C 304 *Ram Bhaj* v *I a n Das* (19) 3 Lah 414 69 I C 7 0 (23) A L 261

(*k*) *Krist asaumy* v *Official Assignee of Madras* (1903) 26 Mad 673 6 8

attaching creditor acquires by virtue of the attachment a right to have the attached property kept *in custodia legis* for the satisfaction of his debt and an unlawful interference with that right constitutes an actionable wrong Thus it is an actionable wrong if *A* cuts and carries away crops attached by *B* in execution of a decree against *C* and a suit will lie at *B* s instance against *A* to recover from *A* damages which should not however exceed the value of the attached property (*l*)

Effect of order of adjudication on attachment—Where a judgment debtor has been adjudicated an insolvent the whole of his property vests in the Official Assignee What is the effect of an order of adjudication on an attachment levied prior to the date of the adjudication order? Has the attaching creditor by reason of his prior attachment priority over the Official Assignee in respect of the property attached by him prior to the date of the adjudication order or is the Official Assignee entitled to claim the attached property by virtue of the adjudication order as part of the property of the insolvent? It has been held that whether the attachment is one before judgment (*m*) or in execution of a decree (*n*) the attaching creditor has no priority over the Official Assignee and the latter is entitled to the attached property for the benefit of the creditors of the insolvent including the attaching creditors These decisions are based on the ground that an attaching creditor does not obtain a charge or lien on the attached property Once the order of adjudication is made the attaching creditor and other creditors of the insolvent stand on the same footing and they are entitled to a rateable distribution out of the property of the insolvent in the hands of the Official Assignee In execution of a decree obtained by *A* against *B* property belonging to *B* is attached *B* is subsequently adjudicated an insolvent As a result of adjudication the property vests in the Official Assignee for the benefit of *B* s creditors See Presidency Towns Insolvency Act 1909 s 53 and Provincial Insolvency Act 1920 s 51

Effect of winding up order on attachment—The position of the liquidator of a registered company differs from that of the Official Assignee in that the property of the company *does not vest* in him An attachment therefore made on the property of the company at the instance of a decree holder before the winding up of the company cannot be released at the instance of the liquidator (*o*)

SALE

Purchaser s title

65 [S 316] Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute

Corresponding section of the Code of 1882—Section 316 of the Code of 1882 ran as follows —

When a sale of immovable property has become absolute in manner aforesaid the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser Such certificate shall bear the

(*l*) *Sankaral ga* v *Kandasami* (190) 30 Mad 413

(*m*) *Krishn a y* v *Official Assignee of Madras* (1903) 6 Mad 6 3

(*n*) *Frederick Peacock* v *Madon Gopal* (190) 29 Cal 4 8 *Juma d* v *Jamchand* (1905) 0 Bom 40 *Sri Ch nd* v *M an Lal* (191) 34 All 6 8 16 I C 183 *I nath Das* v *Su da Das* (1914) 41 I A 51 4 Cal 4 I C 304 *Muhammad Sh rif* v *I da Mohan* (1919) 41 All 5 I C 6

(*o*) *Amrita Lal* v *Anukul* (1916) 43 Cal 34 I C 53

date of the confirmation of the sale and so far as regards the parties to the suit and persons claiming through or under them the title to the property sold shall vest in the purchaser from the date of such certificate and not before

Provided that the decree under which the sale took place was still subsisting at that date

The first part of section 316 now stands as O 21 r 94 with slight verbal alterations The second part with certain substantial alterations to be presently noted stands as s 65 The proviso to s 316 has been omitted altogether

Changes introduced in the section —Under s 316 of the Code of 1882 the title to immovable property sold at an execution sale vested in the purchaser from the *date of the certificate of sale* that is the date on which the sale became absolute Under the present section the title to such property where the sale has become absolute vests in the purchaser from the *time when the property* is sold and not from the time when the sale becomes absolute

The proviso to s 316 has been omitted It is therefore no longer necessary that the decree should be subsisting at the time of the confirmation of sale

Vesting of property in auction purchaser —In the case of a private sale of immovable property the property vests in the purchaser from the time when the deed of sale is executed The reason is that a voluntary sale becomes absolute on execution and delivery of the deed by the vendor In the case however of a Court sale, the property does not vest in the purchaser immediately on the sale thereof The reason is that a compulsory sale does not become absolute until some time after the sale A period of at least thirty days must expire from the date of sale before the sale can become absolute During that period the sale is liable to be set aside at the instance of the judgment debtor on the ground of irregularity in publishing or conducting the sale or on deposit by him in Court of the amount specified in the sale proclamation together with a percentage on the purchase money by way of compensation to the purchaser [O 21 rr 89 90] The application by the judgment debtor *to set aside the sale* in either of these two cases must be made within 30 days from the date of sale Where no such application is made the Court must make an order confirming the sale *and it is upon such confirmation that the sale becomes absolute* [O 21 r 92] After the sale has become absolute a certificate is granted by the Court to the purchaser which is called a certificate of sale [O 21 r 94] Such certificate bears as date the day on which the sale became absolute It is only when the sale becomes absolute that the property sold vests in the purchaser (*p*) But though the property does not vest in the purchaser until the sale has become absolute when it does vest in him it *shall* be deemed to have vested on the sale becoming absolute *from the time when it was sold* The vesting of the property is thus made to relate back to the date of sale (*q*)

Successive purchasers at sales in execution of money decrees —Under the Code of 1882 s 316 the property sold vested in the purchaser from the date of the certificate of sale and not before This gave rise to some difficulty when the question arose as to which of two successive auction purchasers should have priority in cases where the later purchaser had the certificate of sale issued to him first Had the question been determined with exclusive reference to the terms of that section the priority would have rested with the purchaser who first procured the certificate of sale But this inequitable result was avoided and the difficulty was got over by holding that the first purchaser had by his prior purchase obtained an *equitable* interest in the property and that the subsequent purchaser must be deemed to have purchased the property *subject to* such

(*p*) *Vishnu* v *Yusuff* (19–5) 7 Bom L R. 963 88 I C 96 (5) A B 483

(*q*) See *Abd l Rahman* v *Fateh A a n* (19 6) 4 *Luck* 80 91 I C 1047 (26) A O 199

interest (r) No such difficulty can arise under this Code for it is provided by the present section that the property is to be deemed to have vested in the purchaser from the date of sale and not from the date of the certificate of sale

Illustration

In execution of a money decree obtained by *A* against *B* certain immovable property belonging to *B* is sold and purchased by *P1* The same property is sub equently purchased by *P2* at a sale in execution of a money decree obtained by *C* against *B* *P2* obtains a certificate of sale first and is placed in possession of the property Sub e quently *P1* obtains a certificate of sale and sues *P2* for possession Under the present section *P1* is entitled to possession for the property is to be deemed to have vested in him from the date of *sale* and the sale to him was *prior* to the sale to *P2* The same result was arrived at under the Code of 1882 by holding that *P2* bought subject to *P1* s equitable interest and he could not therefore retain possession against *P1* after *P1* s title was perfected by the issue of a certificate to him

But where property is sold in execution of a decree to *P1* and the sale is *et aside* on the ground of irregularity under O 21 r 90 and the same property is sub equently sold in execution of another decree and is purchased by *P2* *P2* is entitled to priority as against *P1* even though the sale to *P1* may subsequently be confirmed The sale to *P1* not having been confirmed until after the sale to *P2* *P1* is not entitled to priority over *P2* Even under the Code of 1882 *P1* would not be entitled to priority over *P2* for the sale to him (*P1*) having been set aside it could not be said that *P2* purchased subject to *P1* s interest in the property *P1* had no interest in the property when it was sold to *P2* (s)

Successive purchasers at sales in execution of mortgage decrees — Priority between successive purchasers of the same mortgaged property in execution of mortgage decree against the same mortgagor is determined by the dates of the several purchases and not by the dates of the several mortgages (t)

Suit for possession by auction purchaser —It was held under the Code of 1859 that a purchaser of immovable property at a Court sale could not maintain a suit for possession thereof *against a third person* unless he had a certificate of sale issued to him before suit although the sale had become ab olute The reason given was that the transfer of property to a purcha er at a Court sale was not complete until a certificate of sale was issued to him The decisions turned upon the language of s 259 which provided that *the certificate shall be taken and deemed to be a valid transfer of such right title* and interest as had passed from the judgment debtor to the purchaser The line of reasoning adopted was that if a certificate was to be taken as a tran fer the tran action must neces arily be incomplete until the certificate was issued The said words were construed as controlling the operation of s 2[illegible] which provided that a sale became absolute when it was confirmed by the Court (u) But it was held that *as again t the judgment debtor and his representatives* the purchaser s title became compl te on the confirmation of the sale (v) Under the present section it seems that an auction purchaser can maintain a suit for possession even against a per on not a party to the suit after the sale is confirmed by the Court though no certificate has been i sued to him before the institution of the suit provided it is produced at or before the pa ing of the decree *The reason is that property under the pre ent section ve ts in the purchaser*

(r) [illegible] v Govind (1896) 10 Bom 4 3 [illegible] v [illegible] (1 [illegible]) 11 Bom 6[illegible]

(s) [illegible] Lal v [illegible] (1900) [illegible] All 168

(t) [illegible] v [illegible] (19[illegible]) Ma[illegible] 4[illegible] J C 10 7 [illegible] (18[illegible]0)

[illegible] 5 C [illegible] 6

(u) [illegible] (18[illegible]3) 10 [illegible] H C 4 [illegible] das v [illegible] (1[illegible]0) 4 Bom 155

(v) [illegible] v [illegible] (1[illegible]) 1 [illegible] 343 [illegible] v [illegible] (1[illegible]) 1 Bom 5 9 [illegible] v [illegible] (1[illegible]) Bom [illegible]

date of the confirmation of the sale and so far as regards the parties to the suit and persons claiming through or under them the title to the property sold shall vest in the purchaser from the date of such certificate and not before

Provided that the decree under which the sale took place was still subsisting at that date

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(*p*) *Vishnu* v *Yusuff* (19_5) 7 Bom L R 963 88 I C 96 (_) A B 483

(*q*) See *Abdul Rahman* v *Fateh Hasain* (19 6) 4 Luck 80 91 I C 1047 (6) A O 189

interest (r) No such difficulty can arise under this Code for it is provided by the pre ent section that the property is to be deemed to have vested in the purchaser from the date of sale and not from the date of the certificate of sale

Illustration

In execution of a money decree obtained by *A* against *B* certain immovable property belonging to *B* is sold and purcha ed by *P1* The same property is sub equently purchased by *P2* at a sale in execution of a money decree obtained by *C* against *B* *P2* obtains a certificate of sale first and is placed in pos ession of the property Sub e quently *P1* obtains a certificate of sale and sues *P2* for possession Under the pre ent section *P1* is entitled to pos ession for the property is to be deemed to have vested in him from the date of *sale* and the sale to him was *prior* to the sale to *P2* The same result was arrived at under the Code of 1882 by holding that *P2* bought subject to *P1* s equitable interest and he could not therefore retain possession against *P1* after *P1* s title was perfected by the issue of a certificate to him

But where property is sold in execution of a decree to *P1* and the sale is *set aside* on the ground of irregularity under O 21 r 90 and the same property is sub equently sold in execution of another decree and is purcha ed by *P2* *P2* is entitled to priority as against *P1* even though the sale to *P1* may subsequently be confirmed The sale to *P1* not having been confirmed until after the sale to *P2* *P1* is not entitled to priority over *P2* Even under the Code of 1882 *P1* would not be entitled to priority over *P2* for the sale to him (*P1*) having been set aside it could not be said that *P2* purchased subject to *P1* s interest in the property *P1* had no interest in the property when it was sold to *P2* (s)

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(r) Leshta ... (18 0) 10 B ... 453 ... Data (1 8) 11 Bom 8

(s) ... (1900) 2 All 16

(t) ... (19 3) ... 48 ... 10 ... (1 0)

... Cal 6

(u) ... Lakhma (1 3) 10 Bom H C 4 ... (1 0) 4 Bom 155

(v) ... (1) 21 W ... Bom 5 9 ... (1) Bom 254

immediately the sale is confirmed by the Court and the vesting is not postponed until the grant of a certificate In a case under the Code of 1859 where the equity of redemption of the judgment debtor was sold it was held that the purchaser was entitled to sue the mortgagee for redemption even before the issue of the certificate the reason given being that the suit was not one in ejectment on title, but one for redemption and therefore of an equitable nature and the purchaser was equitably entitled to redeem The certificate in that case was produced at the hearing (w)

Mesne profits —Under the Code of 1882 the property sold vested in the purchaser from the *date of the sale certificate* and not before Hence it was held that the purchaser was entitled to mesne profits from the date of the certificate and not from the date of sale (x) Under the present section the property is to be deemed to vest in the purchaser from the date of sale The purchaser therefore is entitled to mesne profits from the date of sale (y)

Title of auction purchaser —Under the Code of 1882, property sold in execution of a decree vested in the purchaser *so far as regards the parties to the suit and persons claiming through or under them* That is to say a purchaser at a Court sale was entitled to *hold* the property only against the judgment debtor and his representative but not against third parties The words italicized above which occurred in s 316 of the Code of 1882 have been omitted in the present section The omission however has not the effect of enlarging the purchaser s rights and a purchaser at a judicial sale will now as before get a good title only against persons bound by the decree but not against strangers (z)

Sale when void and when voidable —A sale in execution of a decree is void if the Court had *no jurisdiction* to sell the property Thus a Court has no jurisdiction to sell property in execution of a decree if the notice required by O 21 r 22 is not served (a) Similarly a Court has no jurisdiction to sell the property of a person who was not a party to the suit in which the property was sold or properly represented on the record (b) Again the Court of first instance has no jurisdiction to sell property after an order is made by the appellate Court for stay of execution (c) In each of these cases the sale is a *nullity* and may be disregarded without any proceeding to set it aside (d)

But where a Court *has* jurisdiction to sell the property and there has been an irregularity in the course of execution proceedings the sale is not void but merely *voidable* Thus where the notice required by O 21 r 22 is served upon a person who was not in fact the legal representative of the deceased judgment debtor but whom the Court wrongly held to be his legal representative the sale is voidable and not void (e) Similarly a sale is *voidable* and not void if there has been material irregularity or fraud in publishing or conducting the sale [O 21 r 90]

Irregularities of procedure in obtaining decrees or in execution proceedings — Provided that the Court *has jurisdiction* to sell a purchaser at a Court sale is not bound to inquire into the correctness of the decree or of the order for sale To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under executions *If the Court has jurisdiction* a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution

(w) See *Krishanji* v *Ganesh* (188) 6 Bom 139

(x) *Am Kazim* v *Darbari* (190) 4 All 47 *Shiam Lal* v *Natle Lal* (1911) 33 All 63 7 I C 6

(y) See *Ma Hawa Bi* v *S in Kho* (19) 5 Rang 803 109 I C 151 (8) A R 6

(z) See *Umes Chander* v *Z h r Fatima* (1891) 18 C l 164 178 17 I A 01

(a) *Raghunath Das* v *Sunder Das* (1914) 41 I A 2 1 4 Cal 7 4 I C 304

(b) *Khairajmal* v *Daim* (190) 3 C l 296 313 315 3 I A 3 *Lalla Parsad* v *Lal Sahab* (1891) 13 All 53 17 I A 150 *Beni Prasad* v *Mukhtear* (1899) 1 All 318 *Rashid Nissa* v *Muhammad* (1909) 36 I A 168 31 All 572 3 I C 864 *Jagadanand* v *Lakshmanasamma* (1915) 38 Mad 1076 29 I C 314

(c) *Ramanathan* v *Arunachellam* (1915) 38 Mad 766 I C 99

(d) 3 Cal 296 31 *supra*

(e) *Malkarjun* v *Narhari* (1901) Bom 337 349 7 I A 16

issues (*f*) Strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do (*g*) Therefore when property sold in execution of a decree under the order of a competent Court is purchased by a stranger *bona fide* and for value the sale cannot be set aside on the ground that the judgment debtor had a cross decree of a higher amount and the Court therefore ought not to have directed the sale (*h*) or that the decree had been satisfied out of Court before the sale (*i*) or that the Court wrongly held that the defendant was served with the summons and on that finding passed an *ex parte* decree against him (*j*) or that though an attachment was subsisting at the date of the sale the decree holder s application for an order of sale had been dismissed for want of prosecution *before* sale (*k*) or that the property was not liable to attachment and sale within the meaning of s 60 (*l*) or that the execution of the decree was barred by limitation (*m*) or that the decree proceeded upon an erroneous view of the law (*n*) or that the decree was one which the Court ought not to have passed (*o*) See notes to s 60 Objection that property not liable to attachment and sale when to be raised on p 202 above notes to O 21 r 22 Consequence of omission to give notice and Notice to wrong person and notes to O 21 r 90 Material irregularity in publishing or conducting the sale

The above principles apply in favour of a third party purchasing at a Court sale They do not apply where the decree holder himself is the purchaser The reason is that where the decree holder himself is the purchaser he must be held to have had *notice* of all the facts relating to the suit and execution proceedings (*p*) Nor do they apply in favour of a party to the suit though he may not be a decree holder (*q*)

Effect of reversal of decree upon sale where decree reversed after confirmation of sale—There is a great distinction between decree holders who come in and purchase under their own decree which is afterwards reversed or modified and *bona fide* purchasers who come in and buy at a sale in execution of the decree to which they are no parties and at a time when that decree is a valid and subsisting decree and when the order for sale is a valid order A *bona fide* purchaser who is a stranger to the decree does not lose his title to the property by the subsequent reversal or modification of the decree But where the decree holder himself is the purchaser the sale may be set aside if the decree is subsequently reversed or modified Where the purchaser is a stranger the judgment debtor whose property is sold is entitled only to the sale proceeds of the property if the decree is subsequently reversed But where the purchaser is the decree holder he is bound to restore the property to the judgment debtor (*r*) A sale in execution of a decree at which a *third party* becomes the purchaser is upheld notwithstanding the subsequent reversal of the decree because otherwise there will be less inducement to intending

(*f*) *Re a M lton v I mk shen S gh* (188) 14 Cal 18 13 I A 106 *Moth ra Mo n Ghose v Akho I umar M tter* (1888) 15 C l 5 7 *N ayana v Lal a a* (1896) 19 Mad 19 3

(*g*) *Mallarjun v Narha i* (1901) Bom 337 347 7 I A 16 *Paresh Nath v Ha i Ch a* (1911) 38 Cal 6 6 7 10 I C 61

(*h*) *Re a Malton v R mkishen S ngh* (18) 14 C l 18 13 I A 106

(*i*) *Mothura M hu Ghos v Akhoy Ku ar Mitter* (1888) 1 Cal 557 *I llappa v I ch d i* (1897) 21 Bom 463

(*j*) 38 Cal 6 10 I C 361 *s pra*

(*k*) *I nas n v I erna am* (1 91) 17 Mad 5

(*l*) *D na k nath v T n* (190) 34 Cal 190 *A med v Jas I m* (1907) 9 All 61 *I a d ra g v Krishnaj* (1901) 5 Bom 1 5

(*m*) *S rod i Churn Mahomed* (1855) 11 Cal 376

(*n*) *Girdha ee Lall v Kant o Lall* (1 5) 14 Ben L R 187 1 I A 3 1

(*o*) *Fo s lla v Ch d Sen* (1900) 2 All 3 7 *K d at ullah v Kubra Bega n* (1901) 3 All 5

(*p*) *I l ajmal v Daim* (190) 3 Cal 96 315 I A 3 *M a K ma i v J gat etta i* (1884) 10 Cal 2 0 *G ngaper ha l v G pal gh* (18) 11 I A 31

(*q*) *Offic l Recei r v Chettiappa* (19) 45 Mad 67 91 I C 16 (6) A M 78

(*r*) *Zo l Abd n v M hammad Asghar Al* (1888) 10 All 166 15 I A 1 *Mukhoda v Gop l Ch der* (1899) 26 Cal 31 *Set L ed l v Srinath* (1900) 7 Cal 810 *I a h Nath v Hari Charan* (1911) 38 Cal 6 6 10 I C 361 *Sh rbat v I soo* (1919) 43 Bom 3 38 48 I C 130 *Man Lal v H n f n Nissa* (1916) 3 All 40 34 I C 303 [stranger purchaser] *Ch taman v Chan ak* (1916) 1 Pat L J 43 46 34 I C 747 [decree-holder purchaser] *Agha H sa n Qas m Al* (19 5) 23 All L J 916 89 I C 1019 (6) A A 35

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(w) See *Krisha ji* v *Gan sh* (188) 6 Bom 13)
(x) *I r Jazi* v *D ba i* (190) 24 All 47 *Sh m Lal* v *Natte Lal* (1911) 33 All 63 7 I C 65
(y) See *Ma Hawa Bi* v *Se n Kho* (19) 5 *R J* 803 10 I C 151 (9) A R 6
(z) S e *U s Cha der* v *Zahur Fatima* (1891) 18 Cal 164 178 17 I A 01
(a) *Pagh athia* v *S der Das* (1914) 41 I A 1 4 Cal 4 I C 304
(b) *Khai ajmal* v *D m* (190) Cal 96 313 315 3 I A 3 *R dha I rasa i* v *Lal Sahab* (1891) 13 All 53 17 I A 150 *Be i I ras d* v *M khtesar* (1899) 21 All 316 *I hid un N a* v *Muhammad* (1909) 36 I A 168 31 All 572 3 I C 864 *Paydanna* v *Lak hm ar sam a* (1915) 38 Mad 1076 9 I C 314
( ) *Pamanath n Ar chellam* (1915) 8 Mad 766 2 I C 99
(d) 3 Cal 96 31 *sup a*
(e) *Malkarj n* v *Narh ri* (1901) Bom 337 348 7 I A 216

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(*f*) *Pei a Malton* v *I amk shen S ngh* (188) 14 Cal 18 13 I A 106 *Moth a M I Gl se* v *Akhoy Ku ar M tter* (1888) 15 C I 5 7 *Na a jona* v *Kal a* (1896) 19 Md 19 3

(*g*) *M llarjun* v *Narlari* (1901) Bom 337 347 7 I A 16 *P resh Nath* v *Ha i Cl r n* (1911) 38 Cal 6 6 7 10 I C 61

(*h*) *Pe a M lton* v *Ramkislen Singh* (188) 14 Cal 18 13 I A 106

(*i*) *Moth ra Mohun Gho e* v *Akhoy Ku mar Mitt r* (1888) 1 Cal 557 *I llapi a* v *I a cha dra* (189) 21 Bom 463

(*j*) 38 Cal 6 10 I C 361 *s pra*

(*k*) *I gas mi* v *I ena m* (1891) 17 M d 58

(*l*) *D a l nath* v *Tari* (1907) 34 Cal 199 *I ed* v *Jas I am* (1907) 9 All 61 *I d r g* v *Krish j* (1904) 9 Bom 1 5

(*m*) *S roda Churn* v *Mahomed* (1885) 11 Cal 376

(*n*) *G di ee Lall* v *K too Lall* (18 5) 14 Beng L R 187 1 I A 3 1

(*o*) *Ka is lla* v *Chandar S n* (1900) 2 All 377 *Kud at ullal* v *Fubra Beg m* (1901) 23 All 2

(*p*) *Kl arajmal* v *Daim* (1905) 3 Cal 96 315 3 I A 23 *M na Kuma i* v *J gat eltani* (1884) 10 Cal 2 0 *Gungapershad* v *G p l S gh* (188) 11 I A 234

(*q*) *Official Rece v r* v *Chettiappa* (19 5) 48 M 1 67 91 I C 16 (96) A M 78

(*r*) *Z in ul Abd n* v *M lammad Asghar Ali* (188) 10 All 166 15 I A 1 *Mukhoda* v *Gopal Cl der* (1 99) 6 Cal 734 *Set Umedm l* v *Srinath* (1900) 27 Cal 810 *I a esh Nath* v *Hari Charan* (1911) 38 Cal 6 6 10 I C 361 *Sh bai* v *J esoo* (1919) 43 Bom 35 38 48 I C 130 *I n Lal* v *Ha if-un Nissa* (1916) 38 All 40 34 I C 303 [stranger purchaser] *Ch t man* v *Ch musahu* (1916) 1 Pat L J 43 46 34 I C 747 [decree holder purchaser] *Agha Husa n* v *Qasim Ali* (19 5) 23 All L J 916 89 I C 1019 (6) A A 35

purchasers to buy at an execution sale and consequently less chance of property fetching proper value at such sales (s) See notes to s 144 Who may apply for restitution. But where property sold in execution of a decree is bought by the decree holder and it is subsequently re sold by him to a *bonâ fide* purchaser for value such purchaser acquires a good title though the decree may be subsequently reversed (t)

Effect of reversal of decree upon sale where decree reversed before confirmation of sale —On referring to s 316 of the Code of 1882 (p 213) it will be observed that it contained a proviso the effect whereof was stated to be that a sale could not be confirmed if at the time of application for confirmation the decree under which the sale was effected had ceased to be a subsisting decree (u) That proviso has not been reproduced in the present section Under the present section therefore a sale held in execution of a decree may be confirmed in any event where the purchaser is a third party though the decree has been reversed before confirmation of the sale See O 21 r 92 (1) and note the words the Court *shall* make an order confirming the sale

What passes at a Court sale —See notes to O 21 r 94

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff

66 [S 317] (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner

Changes introduced by the section —

1 The words no suit shall be maintained against any person claiming title under a purchase certified by the Court have been substituted for the words no suit shall be maintained a certified purchaser which occurred in the corresponding section (s 317) of the Code of 1882

2 The words on behalf of the *plaintiff* or on behalf of some one through whom *the plaintiff* claims have been substituted for the words on behalf of *any other person* or on behalf of some one through whom *such other person* claims See notes below Joint purchase

3 The latter part of sub section (2) is new See notes below under the head Suit by a third person for a declaration that the certified purchaser is merely a benamidar

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(s) *M Moda v Gopal Chunder* (1893) 6 Cal 34 37

(t) *Sheik I m l v Pajab P tler* (190) 30 Mad 9 *M n thu v Subba ja* (1903) 13 Mad L J 231

(u) *D ram Das v Sa al Ch nder* (1893) 5 Cal 17 *M l Cla d v Mukta* (1888) 10 All 83 *I a n Sukh v Ram Sahai* (1907) 9 All 591 See *Vatar ja v Ramaswamy* (19) 45 Mad 8 6 860 861 3 I C. 4 9 ( ) A M 491

Benami purchases—The object of the section is to put a stop to benami purchases at execution sales (v). If *A* under a secret understanding with *B* purchases property with his own money but in *B*'s name, the purchase is said to be benami. In such a case *B* is merely a benamidar or ostensible owner; he holds the property in trust for *A* and *A* may compel him to transfer the property to him (*A*). If however *A*'s object in purchasing the property in *B*'s name was to defraud his creditors *and the object of the fraud is carried out*, the Court will not assist *A* in recovering possession of the property from *B*; but if the object of the fraud is not carried out, the Court will assist *A* in recovering possession of the property from *B* notwithstanding *A*'s primary intention to effect a fraud. This is the law as applicable to benami purchases at a *private sale* (w). The law, however, is different as to benami purchases at a *Court sale*. If *A* purchases property in *B*'s name at a Court sale and a certificate of sale is issued to *B* (O 21 r 94), *B* will be *conclusively* deemed to be the real purchaser as against *A*, and no suit will lie under this section by *A* against *B* for possession of the property unless *A* can prove that *B*'s name was inserted in the certificate fraudulently or without his consent [see sub-section (2)]. The same rule applies even if the claim made by the beneficial owner is not for the whole of the property of which the defendant is the certified purchaser. Thus if *B* is the certified purchaser of certain property, part of which was purchased by him on his own account and part benami for *A*, *A* is not entitled to maintain a suit under this section for recovery of the *part* purchased by *B* benami for him (x). The mere fact, however, that the plaintiff has described the defendant as a benamidar does not make the transaction benami if it was not benami in fact; it is a mere misdescription, and it is no ground for refusing the plaintiff a relief to which he is otherwise entitled (y).

Section must be construed strictly—Where a transaction is once made out to be benami, the Courts of India which are bound to decide according to equity and good conscience will deal with it in the same manner as it would be treated by an English Court of equity (z). That is to say, effect will be given to the real and not to the nominal title unless the result of doing so would be to work a fraud upon innocent persons (a). The present section provides that when property is sold at a Court sale, no suit shall be maintained against the certified purchaser on the ground that the purchase was made benami. It provides in effect that the certified purchaser shall be *conclusively* deemed to be the real purchaser, and shall not be liable to be ousted on the ground that his purchase was really made on behalf of another. In other words, the provisions of the present section bar the equitable jurisdiction of the Courts. The section therefore must be construed strictly and not extended beyond its express terms. But though the section prohibits suits against the certified purchaser to assert a benami title against him, *it does not make benami purchases illegal*. The object of the stringent provisions of this section is to discourage benami purchases at Court sale, but not to render such purchases *illegal* (b).

Scope of the section—The section refers to execution sales only and has no application to a sale held by a receiver (c).

(v) *B* [illegible] (1874) [illegible] Beng [illegible] R 31.

(w) [illegible] (1901) [illegible] 3[illegible]0; *Jadu Nath* v. [illegible] (1906) 33 Cal [illegible]67; [illegible] (1887) [illegible]; [illegible] (1907) 31 [illegible] 40; [illegible] *Chandra* (189[illegible]) [illegible]; [illegible] (1906) [illegible]; [illegible] (190[illegible]) 31 Mad [illegible]; [illegible] (1908) 31 Mad 485. See Indian Trusts Act [illegible] s 84.

(x) *D*[illegible] *Bhagwan das* (1901) 3 All 34. But [illegible] (19[illegible]) [illegible].

(y) [illegible] (1919) [illegible] 51 I C 111 [illegible].

(z) [illegible] (1881) 5 [illegible].

(a) Mayne's Hindu Law sec [illegible].

(b) [illegible] *Lalla Puhoor* (18[illegible]) [illegible] 496; *Lokhee* v. [illegible] (1[illegible]) [illegible] 354 [illegible] 154; [illegible] L. R. 1393; [illegible] (19[illegible]) [illegible] Lah. L. J. [illegible].

(c) [illegible] (19[illegible]) 90 I. C. 116 [illegible].

Whether section retrospective—The High Court of Calcutta has held that this section does not apply if the sale was held and confirmed before January 1 1909 when the pre ent Code came into force and that the section applicable is sec 317 of the Code of 1882 (*d*) But if the sale was held before but confirmed after that date the present section applies for the title of the execution purchaser cannot be said to have been perfect until the confirmation of the sale (*e*) It is submitted that even if the sale was confirmed before January 1 1909 this section would apply to the case and not sec 317 (*f*)

Suits outside the section—This section provides that no suit shall lie *against the certified purchaser* on the ground that the purcha e was made on behalf of the plaintiff In other words it is only in suits *against* the certified purchaser as *defendant* that such purchaser is to be *conclusively* deemed to be the real purchaser But if the real owner is actually and honestly in possession and a suit is brought *by* the certified purchaser *as plaintiff* against the real owner for possession or for rents and profits of the property of which he is the certified purchaser the real owner may resist the suit on the ground that the certified purchaser was only a benamidar (*g*) And since the section only bars suits *against* the certified purchaser *as defendant* a suit *by* such purchaser *as plaintiff* for a declaration that he purchased the property on his own behalf and not benami for another is not barred under this section (*h*) On the same ground this section is no bar to a suit by the beneficial owner for possession against the judgment debtor pursuant to an agreement made between them after the sale of the property provided the certified purchaser is joined as a party to the suit and he does not claim the property (*i*) In fact the present section applies only when a suit is instituted by a person claiming to be the real purchaser as plaintiff against the certified purchaser as defendant on the allegation that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims This point is now made clear by the substitution of the word plaintiff for the words any other person in sub section (1)

Suit by a third person for a declaration that the certified purchaser is merely a benamidar—Under the corresponding s 317 of the Code of 1882 the High Court of Calcutta held that the only suits barred under that section were suits brought by *the beneficial owner as plaintiff* against the certified purchaser as defendant and that suits brought by a *third party as plaintiff* against the certified purchaser as defendant for a declaration that the property though ostensibly sold to the certified purchaser is liable to satisfy a claim of such third party against the beneficial owner were not barred under that section (*j*) On the other hand the High Courts of Madras (*k*) and Allahabad (*l*) held that even suits brought by a *third person as plaintiff* were barred under that section The present section gives effect to the Calcutta decisions by providing in sub section (2) that nothing in this section shall interfere with the right of *a third person* to proceed against that (*sic*) property though ostensibly sold to the certified purchaser on the ground that it is liable to satisfy a claim of such third person against the real owner

(*d*) *Promotha Nath v Moh i* (19 0) 47 Cal 1108 8 I C 3 7

(*e*) *Fa l l v Sa d r* (19_8) 3 C W N 11 107 I C 67 (_8) A C 338

(*f*) *M hammad Abd l J lil v Muh mmad Obaid Ull h* (19 9) 31 Bom L R 1393 t pp 139 1396

(*g*) *Lokhee v Kallypuddo* (1775) _3 W R 3 8 _ I A 154 *J n M hammad v Ilah B ksh* (1876) 1 All 290 *Goinda v Lala Kish n* (1901) _8 Cal 3 0 *I ahn i v I gho* (1903) 5 Bom L R 329 *Gh ud-din v Bishan Dial* (190) 7 All 443

(*h*) *Unco enanted Service B k v Abdul Bari* (1896) 18 All 461

(*i*) *Sa ad d i v Gonda* (19) 7 C W N 08 I C 196 (3) A C 30

(*j*) *Kani al v Mo ohir* (1886) 1 Cal 204 *S bha B bi v H a Lal* (1894) _1 Cal 519

(*k*) *Rama Kurup v Sri levi* (1893) 16 Mad 200 But see *Kollanta ida v Tiruw lil* (1897) 0 Mad 36

(*l*) *Delhi a d Lo d n B nk v Partab Bhask r* (1899) 1 All 29 *Fish n Lal v Garurud dh r ja I ras d* (1899) 1 All 238 *Ram Narain v Moh ian* (1904) 6 All 8 *Kl d Baksh v Aziz Alam* (1905) 7 All 194 *Sarju I ras d v Bi deshri* (1911) 33 All 3 9 I C 298

Illustration

A obtains a decree against *B* and attaches certain property alleged to [illegible] to *B*. *C* objects to the attachment alleging that he is the certified purchaser of the property having purchased the same at a Court sale held in execution of a decree [illegible] against *B* by *D*. *A* alleges that the property was purchased by *C* benami for *B* [illegible] sues *C* for a declaration that *C* was merely the benamidar for *B*. The suit is not [illegible] under this section for it is a suit not by the *beneficial owner* but by a *third person*.

Suit by beneficial owner in possession for declaration of title.—[illegible] is a conflict of opinion whether a suit by a beneficial owner *in possession* [illegible] declaration of his right to the property against the certified purchaser is barred [illegible] this section. The High Court of Calcutta in a case under s 317 of the Cod[illegible] held that such a suit was not barred under that section (*m*). On the other hand, the [illegible] Court of Allahabad held that such a suit was barred under that section (*n*). *A* [illegible] a decree against *B*. In execution of the decree certain property bel[illegible] *B* is sold. *B* purchases the property in *C*'s name. The certificate of sale is [illegible] but *B* *continues in possession* of the property. After a few years *C* gives [illegible] the tenants not to pay rent to *B*. *B* thereupon sues *C* for a *declaration* [illegible] real purchaser and for an injunction restraining *C* from interfering with his [illegible] The suit is not barred according to the Calcutta decision. It is barred [illegible] to the Allahabad decision. In the Calcutta case, the Court said: It is [illegible] which the plaintiff seeks to obtain a decree for *possession* against the ostensib[illegible] Resting as it does on an *existing possession* we do not think that it is a su[illegible] prohibited by s 317. As to this it was observed by Strachey C J in th[illegible] cited above: If the learned Judges in that case meant to lay down that s. 31[illegible] only where the plaintiff being out of possession seeks to recover posse[illegible] tified purchaser and can never apply to a suit by a plaintiff in possession [illegible] tion that the certified purchaser out of possession was not the real purch[illegible] agree with them. Banerji J said: The first paragraph [of the section] [illegible] to a suit for recovery of possession only. The correctness of the Cal[illegible] was doubted by the same Court in the undermentioned cases (*o*) but [illegible] that decision was followed by the same High Court in another case (*p*). It was [illegible] last mentioned case that where a Mahomedan father purchases propert[illegible] with his own money in the name of one of his sons *and then lets the property* [illegible] *and the tenant pays rent to him* this section is no bar to a suit by the o[illegible] the tenant and the son in whose name the property was bought fo[illegible] after his father's death.

Where the beneficial owner has been in possession *for twel*[illegible] a suit will lie at his instance against the benamidar for a declaration of [illegible] property. The basis of such a suit is the plaintiff's *title by pos*[illegible] based not on the ground that the defendant is a benamidar but on [illegible] *possession*. Such a suit does not come within the purview of this [illegible]

Persons claiming through beneficial owner.—This section [illegible] by the beneficial owner or one claiming through him. It does not [illegible] by a person who does not claim through the beneficial own[illegible] another per on (*r*).

(*n*) *S[illegible] Ch[illegible]* (1896) [illegible] Cal 609

( ) *Buha[illegible] D[illegible] v Gha[illegible] ud-d[illegible]n* (1901) 3 All 175

(*o*) *Ho[illegible]* v *Ja[illegible]* (1916) 43 Cal. [illegible] (1906) 53 Cal [illegible] I C 934 [illegible] A C 54

(*p*) *Maha[illegible]ad* v *Mahammad* (1919) [illegible] C W N 51 54 I C [illegible]

(*q*) *Muhammad Abdul* [illegible] See also *Buhan* [illegible]

(*r*) [illegible] v *Durga* [illegible]

Joint purchase—The provisions of this section are designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of judgment debtors and in no way affect the title of persons otherwise beneficially interested in the purchase (s) It has accordingly been held that where one of several holders of a joint mortgage decree applies for execution of the decree under O 21 r 15 on behalf of all and the purchase money is set off against the entire amount of the debts the other decree holders are entitled to a declaration that the purchase was made on behalf of all the decree holders (t)

Where property is purchased at a Court sale by a member of a joint Hindu family in his name but *with family funds* the other members are entitled to sue him for a declaration that the purchase was made on behalf of the family though the certificate of sale is in his name The section does not apply to such a case This was decided by their Lordships of the Privy Council in *Bodh Singh* v *Gunesh Chunder* (u) a case under the Code of 1859 Their Lordships said [The provisions of the section] cannot be taken to affect the rights of members of a joint Hindu family who *by the operation of law* and not by virtue of any private agreement or undertaking [such as exists between a benamidar and the beneficial owner] are entitled to treat as part of their common property an acquisition however made by a member of the family in his sole name if made by the use of the family funds The same principle applies where the parties stand in the relation of partners and the purchase is made by one of the partners in his name with partnership funds (v)

When property is purchased at a Court sale by two or more persons jointly the executing Court has no power to grant the certificate of sale to one of them only without the consent of the others If it does so the case is one within sub sec (-) and the other purchasers are entitled to maintain a suit against the certified purchaser for their share of the property (w)

If A joint Hindu family consists of A and his sons and A purchases property at a Court sale with joint family funds without the concurrence of his sons in the name of a third person are the sons entitled to recover their share of the property from the third person [certified purchaser]? The High Court of Madras (x) has held that they are the reason given being that the purchase cannot in such a case be said to have been made by the father on behalf of the sons and the sons are not therefore beneficial owners and the section does not apply On the other hand the Allahabad High Court has held that if a managing member makes a purchase in the name of a third person the purchase though made without the consent of his sons must be deemed to have been made on behalf of the sons and the sons are precluded by this section from maintaining the suit (y) The Allahabad High Court purports to follow the Privy Council ruling in *Suraj Narain* v *Iqbal Lal* ( ) but that case as pointed out by the Madras High Court was a case under s 317 of the Code of 188 which contained the words on behalf of *any other person* now altered into on behalf of the *plaintiff*

Where beneficial owner is in possession with permission of certified purchaser—The High Court of Madras has held that if after obtaining a certificate of sale the purchaser acknowledges that his purchase is benami and gives up possession

(s) *Ga qa N lai* v *Kesl* (1915) 3 All 54 5 4 5 5 4 I A 1 18 30 I C 6
(t) (191) 37 All 54 4 I A 1 30 I C 6 *p a 4 hl la* v *Z jasi* (190) 9 All
( ) (18 4) 1 Beng L R 317
(v) *Achhaibar* v *T pat* (1907) 29 All 5 7 61 *Vist a a h* v *I a diari th* (19 6) 0 Bom 600 9 I C 683 (6) A L
(w) *Eh bat am* v *Di aesh* (19 6) 1 Cal 9) 81 I C 10 9 (6) A C 719
(x) *N t raja* v *I n a j* (19) 45 Mad 8 6 3 I C 4 9 ( ) A M 491 *Naters* v *Te k t ja* (1883) 6 M d 135 *M ksh* v *I l a a* (18) 0 Mad 349
(y) *B j th D* v *L l n* (19 1) 43 All 711 63 I C 676 [purch by t an ger in his wif s nam] *I a n I p* v *Kh d rs* (19 8) 50 All 1 108 I C 130 ( ) A A 619
(z) (191) 44 I A 201 11 40 All 159 1 0 40 I C 988

or does some act which clearly indicates an intention to waive his right or restore the property to the beneficial owner such act may by reason of the antecedent relation between the parties operate as a valid transfer of the property from the purchaser to the beneficial owner Thus if A is the manager of B's estate [and this is the antecedent relation between the parties] and the estate is sold in execution of a decree against B and is purchased by B in A's name a suit will lie at the instance of B against A for possession if after obtaining the certificate of sale A delivers possession of the property to B and then disturbs B in his possession The reason given is that the permission to hold possession amounts to a *transfer of title* from the benamidar to the beneficial owner and the suit is thus based not on the ground that the purchase was benami but on a fresh title created by the transfer (a) The High Court of Allahabad has dissented from this view and held relying on the Privy Council case of *Lokee v Kallypuldo* (b) that the mere permission to hold possession cannot give or transfer a title from the benamidar to the real owner and that a suit like the above would be barred under this section (c) The Calcutta High Court has followed the Allahabad decision (d) However that may be if the certified purchaser allows the beneficial owner to take possession the section does not enable him to sue the beneficial owner for possession, because possession has come into the hands of the person entitled to it (e)

Suit for specific performance against certified purchaser —In *Venkatappa v Jalayya* (f) a Full Bench of the Madras High Court held that this section does not debar a plaintiff from maintaining a suit for specific performance against the certified purchaser if the plaintiff's claim is based upon an agreement to convey the property entered into *after* the purchase The decision in *Venkatappa's case* was approved by the Judicial Committee in *Ramatbai v Peria* (g) In *Ramatbai's case it was held that the* present section does not debar a plaintiff from maintaining a suit for specific performance against the certified purchaser if the plaintiff's claim is based upon an agreement made after the purchase to transfer the property to the plaintiff in pursuance of an agreement made before it The suit cannot in such a case be said to have been brought on the ground that the *purchase* was made on behalf of the plaintiff within the meaning of this section

Certified purchaser —Where a purchaser who had not obtained a certificate was sued and afterwards applied for and obtained a certificate it was held that he was a certified purchaser within the meaning of this section (h)

Successor in title of certified purchaser —This section bars a suit not only against a certified purchaser but also against persons claiming title from him (i) Under the Code of 1882 there was a conflict of decisions as to whether s 317 of that Code was a bar to suits against persons claiming title from the certified purchaser On the one hand the High Courts of Madras Allahabad and Calcutta held that the expression certified purchaser in s 317 of that Code *did not include* a person claiming through or under the certified purchaser such as an heir or an assignee (j) and that that section therefore was no bar to a suit against such person On the other hand the Bombay High Court held that the expression certified purchaser *included* his successor in title (k) The present section contains a legislative recognition of the view taken by the High Court of

(a) *M ppa v S r ppa* (1888) 11 Mad 234 *S nk n v Na ya a* (1894) 17 Mad *K Kumb ling v Anap tra* (189) 18 Mad 436 *Venkatappa v J l yya* (191) 42 Mad 615 616 51 I C 111
(b) (18 5) 3 W R 3 8 I A 154
( ) *B h n Di l v Cha ud-d n* (1901) 3 All 175 1 9 180
(d) *H n h v Nripend* (19 0) 4 C W N R 4 59 I C 719
(e) *M h mad Abd l J l l v Muh mmad Obaid Ull h* (1929) 31 Bom L R 1393
(f) (1919) 42 Mad 615 51 I C 111 *Lab m Dokh na* (1919) 24 C W N 2 54 I C 6
(g) (1920) 47 I A 108 43 Mad 643 56 I C 39 *Se al Bal m v Nalt* (19) 0 Bom L R 8 1 108 I C 11 ( ) A IR 75
(h) *Aldwell v H M I k h* (1853) 5 All 4
(i) *Sowk kam rudeen v Noor Mahamad* (1915) 28 Mad L J 1 28 I C
(j) *Thevvatel n v Kurha* (1) 21 Mad *de v Bhajal* (1899) 1 All 196 *D khada v nmonto* (1 99) 26 Cal 9
(k) *Hari v Ram h dra* (19) 31 Bom 61

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Bombay (l) It is obvious that the section does not apply where the real owner seeks for a declaration of his title against a person who does not claim under a certified purchaser (m)

67 [S 327] (1) The Local Government may, by notification in the local official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value

Power for Local Government to make rules as to sales of land in execution of decrees for payment of money

(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the Local Government may by notification in the local official Gazette, declare such rules to be in force, or may, by a like notification, modify the same

Every notification issued in the exercise of the powers conferred by this sub section shall set out the rules so continued or modified

Sub sec (2) was inserted in the section by the Code of Civil Procedure Amendment Act I of 1914 As to the result where no notification is issued as provided by sub sec (2) see the undermentioned cases (n)

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVABLE PROPERTY

68 [S 320 1st para] The Local Government may declare, by notification in the local official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immovable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immovable property, shall be transferred to the Collector

Power to prescribe rules for transfer to Collector of execution of certain decrees

(l) *M nj v Hoorb* (1911) 3 Bom L R 347 8 I C
(m) *Abinas Ch nd a v J t I Ch Ia* (19_8) 55 Cal 10 0 108 I C 58 ( ) A C 118

(n) *A l Cha l l Ia v ...gh* (1913) P L no 80 | 318 *Fakt v An in Cha d* (19 1) 3 Lah L J 5 60 I C 893 (_1) A L 3

Object of the section — The object of these provisions [i e provisions relating to the execution of decrees by Collectors] is well known In different parts of India the effect of sales in execution of decrees was to transfer landed estates from the old families to modern speculators A strong opinion was entertained by certain members of the Government of India that these results of the administration of civil justice were impolitic and inexpedient and it was suggested that some procedure might be devised by which the Chief Executive Officer of the district would be enabled to liquidate the debts of encumbered land holders without the immediate sale of their estates and so to preserve the old landed gentry of the country The provisions of ss 320 to 325C [now ss 68 70 71 and 72 and schedule III] were inserted in the Code of Civil Procedure *in order to give effect to these suggestions* (o) *See notes to* O 21 r 90 Waiver and estoppel

Provisions of Third Schedule to apply

69 [*New*] The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section

Rules of procedure

70 [*S 320, 2nd 3rd and 4th paras*] (1) The Local Government may make rules consistent with the aforesaid provisions—

(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for retransmitting the decree from the Collector to the Court,

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector,

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector

(o) [illegible]

Jurisdiction of Civil Courts barred

(2) A power conferred by rules made under sub section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court

Power of Local Government to make rules — A Local Government has power under this section to make a rule providing that no suit shall lie to set aside a sale held or confirmed by a Revenue Authority Such a rule is not *ultra vires* (*p*)

Civil Courts are precluded from interfering in any matter declared by notification to be within the Collector s jurisdiction —Thus if it is declared by notification that a decree for the sale of a particular kind of property *e g* ancestral property should be transferred to the Collector for execution a sale of the property if made by a Civil Court is void Such a notification ousts the jurisdiction of the Court so far as regards the execution of the decree (*q*) For the same reason if the execution of a decree is transferred to the Collector the Court transferring the decree has no power to postpone the sale (*r*) or to give leave to the decree holder to bid under O 21 r 72 (*s*) or to re sell the property where a re sale is necessary (*t*) the Collector alone has that power Similarly where a decree is transferred for execution to the Collector and the decree is subsequently adjusted the application under O 21 r 2 [Code of 1882 s 258] for recording the adjustment should be made to the Collector (*u*) But where a decree has been sent to the Collector for execution under this section he holds the money which may be realized in execution of such decree at the disposal of the Court which sent the decree to him for execution and he is not competent to distribute such money in contravention of an order of the Court indicating the mode of distribution (*v*)

It is to be noted that sub section (2) does not take away the jurisdiction of and Court other than the Court referred to in it The Court there referred to is the Court mentioned in the previous portion of the section namely the Court to which an application was made for execution and which as such Court transmitted the decree for execution (*v*)

Where a suit would lie to set aside an order made by a Court executing a decree the fact that such order has been made by the Collector does not deprive the Civil Courts of the jurisdiction to entertain a suit to set aside such order (*x*)

Suit to set aside orders of Collector —A suit will lie to set aside an order made by the Collector if the order is *ultra vires* Thus no rule has been made by the Government of Bombay under this section empowering the Collector to set aside a sale under O 21 r 89 [Code of 1882 s 310A] on a deposit by the judgment debtor of the amount specified in that rule nor is there any rule empowering him to set aside a sale under O 21 r 90 [Code of 1882 s 311] on the ground of material irregularity in

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(*p*) *Fa l t Nissa v S Lim* (19 0) 4 All 54 I C 801 *Ch nd K sh a v M ni Lal* (19 6) 1 Ju k 9 97 I C 1036 (6) A O 61

(*q*) *S khleo v Sheo Ch l m* (188) 4 All 38 *Kri h n Das v I Gopal* (19 9) 50 All 8 7 (9) A A 5 9

(*r*) *Daul t Si gh v Jui l Ki ho e* (1900) All 108 111

(*s*) *Shri r v Jajaderappa* (1918) 4 I m 6 1 46 I C 6 3

(*t*) *Shal a1 S ngh v Han n I* (19 4) 46 All 56 83 I C 766 (4) A A 04

(*u*) *M ha m 1 v I ia1 S h* (1894) 16 All 8 *Kh I ha d v Na dr m* (1911) 3 Bom 16 1 I C 57

(*v*) *Tajeers v D kinand n* (1894) 16 All 1

(*w*) *Sl am B I n Lal v F ip J sho e* (1893) 0 All 379 38 83

(*x*) *Sh m B h L l v P p F shore* (1893) 0 All 379

publishing or conducting the sale (*y*) Nor has any rule been made by the Local Government of the N W P under this section empowering the Collector to set aside a sale under O 21 r 89 [Code of 1882 s 310A] ( ) though there is a rule empowering him to set aside a sale under O 21 r 90 [Code of 1882 s 311] Again no rule made by any of the Local Governments empowers the Collector to set aside a sale on the ground of fraud (*a*) The Collector has no jurisdiction to set aside a sale after it has been confirmed and the decree retransmitted to the Civil Court (*b*) If in any of these cases the Collector arrogates to himself the power which he has not and sets aside the sale the order is *ultra vires* and it is competent to the auction purchaser to bring a regular suit in a Civil Court for a declaration that the sale was valid and that the order of the Collector setting aside the sale was invalid (*c*)

Suit to set aside sale held by Collector—A suit will lie to set aside a sale held by the Collector if the sale was brought about by the fraud of the decree holder the auction purchaser and persons who had brought pre emption suits and who had all conspired to deprive the plaintiff of the property for O 21 r 90 applies only to fraud in publishing and conducting a sale (*d*)

Appeal—No appeal lies *to the High Court* from an order passed by the Collector in an execution proceeding transferred to him under this section The reason is that this section specially provides that an appeal shall lie from the order of the Collector *to such authorities as the Local Government may by rules prescribe* (*e*)

Revision—An order made by the Collector in the course of execution proceedings under this section sanctioning the prosecution of a party to the suit under s 476 of the Code of Criminal Procedure is an order made by him as a Revenue Court and is not therefore subject to revision by the High Court (*f*)

71 [S 320, 5th para] In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially

Collector deemed to be acting judicially

Shall be deemed to be acting judicially—The effect of this provision is that the Collector and his subordinates are entitled to the benefit of the provisions of the Judicial Officers Protection Act XVIII of 1850 which are as follows —

No Judge Magistrate Justice of the Peace Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of and no officer of any Court or other person bound to execute the lawful warrants or orders of any such Judge Magistrate Justice of the Peace Collector or other person acting judicially shall be liable to be sued in any Civil Court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same

But though the Collector is deemed to be acting judicially he is not a Court (*d*)

(*y*) *J it* v *Chu lal* (1907) 31 B m 207 *Na yan* v *I s Bha* (1 99) 23 B m 31 (*p l* v *Js* (1 91) 15 B m 3 *I Imth* v *Mall* (1891) 15 Bom 691

(*z*) *Sheo I d* v *Mula m l* (1903) 5 All 167

( ) *Sath Cha dh ri* v *Abhena l n Pra ad* (1904) 6 All 101 t 104

(*b*) *N t K h e* v *I l gh* (19 6) 48 All 0 95 I C 5 4 (6) A A 5 5

( ) *Math l a* v *Pa kalal* (1) 19 B m 16 *M th ra Da* v *J mna* (19 3) All 355

(*d*) *Bhagw Da* v *S aj Prasad* (19) 47 All 1 84 I C 1031 ( ) A A 146

(*e*) *Mancherj* v *Thaku das* (190) 1 m L.R. 8

(*f*) *Emperor* v *A ha k Lal* (191) 2 All 91 S C 11 All L J 1907 34 I C 419 See also *Emperor* v *Bhaw* (1915) 3 All 334 29 I C 89

72 [S 326] (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share

Where Court may authorize Collector to stay public sale of land

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable

The Court may authorize the Collector —These words are not imperative but leave a discretion to the Civil Court That discretion can only be exercised upon materials placed before the Court It is therefore open to the decree holder to place those materials in the shape of evidence before the Civil Court and to satisfy the Court as well by evidence as by argument that the proposal of the Collector is not feasible or practicable The Court should not decline to receive the evidence offered by the decree holder (*g*)

Temporary alienation —This section admits only of a temporary alienation of land and not an arrangement by which possession is to be left with the judgment debtor subject to payment of the judgment debt by instalments (*h*)

A *temporary alienation of land belonging to a judgment debtor who is a member* of an agricultural tribe does not come within the purview of s 16 of the Punjab Alienation of Land Act 13 of 1900 which prohibits a sale *out and out* (*i*)

Provisions of sections 69 to 71 to apply —Reading this section with para 2 of schedule III [Code of 1882 s 322] referred to in s 69 it is clear that the provisions of this section cannot be applied to a decree which directs the sale of land in pursuance of a contract specifically affecting the same (*j*) Similarly reading this section with para 11 sub para (1) of schedule III [Code of 1882 s 322A] it follows that where a judgment debtor executes a mortgage of his property while the property is in the management of a Collector under this section with an undertaking to put the mortgagee in possession the mortgagee is not entitled to claim possession (*k*) Likewise reading this section with the same paragraph no Court can issue any process of execution against any immovable property in the management of a Collector under this section Therefore the period during which the property is in the management of the Collector under this section should be excluded from the period of limitation applicable to the decree of which execution is refused by the Court by reason of the property having been in the Collector s management (*l*) see sch III para 11 sub para (3)

(*g*) *H* *I* *I P* *v* *Kali Ira al P v* (1883) 9 C l 90 *S* *d* *v P m I ttan* (19 0) 1 I 31 1 58 I C 603 [F I]

(*h*) *K* *h* *Lal* *Am er Ja* (1876) All H C 31 *Mull a I er h d* *I* *I* *I I* 1873) 6 All H C 39

(*i*) *Sa I* *v I a* *I ttan* (19 0) 1 Lah 10 58 I C 633 [F B] *S* *D tta v N r* *Ahma I* (19) 4 Lah I J 4 6 4 I C 191

(*j*) *I h q a I r* *I v* *I* *I* (1 80) 2 All 8 6

(*k*) *Seth J* *I y I v* *I* *S hae* (1890) 17 C l 43 [F C]

(*l*) *C dh r D v* *H r Si* *l r* (1 98) 0 All 83

Distribution of Assets

73 [S 295] (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment debtor and have not obtained satisfaction thereof the assets, after deducting the costs of realization, shall be rateably distributed among all such persons

Proceeds of execution sale to be rateably distributed among decree holders

Provided as follows —

(*a*) where any property is sold subject to a mortgage or charge the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale

(*b*) where any property liable to be sold in execution of a decree is subject to mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold,

(*c*) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale,

secondly, in discharging the amount due under the decree

thirdly, in discharging the interest and principal moneys due on subsequent incumbrances (if any) and

fourthly, rateably among the holders of decrees for the payment of money against the judgment debtor, who have, prior to the sale of the property applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets

(3) Nothing in this section affects any right of the Government

Changes introduced by the section—The present section differs from the corresponding s 295 C P C 1882 in the following respects —

1 The words where assets are held by a Court have been substituted for the words whenever assets are realized *by sale or otherwise in execution of a decree* This it is submitted introduces an important alteration though the High Court of Bombay has held otherwise See notes Assets held by a Court on p 233 below

2 The words before the receipts of such assets have been substituted for the words prior to the realization See notes Before the receipt of the assets on p 231 below

3 The word passed has been added after the word money See notes Same judgment debtor on p 240 below

4 The words interest in in cl (b) have been substituted for the words right against to bring the wording of that clause into line with the Transfer of Property Act 1882 s 96 This is a mere verbal alteration

Rateable distribution—The object of this section is to provide a cheap and expeditious remedy for the execution of money decrees held against the same judgment debtor by adjusting the claims of rival decree holders without the necessity for separate proceedings (*m*) Under the Code of 1859 (s 2 0) the creditor who first attached property has a prior claim to have his decree satisfied out of the sale proceeds to the exclusion of other creditors but now all judgment creditors who apply to the Court prior to the receipt of the sale proceeds by the Court are entitled to share rateably (*n*) In *Bithal Das* v *Nand Kishore* (*o*) Strachey C J said The object of the section is two fold The first object is to prevent unnecessary multiplicity of execution proceedings to obviate in a case where there are many decree holder each competent to execute his decree by attachment and sale of a particular property the necessity of each and every one *separately* attaching and *separately* selling that property The other object is to secure an equitable administration of the property by placing all the decree holders in the position I have described upon the *same* footing and making the property *rateably* divisible among them instead of allowing one to exclude all the others merely because he happened to be first who had attached and sold the property *A* obtains a decree against *B* in Court *X* for Rs 4 000 and applies to that Court for execution of his decree by attachment and sale of certain property belonging to *B* and the property is thereupon attached *C* then obtains a decree also against *B* in Court Y for Rs 2 000 and applies to that Court for execution of his decree by attachment and sale of the same property attached in execution of A s decree The property is then sold by the Court in execution of *A* s decree for Rs 3 000 *C* is entitled to share rateably in the net sale proceeds that is to say if the net sale proceeds amount to Rs 3 000 *A* will be paid Rs 2 000 and *C* will be paid Rs 1 000 It is not necessary to entitle *C* to participate in the assets that he should have given *notice* to A of the application made by him for execution of his decree (*p*)

(*m*) See *H oon Arra* v *Jawadoon issa* (18 9) 4 C 1 29

(*n*) *Kommachi* v *Pakker* (1897) 0 Mad 10 111

(*o*) (1901) 3 All 106

(*p*) *Ch Lal* v *Jug l Kishore* (190) 7 All 13

Conditions for rateable distribution —To entitle a decree holder to participate in the assets of a judgment debtor the following conditions must be present —

1 The decree holder claiming to share in the rateable distribution should have *applied for execution* of his decree to the *Court by which the assets are held*
2 Such application should have been made *prior to the receipt of the assets* by the Court
3 The assets of which a rateable distribution is claimed must be *assets held by the Court*
4 The *attaching creditor as well as the decree holder claiming to participate* in the assets should be holders of *decrees for the payment of money*
5 Such decrees should have been obtained against the *same judgment debtor*

No rateable distribution can be claimed under the section unless all the conditions enumerated above are fulfilled We proceed to examine those conditions

Court to which application for execution should be made —Those decree holders alone are entitled to rateable distribution who have applied for execution of their decrees in the form prescribed by O 21 r 11 [Cod of 1882 s 235] *to the Court by which the assets are held* (q) An application to the Court which passed the decree to issue a precept of attachment to the Court by which the assets are held is not sufficient (r) Nor is an application to a Court in anticipation that the decree will be transferred to it for execution (s)

The point to be considered under this head is whether where property of the same judgment debtor is attached in execution of decrees of more Courts than one and the property is sold by the Court of the highest grade the holders of decrees of inferior Courts are bound in order that they may be entitled to rateable distribution to have their decrees transferred to the Court of the highest grade and make a fresh application for execution to that Court *A* obtains a decree against *B* in the Court of a Subordinate Judge of the First Class In execution of the decree *B*s property is attached by that Court *C* then obtains a decree against *B* in the Court of a Subordinate Judge of the Second Class and applies to that Court for execution of his decree by attachment and sale of the same property The property is then sold by the First Class Subordinate Judge in execution of *A*s decree and the sale proceeds are received by that Court Here the Court of the Subordinate Judge of the First Class is the Court by which the assets are held Is *C* entitled to rateable distribution? No according to the High Court of Bombay he not having applied to the Court of the Subordinate Judge of the First Class for execution of the decree that being the Court by which the *assets are held* (t) Yes according to the Calcutta (u) Rangoon (v) and Madras High Courts (w) the reason given being that under s 63 the Court of the Subordinate Judge of the First Class is the Court to determine all claims relating to the attached property and such claims *include* claims for rateable distribution

2 **Before the receipt of the assets** —The application for execution must be made *before the receipt* of the assets by the Court The corresponding s 295 of the Code of 1882 commenced as follows —

Whenever assets are *realized by sale or otherwise in execution of a decree* and more persons than one have *prior to the realization* applied to the Court by which such assets are held

(q) Kr h l ka v Ch l la ka (1 81) 5 B 19 01 ... I S I ... t e ... d (19 6) 5 Ma l 60 118 I C (9) A M (3
(r) Ka v ... (19 6) 90 I C 5 7 (6) A C 49
( ) Na j ... v N ll k pp (19 8) 55 M l J 1 109 I C 404 (8) A M 416
(t) Nim ... v ... la (1 9) 16 B m 683
( ) ... v Al x der (1 94) 1 C 1 29 ... Ham Ph ... am (1 2) 2 C W N 1 6 B ... v H k m (19) 79 C l J ... d a v Keda N th (19 1) 73 C W N 5 3 8 I C 3 ( ) A C 966
( ) Kw To K v L m Cha (19) 6 Ran 131 110 I C 11 ( ) A R 13
(w) N ... v Krishnam ... (1914) 26 M L J 406 23 I C 962

The present section begins as follows —

"Where assets are *held by a Court* and more persons than one have *before the receipt of such assets* made application to the Court"

The word "realization" was rather obscure Indeed it called for several decisions in which the Courts had to define its precise meaning The word "receipt" which is now substituted for "realization" is not likely to require any judicial interpretation Cases of the character noted below which turned upon the word "realization" are not likely to arise under the present section so clear is the meaning of the word "receipt"

A B and *C* held each a money decree against the same judgment debtor In December 1892 *A* attached by a prohibitory order funds of the judgment debtor in the hands of *D* [O 21 r 46 Code of 1882 s 268] In January 1893 *B* attached the same funds in execution of his decree In February 1893 *D* paid the funds into Court On the same day but *after* payment was made into Court *C* applied to attach the funds as property in the custody of the Court [O 21 r 52 Code of 1882 s 272] It was held under s 295 of the Code of 1882 that the funds should be rateably distributed between *A* and *B* and that *C* was not entitled to participate therein as his application was made *subsequent* to the *realization* of the assets by the Court (*x*) The decision would be the same under the present section for it is quite clear that *C*'s application was made *after the receipt* of the assets by the Court

It was held under s 295 of the Code of 1882 that where property is *sold* in execution of a decree the sale proceeds are deemed to be *realized* not when the 25 per cent is deposited by the purchaser into Court under s 306 [now O 21 r 84] but when the balance of the purchase money is paid (*y*) Hence a decree holder who applied for execution *before* the entire amount due from the purchaser had been paid into Court was held entitled to share in the rateable distribution though the application was made after deposit of the 25 per cent But it was held that a decree holder who applied for execution *after* the entire amount of the purchase money had been paid into Court was not entitled to share in the rateable distribution though his application was made before the sale was *confirmed* by the Court under s 312 [now O 21 r 92] and the decision was put on the ground that the point of time when assets are *realized* is when the sale proceeds are paid into Court and not when the sale becomes absolute (*z*) The result is the same under the present section as will be seen by substituting the word "received" for the word "realized" (*a*)

The High Court of Madras has held that where immovable property is sold in execution of a decree in separate parcels the sale proceeds are not deemed to be *realized* until the entire amount of the purchase money in respect of *all* the parcels is paid into Court (*b*) This decision was followed by the Calcutta High Court (*c*) but in a later case that Court held that where immovable property is sold in separate parcels the sale proceeds are deemed to be realized *on the several dates* on which they are received by the Court (*d*) As regards movables the Lahore Court has held that if the property consists exclusively of movables and they are sold in separate lots on different dates the sale proceeds are deemed to be realized *on the several dates* on which they are received by the Officer of the Court and not on the date on which the last payment is received Thus if some of the movables are sold and the price thereof is received on January 5 and the rest are sold and the price thereof is received on January 10 a decree holder who applies

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(*x*) S[illegible] asa v *Seetharamayyar* (1896) 19 Mad [illegible]

(*y*) *Hafez* v *D mod r* (1891) 18 C[illegible] 1 4

(*z*) [illegible] (188) 6 Bom 16

(*a*) [illegible] (1911) 1[illegible] Cal [illegible] 10 I C 5 7 [illegible] (19 4) [illegible] 5 5 87 I C 783 ( ) A C 966

(*b*) *Ramanathan* v *Subramanian* (1903) 6 Mad 1 9

(*c*) *Ba end a Nath* [illegible] *Co* (19 1) 33 Cal L J 7 1 6 I C 167

(*d*) [illegible] *Nath* v [illegible] (19 4) 29 C W N 57 8 I C 83 ( ) A C 966

for rateable distribution on January 7 is entitled to rateable distribution of the sale proceeds realized on January 10 but not of those realized on January ɔ (e)

Where property is sold in execution by a person appointed by the Court under O 21 r 6 the receipt of purchase money by such person is for the purposes of this section equivalent to receipt of assets by the Court The material date therefore is not the date on which the Court receives the amount of the purchase money from such person but the date on which such person receives the purchase money from the purcha er (f)

When property which is attached in execution of decrees of several Courts is sold by a Court of inferior grade and the sale proceeds are transferred to the Court of highest grade for rateable distribution the date of receipt of assets is the date when the sale proceeds are received by the latter Court (g)

Sale by Collector —Where the sale is held by the Collector the application for execution must be made before the sale proceeds are *received* by him though he may send the sale proceeds to the Court under Sch III cl 9 at a later date (h)

3 **Assets held by a Court** —Far more important than the change effected by the word receipt is the change introduced by the omission of the words when ever as ets are realized *by ale or otherwise* in execution of a decree and the substitu tion therefor of the words where assets are *held* by a Court The latter words coupled with the word realization which occurs later on in the section include it is submitted several kinds of assets which were held not liable to rateable distribution under s 2ɔɔ of the Code of 1882

Assets available for rateable distribution —The only kinds of assets that were held to be available for rateable distribution under s 29ɔ were —

(a) as ets realized by sale in execution of a decree that is sale proceeds of property sold in execution of a decree (i) and

(b) assets realized otherwise in execution of a decree These words were held to mean assets realized from the property of the judgment debtor by such modes as tho e prescribed by s 291 [O 21 r 69] s 30ɔ [O 21 r 83] and s 322 [Sch III paras 2 and 7] (j) This was explained in later decisions as meaning assets realized in one of the modes *expressly* pre scribed by the sections of the Code (k) The following were held to be assets of this class —

(i) debts attached under s 268 [now O 21 r 46] and paid into Court by the garni hee (l)

(ii) rents of property under attachment realized by a receiver appointed under s 503 [now s ɔl cl (d)] at the instance of the decree holder (m) [The appointment of a receiver by the Court in such a ca e is a process of execution]

(iii) money in the custody of a pul lic officer attached under s 27_ [now O 21 r 5] and paid into Court by that officer (n)

(e) Su j gh v I rag Das (1918) 1 R n 33 p 1 8 45 I C 108
(f) Galet v I erj (1917) 44 C 1 89 35 I C 8 0
(g) God rubai v D ekappa (19) 9 I 11 I 1 319 101 I C 411 ( ) A B 4
(h) D tt t ay I n ll k (19 0) Bon L 1 1001 5 I C ( )
( ) I ms y v reen th (1 31) 1 Cal 8 0
(j) I hd d s v v jth rth (1) 6 Bon 5 8 (pal D s v Ch (1 6) 8 All 6 I sb dhapr ya v I ruf (1 5) 8 M d 3 0
(k) See I r J b ( ) I (1) 13 Cal 9 I rononm m y ena th (1891) 1 Cal 80 81 I sudhapriya v I f (190) 3 Mad 380 1
(l) Nor bj Gorind (1) 16 Bom 91
(m) I nk v Pakad or k (1 2) 6 Cal
( ) M al v Na ka (1901) 25 1 m 1

(iv) money realized in execution of a decree held by the judgment debtor against another where such decree is attached and realized under O 21 r 53 [Code of 1882 s 273] (o)

(v) money paid under O 21 r 69 to the officer conducting the sale to stop the sale (p)

(vi) money raised by the judgment debtor by private alienation under O 21 r 83 and paid into Court (q)

(vii) the 25 per cent deposit paid by a defaulting execution purchaser which has not under O 21 r 86 been forfeited to Government (r)

Assets not available for rateable distribution—Assets not realized by sale or otherwise in execution of a decree were not liable to rateable distribution under s 295 The following are instances of assets held not to be realized by sale or otherwise in execution of a decree within the meaning of s 295 and therefore not subject to rateable distribution under that section —

Cases under s 295 of the Code of 1882

A —*Purshotamdass* v *Surajbharthi* (1882) 6 Bom 588—Moneys paid by a judgment debtor under arrest under s 236 of the old Code [now s 55 proviso 4] to the officer arresting him in order to secure his release were held to be assets not subject to rateable distribution Sir Charles Sargent C J said Section 295 must be read as if the words from the property of the judgment debtor were inserted after the word realized The provisions contained in sections 291 [O XXI r 83] 305 [O XXI r 69] and 322 [now Sch III paras 2 and " the latter para corresponding with s 323 of the old Code] are all modes of realizing assets from such property otherwise than by sale and are sufficient to account for the introduction of that expression into section 295 The effect of the above decision is that to constitute a realization with the meaning of s 295 it must be either a realization by a sale in execution under the process of the Court or it must be a realization *in one of the other modes expressly prescribed by the sections of the Code*

The correctness of the reasoning in *Purshotamdass* case seems to have been doubted in *Manilal* v *Nanabhai* (s) where Sir Lawrence Jenkins C J said *Prima facie* the word realized implies that property has been *converted into* or *obtained* in cash or some other form available for immediate distribution and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution But it was the leading case under the old section and it was followed in cases B C D and E below

B —*Gopal Dei* v *Chunni* (1886) 8 All 67 following case A—Money paid into Court by the judgment debtor under s 2 5 of the old Code [now O XXI r 55 (a)] for payment of the amount due to the decree holder at whose instance the property was attached was held to be an asset not available for rateable distribution the reason given being that the money was not realized from the property of the judgment-debtor

(o) *Ama a* v *Anna iala* (1904) 31 Mad 50"

(p) *I sholamda s* v *Su ajbharth* (18) 6 Bom 588 5 9

(q) *P rshot mdass* v *S rajbharth* (188) 6 Bom 588 589 *Th raiy m* v *Lakshma a* (1918) 41 Mad 616 47 I C 538

(r) *Sree Maha t Prya* v *Raja of Kalash ati* (19 6) 49 Mad 6 0 97 I C 86 ("6) A M 87

( ) (1903) 28 Bom 264 71

C.—*Sew Bux* v *Shib Chunder* (1886) 13 Cal 225 following case A—*A* obtained a decree for money against *B* *B*'s property was attached in execution of the decree *C* then obtained a decree for money against *B* and applied for attachment of *B*'s said property a warrant of attachment was issued but the property was not actually attached *B* then filed his petition in insolvency and a vesting order was made The Official Assignee then paid into Court the amount of *A*'s decree and the property was released from attachment *C* then applied for rateable distribution under s 295 of the amount paid into Court *Held* that C was not entitled to rateable distribution Trevelyan J said I do not think that in this case the money was realized out of the property of the judgment debtor I think that by sale or otherwise means by sale or other process of execution provided for in the Civil Procedure Code

D.—*Prosonnomoyi* v *Sreenauth* (1894) 21 Cal 809—In this case Sale J said that the rule deducible from cases A and C was that to constitute a realization within the meaning of section 295 it must be either a realization by a sale in execution under the process of the Court or it must be a realization in one of the other modes *expressly* prescribed by the sections of the Code

E.—*Vibudhapriya* v *Yusuf* (1905) 28 Mad 380 following cases A B C and D—Moneys realized by a judgment debtor by a private sale of his property attached in execution of a decree against him and paid by him into Court under s 275 of the old Code [now O XXI r 55 (a)] for payment of the amount due to the decree holder at whose instance the property was attached were held to be assets not available for rateable distribution the reason given being that though there was a realization of assets the realization was not in one of the modes *expressly* prescribed by the sections of the Code

Note—The only distinction between cases B and F is that in case F the judgment debtor obtained the money by sale of the attached property while in case B he obtained it without any sale

It is submitted that the assets in cases A B C and F should under the present section be treated as assets available for rateable distribution The test under the present section is—

(1) whether the moneys of which rateable distribution is claimed are assets held by the Court and

(2) whether they have been realized or obtained in execution The scope of the new section is wider than that of the old one (*t*) See below notes under case F

Cases under the present section

In the following cases which were all decided under the present section it was held that the moneys held by the Court were not assets available for rateable distribution within the meaning of the section —

F.—*Sorabji* v *Kala* (1911) 36 Bom 156 12 I C 911—Money paid into Court by a judgment debtor under O XXI r 55 (a) [Code of 1882 s 275] for payment of the amount due to the decree holder at whose instance the property was attached has been held not subject to rateable distribution under this section (This is the same as case B above) Sir Basil Scott C J said In the

(*t*) *Hirai Sala* v *Fazlul Rahman* (1913) 40 Cal 619 18 I C 839

reference to the costs of realization we have an indication that the legislature contemplated that the assets referred to should be assets held in the process of execution If we were to hold that money paid into Court under Order XXI Rule 55 was assets held by the Court within the meaning of section 73 we should be only nullifying the provisions of Rule 55 for there will be no inducement to any judgment debtor to procure a payment into Court of the amount claimed by his attaching creditor if his money could at once be absorbed by rateable distribution amongst a number of other creditors This assumes that the word realized means realized by sale or other process of execution expressly prescribed by the sections of the Code as was held in cases A C D and E It is submitted with respect that the words sale or otherwise which occurred in s 295 of the Code of 1882 having been omitted in the present section the interpretation put upon those words in cases A C D and E can no longer govern cases arising under the present Code All that is necessary under the present Code is that (1) there should be assets held by the Court and (2) that such assets should have been realized *or obtained* in execution proceedings [see the observations of Sir Lawrence Jenkins cited in case A above] It cannot possibly be said that moneys paid into Court by a judgment debtor under stress of execution under O 21 r 55 (a) are not assets *obtained* in execution proceedings It is indeed difficult to see how this view of the section nullifies the provisions of O 21 r 55 for money paid into Court under r 55 may be held to be assets subject to rateable distribution and yet full effect may be given to r 55 There is no reason why because a particular payment may operate to release the person [see case G] or property of a judgment debtor from attachment that payment should be applied for the benefit exclusively of the decree holder at whose instance the person or property of the judgment debtor was attached Moreover the object of O 21 r 55 is not to afford any inducement to a judgment debtor as supposed by the Court in *Sorabji* v *Kala* All that O 21 r 55 says is that the circumstances mentioned in cls (a) (b) and (c) of that rule shall have the effect indicated in the rule As to the argument based on the costs of realization it cannot possibly be said that no costs were incurred in obtaining the moneys from the judgment debtor The decision in *Sorabji* v *Kala* has been disapproved by the High Court of Madras (*u*) It has also been disapproved by Pratt J in a later Bombay case—*Nathmal* v *Maniram* (*v*) As to the first of the two grounds on which the decision in *Sorabji* v *Kala* was based namely that the money was not realized in process of execution Pratt J said that it followed the cases decided on the words sale or otherwise which were held to mean sale or other process of execution *expressly* provided for in the Code but that it was too restrictive a construction under the amended section (*w*) As to the second ground namely that to allow rateable distribution of money paid into Court under O 21 r 55 would be to nullify the provision of r 55 the learned Judge said I also venture to doubt the correctness of the second reason Order XXI rule 55 operates effectively where there is one decree holder If there are a number of decree holders there is no scope for the rule for the judgment debtor has no motive for paying off one judgment-creditor when the same property is liable to be re attached

(*u*) *Tha yam* v *Lak hm a* (1918) 41 Mad 616 618 47 I C 34 *P tapa* v *A I L Musson* (19 6) 49 M 1 34 9 I C 406 (6) A M 3)

(*v*) (1919) 1 1 m I P 97 9 8 9 3 I C 99

(*w*) *Se Har S h* v *F al r I h an* (1913) 40 Cal 61 6 19 I C 839

by the others To allow one decree holder to be paid off in full when the property is insufficient to discharge other judgment debts might possibly be undue preference and defeat the object of the section which is equal distribution of all the monies received in execution Again why should a judgment creditor whose attachment has been removed under Order XXI r 55 be in a better position than a judgment creditor who has taken the trouble of bringing the property to sale Lastly if the money paid under Order XXI rule 55 to remove an attachment is not available for rateable distribution then *a fortiori* money paid to stop a sale under Order XXI rule 69 would also not be so available But even under the old section it was as umed by Sir Charles Sargent in *Purshottamdas case* [case A p 234] that money paid to stop a sale is available for rateable distribution So that the interpretation put upon the section in *Sorabji v Kala* makes the new section more restrictive than the old one and this is not what the Legislature intended The decision in *Sorabji v Kala* has also been dissented from by the Calcutta High Court in *Noor Mahomed v Bilasiram* (x) In that case Rankin J said The money paid with whatever motive if paid to the Court is paid upon terms of the Code whatever they may be These terms as I read section 73 have been laid down so that distinctions in the form in which execution has been had in the precise extent to which execution has been allowed to run in the exact source or genesis of the fund in Court are now no part of the definition of assets that are subject to distribution rateably The object of the new Code in using larger language can only be to avoid anomaly To introduce a distinction on the strength of the *voluntariness* of the payment or the purpose of the debtor is I think to cut down the language and intention of the Code upon a principle which is inapplicable to the subject matter and which if applicable is very difficult to apply The same view has been taken in later decisions of the same Court (y) In a later Bombay case (z) Mirza J refused to follow the opinion of Scott C J in *Sorabji v Kala* on the ground that it was obiter

In the Madras case above referred to (a) it was held that moneys paid into Court under O 21 r 83 (2) were assets liable to be distributed rateably within the meaning of this section In the course of the judgment however the learned judges went to the length of observing that the assets referred to in the present section need not be assets obtained in execution proceedings This indeed is an extreme view and it was dissented from by Pratt J the learned judge holding that the reference to the costs of realization and the position of the section in the Code at the end of Part II on Execution led irresistibly to the conclusion that the assets to be available for rateable distribution must have been obtained *in execution* (b) The view taken by Pratt J is it is submitted correct In a recent Calcutta case Rankin J took much the same view as Pratt J (c) The learned Judge said If for example a defendant is made to pay into Court the amount of the plaintiff's claim as a condition of getting an adjournment it does not follow from my reading

(x) (1920) 47 Cal 515 59 I C 458
(y) *Ch ... v Tod ... ll* (1921) 6 C W N 169 1 3 ... 0 I C 539 ( ) A C 19 *Han ... v B ... da* (19) 35 Cal L J 3 7 ... 0 I C 541 (1) A C 749 [m ... nev vol ntarily ... t Court are a set]
(z) *I ... d ... v ... ceej* (1926) 28 Bom L R 23 93 I C 8 (6) A I ... 4
(a) *Thiagarajam v Lakshmana* (1918) 41 Mad 616 61 ... 4 I C 538
(b) *Sa ... hmal v M ... ram* (1919) 21 Bom L R 9 5 9 ... 979 53 I C 599
(c) *Noor Mahomed v Bilasiram* (1920) 47 Cal 515 520 59 I C 458 See also ... *kerna v Haree Mahomed* (1915) 38 Mad 221 224 29 I C 39

of section 73 that other creditors could claim to share Nor could they under O 21 r 52 where funds in Court are themselves the subject matter of the execution

G —*Hoji Umersey* v *W & A Graham & Co* (1917) 19 Bom L R 274 39 I C 693—Money paid by a judgment debtor under arrest under section 55 proviso 4 to the officer arresting him in order to secure his release is not an asset subject to rateable distribution [This case is the same as case A] Macleod J said It appears that the section was only intended to apply to assets *realised by the sale* of property attached This view of the section it is submitted is not correct If this view were correct money paid to stop a sale under O 21 r 69 and money raised by private alienation under O 21 r 83 would not be assets subject to rateable distribution But even under the old section it was assumed by Sir Charles Sargent in case A that such monies were available for rateable distribution It cannot possibly be said that the present section is more restricted in its scope than the old section See also the observations of Rankin J in *Noor Mahomed's case* cited in case F above

H —*Nathmal* v *Maniram* (1919) 21 Bom L R 975 53 I C 599—A obtained a decree for money against B and in execution of the decree took out a warrant for attachment of the movable property of B under O 21 r 43 The bailiff entered B's shop and showed the warrant to B and pointed out that if the money were not paid he would seize and keep in his custody the movable property in his shop B then paid the decretal amount and costs of execution and sheriff's poundage Upon these facts Pratt J expressed the opinion that the money having been paid under stress of the warrant (*d*) and the warrant being a process of execution the money was an asset available for rateable distribution within the meaning of the present section The learned Judge however felt bound by the decision of the Appellate Court in *Soralji* v *Kala* [case I] and held that the money was not subject to rateable distribution

I —*Ghisulal* v *Tolarmull* (1921) 26 C W N 169 70 I C 539—In a money suit by A against B B's property was attached before judgment and then released on C standing security for the amount of the claim The suit was ultimately decreed and A applied for execution whereupon C deposited the amount of the decree in Court On that very day just before the deposit was made D another decree holder applied for execution of his decree It was held that the moneys deposited by the surety were assets held by the Court within the meaning of this section and D was entitled to rateable distribution

J —*For other cases see*—

O 21 r 52 notes Priority

O 21 r 72 notes Amount due on the decree

O 21 r 83 notes Rateable distribution

O 21 r 89 notes 'For payment to the decree holder—rateable distribution

O 38 r 2 notes Deposit in Court

(*d*) See *Lucke* v *B th C llery Co* (1878) 3 ... W 1 46
1 x D 1 4 *Budhoo* v *I eshub* (1864) 9 ...

Compensation under Land Acquisition Act 1894—Compensation deposited by the Collector in Court under s 31 of the Land Acquisition Act 1894 has been held to be assets held by the Court (e)

4 **Decrees for the payment of money**—It is only holders of *decrees for the payment of money* that are entitled to a rateable distribution under this section What is a decree for the payment of money within the meaning of this section? We proceed to note the decisions —

(i) A decree for the payment of mesne profits is a decree for the payment of money within the meaning of this section notwithstanding that the amount of mesne profits has not yet been ascertained The holder of such a decree who has applied for attachment under O 21 r 42 [Code of 1882 s 2] is entitled to a rateable distribution with other decree holders under this section (f)

(ii) A decree upon a mortgage which enables the mortgagee to realize the amount of the mortgage debt from the mortgaged properties *and from the defendants personally* was held to be a decree for the payment of money within the meaning of the old section by the High Court of Calcutta in *Hart v Tara Prasanna Mukherji* (g) In that case the Court said Every decree by virtue of which money is payable is to that extent a decree for money within the meaning of the section even though other relief may be granted by the decree [*e g* sale of mortgaged property] and the holder of such a decree is entitled to claim rateable distribution with holders of decrees for money *simpliciter* (h) Following these observations the High Court of Madras held that where a decree upon a mortgage directs the mortgagor to pay the mortgage debt to the mortgagee within the period fixed by the Court and provides that in default the mortgaged property should be sold and *the balance if any should be recovered from the mortgagor* the decree was one for the payment of money within the meaning of the old section (i) In subsequent cases however which turned upon the meaning of the expression decree for the payment of money which occurred in s 230 of the Code of 1882 [now s 48] the High Court of Calcutta dissented from the Madras decision on the ground that the decree in that case was not similar to the decree in *Hart v Tara Prasanna Mukherji* the decree in the latter case containing a distinct order upon the mortgagor personally to pay the amount of the mortgage debt (j) The decree in those cases was similar to the decree in the Madras case and it was held that the decree was not a decree for the payment of money within the meaning of s 230 of the Code of 1882 The decision it seems would have been the same if the Court had been called upon to interpret the same expression in s 295 of the Code of 1882 and the observations in *Hart's* case set out above would have been regarded as mere *obiter dicta* The Allahabad decisions bearing on the expression decree for the payment of money in s 230 of the Code of 1882 are also to the same effect (k) There is little doubt that if these High Courts were called upon to decide whether a decree of the character

(e) *Salt S a v A F L Mission* (1926) 49 Mad 38 97 I C 496 (26) A M 307

(f) *I araq ra v I a ad* (1882) 5 M d 1 3

(g) (188) 11 Cal 718

(h) *Ib* pp 7 9 730

(i) *Romn a I I ather v Pakker* (1897) 0 Mad 107 followed in *Abdull Sahib v Oo n an Sah b* (1905) 8 Mad 2 4 [case under s 230 of the Code of 188 which contained the expres ion decree for the payment of m ey now s 48] and approved in *I c th adas my Ayyar v Son s d am I ill i* (1905) 28 Mad 4 3 (case under s 2 8 of the Code of 188 now O 1 r]

(j) *Fa l v Krish a* (1898) 5 Cal 580 *Kar t k v Juggern th* (1900) C 1 85

(k) *I Char n v Sh oba at* (1 94) 16 All 418 *I ahatran v a ain* (1900) All 401

in the Madras case was a decree for the payment of money within the meaning of this section they would hold that it was not In any event the Madras decision cannot be sustained under this Code see O 21 r 20

(iii) A decree directing the payment under s 90 of the Transfer of Property Act [now O 34 r 6] of the balance of the mortgage debt remaining due after payment to the mortgagee of the nett proceeds of the sale of the mortgaged property is a decree for the payment of money within the meaning of this section (l)

(iv) A decree directing the payment of money by a person does not cease to be a decree for the payment of money so far as that person is concerned merely because it directs as against another person the realization of the money claim from mortgaged property Thus a decree against A B and C which so far as A and B are concerned is a decree for the enforcement of a mortgage by sale of their property but which does not direct the sale of any specific property belonging to C is as regards C a decree for the payment of money (m)

(v) A judgment entered up under s 86 of the Insolvent Debtors Act is a money decree (n)

5 Same judgment debtor —The provisions of this section do not apply unless the judgment debtor is the same Where the holder of a decree against *two or more persons* applies for a rateable distribution of the assets realized from property belonging *to one of such persons* the application is one for the execution of the decree against the *same judgment debtor*

Illustration

X obtains a decree against A and attaches A s property in execution of the decree Y who holds a decree against A and B applies for execution of his decree by attachment and sale of A property attached in execution of X s decree Y is entitled under this section to share in the proceeds of the sale of A s property it is immaterial that Y decree is against B also and that the decree might have been separately executed against B *Shumthoo Nath* v *Luckynath* (1883) 9 Cal 920 *Grant* v *Subramanian* (1899) 22 Mad 241 *Delhi and London Bank* v *Uncovenanted Service Bank* (1888) 10 All 35

Similarly where the holder of a decree against one person applies for a rateable distribution of the assets of that person realized from property belonging to that person and another such application is an application for the execution of a decree against the *same judgment debtor*

Illustrations

X obtains a decree against A B and C and attaches in execution of the decree certain property belonging to A B and C jointly Y holds a decree against A alone Y is entitled under the provisions of this section to a proportionate distribution of the assets realized by the sale of the joint property so far as they represent the share of A in that property Similarly if Y held a decree against A and B he would be entitled to a rateable distribution of the assets so far as they represented the share of A and B in the property *Ganesh* v *Shiva* (1903) 30 Cal 583 *Calli Lal* v *Bir Bahadur* (1905) 27 All 198 *Ramanathan* v *Subramania* (1903) 26 Mad 179 *Chhotalal* v *Nathibhai* (1905) 29 Bom 5— These were decisions under s 295 of the Code of 1882 They have been followed under the present Code in *Husein Saheb* v *Ibaji* (19) 28 Bom I I

(l) *Mallikarjuna* v *Lingamurti* (1902) ... Mad 14 ... 86 87
(m) *Delhi and London Bank* v *Uncovenanted* Service Bank (1888) 10 All 35
(n) ... *re Bhagwanda* (1884) 8 Bom 11

78 93 I C ..2 (26) A B 1o0 and *C P M A Chettyar* v *A R S I Chettyar* (1927) 5 Pang 757 107 I C 169 (28) A R 96 In *Balmer Lawrie & Co* v *Jadunath* (1925) 42 Cal 1 27 I C 644 it was doubted whether the earlier decisions were affected by the introduction in the present section of the word passed which did not occur in the Code of 1882 *Balmer Laurie & Co* v *Jadunath* (1915) 42 Cal 1 27 I. C 644

Decree against legal representative of judgment debtor—The High Courts of Bombay and Madras have held that if a decree is obtained by X against *B* and by *Y* after *B*s death against *B*s legal repre entative the judgment debtor is not the same and the pre ent section does not apply (*o*) A different opinion has been expressed by the High Court of Calcutta (*p*)

Clauses (a) (b) and (c)—The first paragraph of this section and clauses (a) and (b) have reference to sales in execution of simple money decrees Clause (a) declares the incompetence of a mortgagee or incumbrancer as such to share in any surplus proceeds when property is old subject to his mortgage or charge But the alternative is afforded to him by clau e (b) of consenting to the property being sold free of his mortgage or charge in which case the Court may give him the same right against the sale proceeds as he had against the property Clause (c) has reference to a sale in execution enforcing an incumbrance but in di tributing the sale proceeds the discharge of subsequent (and not prior) in umbrances is alone taken into account (*q*) but no payment can be made to a subsequent incumbrancer if the mortgagor challenges its exi tence or validity (*r*) In cases coming under clause (c) the application for execution must be made prior to the *sale* of the property (*s*) Compare O 34 r 13

Claims for rateable distribution of assets—These claims are claims enforceable under an attachment within the meaning of s 64 See notes to s 64 Explanation to the section

Attachment before judgment—A decree holder who has caused property to be attached before judgment is not entitled to share in a rat able distribution of the sale *proceeds of that property unless he makes after judgment a fresh applica* tion for execution under O 21 r 11 [Code of 1882 s 235] O 38 r 11 [Code of 1882 s 490] does not touch the point (*t*)

Sub sec (2) Suit for refund—The scheme of this section is to enable the Court as a matter of administration to distribute the assets according to what seem at the time to be the rights of parties without this distribution importing a conclusive adju dication as to tho e rights which may be subsequently re adjusted in a suit brought under the penultimate paragraph of the section (*u*) Such a suit is virtually a suit for money had and received and the period of *limitation is three years from the date of* the receipt of the a sets by the defendant (*v*) The suit being one for money *had and received* it would be premature if it were brought before the moneys were *actually paid* to the defendant *A mere order* for the payment of money under the section is not sufficient to found the action (*w*)

Suit by sub equent mortgagee to recover balance of money reali ed by sale under a prior mortgage—X mortgages his property to *A* He then mortgages the same property

(*o*) *Govind* v *Moh raj* (1901) Bom 494 *S nu sa* v *I antlimatl* (1910) 33 M d 465 5 I C 917
(*p*) *H t v Tara I ra anna Mukhe j* (188) 11 C I 718 8
(*q*) *J oat v D dhry* (1883) 5 All 566 See lso *M tt Kishan* (1890) I All 546
(*r*) *L chm v M tthu* (19) 43 All 636 101 I C 0 (7) A A 46
(*s*) *Datt t j P dl k* (19 0) Bom L R 1001 1003 58 I C 99
(*t*) *P ll j v Jord n* (1888) 1 Bom 400 *Ar I ll m v H ji She k Mee a* (1910) 34 Mad I C 8 0
(*u*) *Sh nk Sa p v M j M l* (1901) 23 All 313 3 .4 I 4 03
(*v*) 3 All 313 *s j I m v r v Brij B Le Jal* (191) 39 All 3 333 9 I C 53 *B iz ih v I al s* (1916) 39 M d 6 26 I C 19 See Limitation Act rt 6.
(*w*) *H ri v T I sa a Mukherji* (188) 11 Cal 18

to *B* Subsequently he executes a further charge on the property in favour of *A* *A* sues *X* on the first mortgage joining *B* as a defendant and obtains a decree on the mortgage The property is sold in execution of the decree and a balance of Rs 12 000 which remains after satisfying *A* s decree is deposited in Court *A* then obtains a decree for sale on the further charge and in execution of the decree draws out the balance deposited in Court *B* is not joined as a party to this suit nor is any notice given to him that *A* was drawing out of Court the balance of Rs 12 000 *B* then sues *A* to recover the amount drawn out by *A* that is Rs 12 000 Such a suit is not one under sub sec (2) and the period of limitation applicable to the suit is 12 years under art 132 of the Limitation Act The suit is really one to enforce payment of money charged upon immovable property within the meaning of that article (*x*)

Declaratory suit—Is a decree holder claiming under this section entitled to file a suit for a declaration that another decree holder is not entitled to rateable distribution and for an injunction restraining him from receiving payment *before* distribution of the assets by the Court or is he bound to wait until actual distribution is made and then sue for a refund? In a Madras case (*y*) Sadasiva Ayyar J expressed the opinion that he is entitled to sue for a declaration

Inquiry as to the validity of decree—There is a conflict of opinion whether on a claimant s objection that a decree obtained by another claimant is collusive that is obtained by the latter in collusion with the judgment debtor the Court has power to inquire into the validity of the decree The High Court of Calcutta (*z*) has held that it has On the other hand the High Courts of Madras (*a*) and Bombay (*b*) have held that it has not The latter view it is submitted is correct If a Court executing a decree has no power to go behind the decree [see notes to s 38] much less has a Court acting under the provisions of this section (*c*)

Rights of Government not affected—A judgment debt due to the Crown is entitled to precedence in exe ution (*d*)

Attorneys lien—The section does not apply to a solicitor s common law lien for osts That lien is not affected by the attachment of the decree (*e*)

Rights created by this section not affected by insolvency—An order made under this section for rateable distribution is not affected by the insolvency of the judgment debtor *subsequent* to the making of the order But the order will be confined in it operation to the assets of the judgment-debtor realized *up to the date of the order of adjudication* assets realized *after* the date of the order of adjudication will vest in the Official Assignee (*f*)

Appeal—An order made under this section is not appealable unless all the conditions *enumerated in s 47* are present (*g*) One of those conditions is that the question decided by the Court should be one which arose between the parties to the suit that is between the judgment debtor on the one hand and the decree holder on the

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(*x*) *Barhamdeo* v *Tara Cha d* (1914) 41 Cal 654 41 I A 45 21 I C 961

(*y*) *Ve katarama* v *The S uth I dian Bank Limited* (19 0) 43 Mad 331 39 55 I C 45

(*z*) *In e S nda Dass* (1885) 11 Cal 4 *P anchand* v *Su endra* (191) 16 Cal L J 59 16 I C 795 *I eary Lal* v *I eary Lal* (1913) 19 C W N 903 I C 407 *In Math a Nath* v *Umesh Cha d a* (1897) 1 Cal W N 633 Maclean C J doubted the correctness of *In re Su da Dass*

(*a*) *S ara a* v *Aru achalam* (1917) 40 Mad 841 38 I C 117

(*b*) *Dat atraya* v *Purshot m* (1922) 46 Bom 63 6 I C 600 ( ) A B 31 [F B]

(*c*) See *Shankar S rup* v *Mejo Lal* (1901) 9 I A 203 23 All 313 followed in *B bi L ma* v *R ool n* (19 6) 5 Pat 445 93 I C 7 9 (6) A P 497

(*d*) *Secretary of State* v *B mbay La d g C y* (1868) 5 B H C 3

(*e*) *Tyabji* v *Jetha* (19 7) 51 Bom 855 105 I C 353 (27) A B 517

(*f*) *Howatson* v *Durrant* (1900) 27 Cal 351 *Official Recei er of Ta jore* v *Venkatarama* (1922) 4 Mad L J 361 63 I C 512 ('2) A M 31

(*g*) *Musammat* v *Musammat* (19 0) 5 Pat L J 415 57 I C 4 1 ( ) A 1 401

other (h) Hence an order made under this section determining a question between *two rival decree holders* in which the judgment debtor had no interest does not fall within s 47 and no second appeal lies from such order (i) But if the question determined by the order arose not only between rival decree holders but also between the judgment debtor on the one hand and the decree holders on the other the order would *be within s 47 and would therefore be appealable* (j)

Revision —As to revision see the undermentioned cases (k)

RESISTANCE TO EXECUTION

74 [S 330] Where the Court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree holder or purchaser, order the judgment debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree holder or purchaser be put into possession of the property

Resistance to execution

See O 21 rr 97 103

(h) *Jagadish* v *Kripa Nath* (1909) 36 Cal 130 1 I C 783 *Dwarkadas* v *Jadab* (19 4) 51 Cal 61 at p 67 (per Walmsley J) at pp 7 1 773 (per Mukerji J) 8 I C 31 (-4) A C 801

(i) *Balmer Lawrie & Co* v *Jadu nath* (1914) 4- Cal 1 7 I C 644 *Varada* v *Venkataratnam* (19) 4? M d L J 4 3 67 I C 546 ( ) A M 99

(j) *Sorabji* v *Kala* (191) 36 Bom 156 1- I C 911 *Rajah of Kirvetnagar* v *Venkata Reddi* (1916) 39 Mad 570 -9 I C 31

(k) (19 4) 51 Cal 761 8 I C 731 (-4) A C 801 [allowed] *Hari* v *Birendra* (19-) 35 Cal L J 3 7 70 I C 541 (-1) A C 749 [refused] *Krpaja* v *Vatta* (19-) 48 Mad L J 459 87 I C 390 (-5) A M 587 [allowed] *Musammat* v *Musammat* (19 0) 1 Pat L J 415 5 I C 4 1 (1) A P 401 [refused] *S A S Chettyar* v *S A I A Firm* (19 8) 6 Rang 58 (28) A R 163 [allowed]

PART IV

Suits in Particular Cases

Suits by or against the Government or Public Officers in their official capacity

79 [S 416] (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council

Suits by or against Government

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate General in exercise of the power declared by section 111 of the East India Company Act, 1813

Sub sec (2) is new

As to procedure in suits by or against Government see O 27

Scope of the section —This section does not enlarge or in any way affect the extent of the claims or liabilities enforceable by or against the Secretary of State for India in Council which must always depend on the provisions of the Government of India Act 18οS s 6ο [now Government of India Act 1915 s 32] It gives no cause of action but only declares the mode of procedure when a cause of action has arisen (a) That section enacts that the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate and all persons and bodies politic shall and may have and take the same suits remedies and proceedings legal and equitable against the Secretary of State in Council of India as they could have done against the said Company that is the East India Company (b)

The Secretary of State is not a proper party to a suit by an owner of land under s 42 of the Specific Relief Act 1 of 1877 against a member of the public who claims to use such land as a public road and thereby endangers the title of the owner (c)

Act of State —The Secretary of State can only be sued in respect of those matters for which the East India Company could have been sued in matters for which private individuals or trading corporations could have been sued or in regard to those matters for which there is express statutory provision No suit would lie against the East India Company in respect of acts of State or acts of Sovereignty and therefore no suit in respect of such acts lies against the Secretary of State in Council (d)

(a) *Jehangir v Secretary of State* (1903) 27 Bom 189

(b) See *Doma Na v Secretary of State* (1886) 14 C L R 8 1 *Secretary of State v Moment* (1913) 40 I A 48 15 40 Cal 391 1 I C

(c) *Ch I I Ns I m Fuhen* (1888) 15 Cal 460

(d) *I & O S N C v Secretary of State* (1861) 5 Bom H C App 1 approved in 40 I A 48 51 *Jehangir v Secretary of State* (1903) 27 Bom 189 (damages for d f m tion] *Shivabhai v Secretary of State* (1904) 28 Bom 314 *Rose v Secretary of State* (1916) 39 Mad 81 31 I C *Mel ny v Secretary of State* (1911) 39 Cal 9 13 I C 3 0 *Secretary of State v Cockcraft* (1916) 39 Mad 351 I C 3 [damages for injury to person] See also *Dhakjee v The East India Co* (1843) 2 Morley s Digest 0 *Secretary of State v Hari* (1) 5 Mad 3 *v Secretary of State* (1 4) Mad 466

other (h) Hence an order made under this section determining a question between *two rival decree holders* in which the judgment debtor had no interest does not fall within s 47 and no second appeal lies from such order (i) But if the question determined by the order arose not only between rival decree holders but also between the judgment debtor on the one hand and the decree holders on the other the order would be within s 47 and would therefore be appealable (j)

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Resistance to execution

See O 21 rr 97 103

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(i) *Balmer Lawrie & Co* v *Jad nath* (1914) 4 Cal 1 7 I C 644 *Varada* v *Venkatanam* (19) 4 M d L J 4 3 67 I C 546 ( ) A M 99

(j) *Sorabj* v *Kala* (191) 36 Bom 156 12 I C 911 *Rajah of Ka vetnagar* v *Venkata Reddi* (1916) 39 Mad 570 9 I C 931

(k) (19 4) 51 Cal 761 78 I C 731 (4) A C 801 [allowed] *Hari* v *Birendra* (19) 3 Cal L J 3 7, 0 I C 641 (1) A C 749 [refused] *Karpaga* v *Vania* (19 5) 48 Mad L J 459 87 I C 390 (25) A M 587 [allowed] *Musammat* v *Mus mmat* (19 0) 5 I at L J 415 57 I C 4 1 (21) A P 401 [refused] *S A S Chettiyar* v *S A R A Firm* (1928) 6 Rang 8 (8) A R 163 [allowed]

PART III

Incidental Proceedings

COMMISSIONS

Power of Court to issue commissions

75 [*New*] Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

(a) to examine any person,

(b) to make a local investigation,

(c) to examine or adjust accounts, or

(d) to make a partition

The general powers of Courts in regard to commissions have been summarised in this section The detailed provisions are set forth in O 26

Commission to another Court

76 [S 385] (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides

(2) Every Court receiving a commission for the examination of any person under sub section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed shall be returned together with the evidence taken under it to the Court from which it was issued unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order

See O 26 r 4

Letter of request

77 [*New*] In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India

78 [S 391] The provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by—

Commission issued by foreign Courts

(a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of the Governor General in Council or

(b) Courts situate in any part of the British Empire other than British India, or

(c) Courts of any foreign country for the time being in alliance with His Majesty

PART IV

Suits in Particular Cases

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

Suits by or against Government

79 [S 416] (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate General in exercise of the power declared by section 111 of the East India Company Act, 1813

Sub sec (2) is new

As to procedure in suits by or against Government see O 27

Scope of the section—This section does not enlarge or in any way affect the extent of the claims or liabilities enforceable by or against the Secretary of State for India in Council which must always depend on the provisions of the Government of India Act 1858 s 65 [now Government of India Act 1915 s 32] It gives no cause of action but only declares the mode of procedure when a cause of action has arisen (*a*) That section enacts that the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate and all persons and bodies politic shall and may have and take the same suits remedies and proceedings legal and equitable against the Secretary of State in Council of India as they could have done against the said Company that is the East India Company (*b*)

The Secretary of State is not a proper party to a suit by an owner of land under s 42 of the Specific Relief Act 1 of 1877 against a member of the public who claims to use such land as a public road and thereby endangers the title of the owner (*c*)

Act of State—The Secretary of State can only be sued in respect of those matters for which the East India Company could have been sued i e matters for which private individuals or trading corporations could have been sued or in regard to those matters for which there is express statutory provision No suit would lie against the East India Company in respect of acts of State or acts of Sovereignty and therefore no suit in respect of such acts lies against the Secretary of State in Council (*d*)

(*a*) *Jehangir* v *Secretary of State* (1903) B m 189
(*b*) S D ya N v *Secretary of State* (1936) 14 C L 56 1 *Secretary of State* v M m t (1913) 40 I A 48 51 40 C L 391 18 I C [illegible]
(*c*) *Chun L ll* v *I m Kishen* (1888) 15 Cal. 460
(*d*) *I & O* N C v *Secretary of State* (1861) 5 B m H C App 1 approved in 40 I A 48 51 pra *Jehangir* v *Secretary of State* (1903) [illegible] Bom 189 [illegible] d f m ti n) *Shivabhajan* v *Secretary of State* (1904) 8 Bom 314 *J* v *Secretary of State* (1916) 39 Mad 41 31 I C 1 *Mel* v *Secretary of State* (1911) 38 Cal. 9 13 I C 3 0 *Secretary of State* v *Cockcraft* (1916) 39 M 1 351 I C 3 (damages for injury to person) see also *I A kye* v *The East India C* (1843) 2 M rly s Di est 30 *Secretary of State* v *Ha* ((18) 5 Mad 3 [illegible] v *Secretary of State* (1) 7 M 466

Jurisdiction —A suit against the Secretary of State for India can only be brought in the Court within the local limits of whose juri diction the cause of action arose The words dwell or reside or carry on bu iness or personally work for gain which occur in ss 16 19 and 20 of the Code and cl 12 of the Letters Patent do not apply to the Secretary of State in Council (e)

Information exhibited by Advocate General —The power of the Advocate General to exhibit information in the nature of actions at law or bill in equity was expressly declared by s 111 of the East India Company Act 1813 [53 Geo 3 c 155] and kept alive by s 2 of the Government of India Act 1833 [3 & 4 Will 4 c 85] and again by s 1 of the Government of India Act 1853 [16 & 17 Vict c 95] and by s 29 of the Government of India Act 1858 [21 & 22 Vict c 106] now merged in s 114 of the Government of India Act 1915 [5 and 6 Geo 5 c 61] As the Governor General in Council was pre luded by s 22 of the Indian Councils Act 1861 [24 & 25 Vict c 67] from legislative interference with the provisions of any of the enactments above quoted it was thought that s 416 of the Code of 1882 [now sub section (1) of the present section] in so far as it excluded information exhibited by the Advocate General did not compre hend a full and accurate statement of the law on the subject Accordingly sub section (2) was added to show that the power exists and is not affected by the section

Appeals —The rule laid down in this section applies also to appeals (*f*)

80 [S 424] No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council delivered to, or left at the office of a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action the name description and place of residence of the plaintiff and the relief which he claims and the plaint shall contain a state ment that such notice has been so delivered or left

Notice

Changes in the section —This section corresponds with s 424 of the Code of 1882 The words any act have been substituted for the words an act and the words by such public officer for the words by him See notes below Notice to Secretary of State

Provisions of this section imperative —The section is a matter of civil procedure and cannot be said to be subject to section 65 of the Government of India Act see note Scope of section under section 79 The section is explicit and mandatory and admits of no implications or exceptions (*g*) The language of this section is imperative and ab olutely debars a Court from entertaining a suit instituted without compliance with its provisions If the provisions of the section are not complied with the plaint must be rejected under O 7 r 11 (d) (*h*)

(e) *Dova Narain v Secretary of State* (188) 14 Cal 56 *Rodricks v Secretary of State* (1913) 40 Cal 308 15 I C 9 5

(f) *Collector H a Na d* (1928) 9 Lah 667 119 I C 477 (29) A L 10

(g) *Bhagchand v Secretary of State* (19) I A 333 51 Bom 104 I C 2 7 ( ) A PC 1 6

(h) *B h h v Secretary of State* (190) 25 All 187

Object of notice—The object of the notice required by this section is to give the Secretary of State or the public officer an opportunity to reconsider his legal position and to make amends or settle the claim if so advised without litigation (i)

Notice must be given after accrual of cause of action—A notice given before the cause of action has arisen is invalid (j)

Devolution of defendant's interest upon Government pending suit—No notice is necessary if the defendant's interest devolves upon Government during the suit e g a private railway company is taken over by Government for then the suit has already been instituted (k) But if the suit was instituted in a Court which has no jurisdiction to try a suit against Government and the devolution occurs after the plaint has been returned for presentation in the proper Court notice is necessary (l)

Sufficiency of notice—A notice under this section is sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed (m) Hence a notice is not invalid merely because it is given by only two out of three plaintiffs (n) It is essential however that the notice should state the names descriptions and places of residence of all the plaintiffs Hence where a suit was brought by sixty three plaintiffs but the notice contained the names descriptions and places of residence of only two of them it was held that the notice was insufficient (o)

Waiver of notice—It is competent to the Secretary of State to waive notice and he may be estopped by his conduct from pleading the want of notice at a late stage of the trial Thus where the Secretary of State took objection to the sufficiency of notice in his written statement but raised no issue on the point when issues were settled and took no objection during the trial the Court held that another defendant was not competent to raise the issue at a later stage as the Secretary of State had waived notice (p)

Notice to Secretary of State—Where a suit is to be instituted against the Secretary of State for India in Council notice to him under this section must be given *in all cases* whether the act in respect of which the suit is to be brought purports to be done by him *in his official capacity* or not The words in respect of any act purporting to be done by such public officer in his official capacity refer to the public officer and not to the Secretary of State The substitution of the words by such public officer for the words by him which occurred in the corresponding s 424 of the Code of 1882 makes the point quite clear

Notice to public officer—Act purporting to be done in official capacity—The present section corresponds with s 424 of the Code of 1882 except that the word any has been substituted for the word an and the words such public officer have been substituted for the word him According to the Concise Oxford Dictionary to purport in this context means to be intended to seem Applying this meaning the words any act purporting to be done by such public officer in his official capacity mean any act intended to seem to be done by him in his official capacity (q) If the act was one

(i) Secretary of State v Perumal (1901) 24 Mad 279 ... (1891) ... L 490 ... Secretary of State (190) ... Cal L J 148 ... Secretary of State v ... (1916) 40 Bom ... 36 34 I C 235

(j) ... v Secretary of State (19) ... Cal 969 10 I C 300 ( ) A ... 4

(k) G I P Rly v Mah ... (1906) ... All L J 6 ... I C ... (6) A ... 9

(l) ... v ... Rly (19 3) ... Bom 48 (3) A ... 1

(m) ... (1903) ... Bom 189

(n) Secretary of State v ... mal (1901) 24 Mad ... 9

(o) ... v Secretary of State (1913) 40 ... 603 18 I C 841

(p) ... Secretary of State (1907) 5 Cal L J 145 ... Nath v Secretary of State (191) 40 Cal 603 16 I C 849 ... Lal ... (19 3) ... All ... 81 I C ... ( ) A ... 41

(q) ... (1919) 41 Mad ... 60 46 I C 86 per Wallis C J

such as is ordinarily done by the officer in the course of his official duties and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting the act clearly purports to be done in his official capacity within the ordinary meaning of the term purport (r)

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The decisions are conflicting as to whether notice is necessary under this section when a public officer acts *mala fide* that is maliciously or dishonestly it being held in some cases that it is not (z) while in others that it is (a) necessary The former proceed on the ground that an act done *mala fide* by a public officer cannot be said to be an act purporting to be done by such public officer *in his official capacity* The latter proceed on the ground that the section makes no distinction between acts done *bona fide* and acts done *mala fide* and that notice is necessary in every case where a public officer purports to act *in his official capacity* Thus a suit against a police officer for having searched the house of the plaintiff dragged him to the thana and detained and kept him in confinement for several hours maliciously and without cause could be filed according to the former view without notice because the officer having *acted illegally and in bad faith* could not be said to have acted *in his capacity as a public officer* (b) Similarly in a suit against a District Magistrate and two officers of Police for conspiracy and malicious arrest and search it was held that the suit was one in which the public officer was sued in respect

(r) *Abdul* ... (1934) 46 All 834 80 I C (1934) A A 81

(s) *Secretary of State* ... (1914) 3 Mad 113 18 I C 94

(t) *Ganoda* ... (1909) 36 Cal ...

(u) *Datt* ... (19 8) Bom 63 ... A L 35 (F B)

(v) *Mumta* ... (1910) All ... 301 5 I C 46

(w) *Ananth* ... (1898) 11 Mad 31

(x) *Shaheb* ... (1891) Cal 499

(y) *Da* ... (19 3) ... 3 8 3 I C 40 (3) A B 33

(z) *Sh* ... (1881) ... 493 ... *Lal* (1901) 6 All 0 ... Banerji J ... (190) 8 C ... Mukerje ... *Mohun D* v *West* ... (1906) 16 Cal ... *Lord* (1884) 8 Bom 4 1

(a) ... (1918) 41 Mad 9 46 I C ... (F B) *The Collector* ... (1 ...0) 3 All 0 ... (190) 9 All 6 ... (191) 13 All ... 30 I ... (1911) 33 All 40 10 I C 1 ... (19 4) 46 All 84 80 I C ... (1910) 34 Bom 3 I C 6 ... (1911) 35 Bom 4 7 ... (19 3) 50 Cal 99 I C 1 3 (4) A C 145

(b) ... *Lal* (1904) 6 All 2...0

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(i) Secretary of State v Perumal (1901) ... M ... Shah bzad ... v Ferguson (1 ...) ... Cal ... Naraina v Secretary of State (190) ... Cal L J 148 Secretary of State v Gulam ... (1916) 40 Bom ... 36 34 I C 535

(j) K ... m ... Secretary of State (19 ...) ... Cal 9 ... 10 I C ... 60 (...) A C ...

(k) G I P Rly v Mahadeo (19 6) ... All L J 6 ... 96 I C 3 1 (... 6) ... 9

(l) H ... v ... (19 ...) Bom ... (...) A B ... 1

(m) ... Secretary of State (1903) ... I ... m ...

(n) Secretary of State ... (1901) ... Mad ...

(o) Bhola Nath v Secretary of State (1913) 40 Cal 503 16 I C 843

(p) M ... Secretary of State (190) 5 Cal L J 149 Bhola Nath v Secretary of State (191) 40 Cal 503 16 I C 843 ... Lal v ... (1925) ... All ... 93 84 I C ... (1925) A ... All ...

(q) ... v ... (1919) 41 Mad ... 9 80 46 I C 86 per W llis C J

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(r) *Abd* [illegible] (19 4) 40 All 654 60 I C [illegible]
(s) *Secretary of State* v *K lekh n* (1914) Mad 113 [illegible]
(t) *Ga od* [illegible] (1909) 30 [illegible] 14
(u) *Dattat* [illegible] *A nappa* (19 8) [illegible]
(v) *M* [illegible] (1910) All [illegible] 01 5 I C 46
(w) *Anant* [illegible] (1898) 11 M [illegible] 1
(x) [illegible] (1881) Cal [illegible]
(y) *D* [illegible] (11 3) [illegible]
(z) *Sh* [illegible] (1881) [illegible] *Lal* (1894) [illegible] (1890) [illegible] 1130 [illegible]

[illegible] (1900) 16 [illegible] (1884) 8 B [illegible]
(a) *Jor* [illegible] (1897) 4 Cal [illegible] (1918) [illegible] (1 80) 3 All [illegible] (1011) 33 All [illegible] (19 0) 46 All 881 80 I C [illegible] (1910) 34 B m [illegible] (1911) 35 B [illegible] (19 3) [illegible]
(b) [illegible] (1901) 6 All [illegible]

of an act *done in bad faith* and therefore no notice under this section was required (c) On the other hand in *Jogendranath Roy* v *Price* (d) where the plaintiff sued a District Magistrate for damages for illegal and malicious arrest under a warrant it was held that though the act was said to have been done maliciously notice was necessary under this section. The Court said The section does not seem to us to warrant the drawing of a distinction between acts of this kind done inadvertently or otherwise Following the above decision the High Court of Allahabad in a suit against a Police Officer to recover certain books seized by him in a search said that if he seized the books which was denied he did so in his capacity of Police Officer and that notice was necessary under this section (e) In a case decided by a Full Bench of the Madras High Court (f) *A* sued *B* and attached before judgment certain wood belonging to *B* Thereafter the village munsif sold the wood for arrears of revenue due from *B* though there was no necessity to sell the whole and after retaining the amount due for arrears of revenue handed over the balance of the sale proceeds to *B* although he had knowledge of the attachment. Thereupon *A* brought a suit against the village munsif for damages alleging that the munsif had colluded with *B* and paid the balance to him The Court found that the munsif was aware of the attachment and that he dishonestly and fraudulently paid over the balance of the sale proceeds to *B* On the question of notice under this section the Full Bench held that the munsif was entitled to notice under this section although he acted *mala fide* in the discharge of his duties The latest decisions of all the High Courts are in favour of the view that notice is necessary even if the act is done *mala fide* In this connection it is well to recall the dictum of Privy Council in *Bhagchand* v *Secretary of State* (g) that the section admits of no implications or exceptions

Suits on contracts and torts —The High Court of Bombay had held in a series of cases that the requirement of notice was limited to suits on tort and that no notice was necessary in suits founded on contract (h) This distinction for which there is no justification in the terms of the section has been swept away by the Privy Council judgment in *Bhagchand* v *Secretary of State* (i) which describes the section as imposing a statutory and unqualified obligation upon the Court and as applicable to all forms of action and all kinds of relief

Declaratory suits —The section applies to suits for a declaration (j)

Suits for injunction —There was a conflict of decisions as to whether the section applied to suits where the relief claimed was a perpetual injunction This is settled by the Privy Council judgment in *Bhagchand* v *Secretary of State* (k) approving Calcutta Madras and Allahabad decisions (l) that the section and the corresponding section 424 of the previous Codes should be strictly complied with and that they are applicable to all forms of action and all kinds of relief The Privy Council overruled Bombay decisions that no notice was necessary in a suit for an injunction against a public officer or even against the Secretary of State when the act to be restrained might occasion serious or

(c) P ry Mohan Das v West (1906) 16 C L W N 145
(d) (189) 4 C L 594
(e) Bhaktwar Mal v Abdul Latif (190?) 9 All 26
(f) Kot Reddi v Subbiah (1919) 41 Mad 9? 46 I C 86
(g) (19) 54 I A 339 1 Bom ?? 104 I C 57 ( ) A P C 1 6
(h) P ym I v H m ((1896) ?? B m 69 (ral (ray v The C to ment Committee of Poona (1910) 34 B m 553 7 I C 6 9 Bhika v Nana (1889) 13 Bom 343 S rda Nagji v Ga pat (1890) 14 B m 395
(i) (19 7) 54 I A 338 51 B m ?? 104 I C 57 ( ) A PC 1 6
(j) Chhag nl l v Collector of Kaira (1911) 35 Bom 4 7 I C 993 Bhagchand v S cre- ta y f Stat (19 7) 54 I A 338 51 Bom 104 I C 7 (7) A I C 176
(k) (19) 4 I A 338 51 Bom 104 I C ?? ( ) A I C 1 6
(l) Secr t y f St te Rafiuchi (1898) 5 Cal 3? Dak hin R j v Uma Chand (19 4) 0 Cal 9? 75 I C 1 3 (?1) A C 14 Secr ta y f St te v Kalekhan (1911) 3 Mad 113 16 I C 917 Koti Reddi v Subbiah (1919) 41 Mad 9? 46 I C 86 Bach hu v Secr ta y of State (190) 5 All 14 Abd l Rahim v Abdul R hma (19?4) 46 All 894 80 I C (?1) A A 8 1 Arunach lam v Ba ?? (19) ?0 Mad 39 99 I C ?41 (?7) A M 166 must be t k n to have been o er ruled by the Pri y Coun il in Bh gch nd s case

irreparable damage (*m*) In delivering the judgment of the Board Viscount Sumner said To argue as the appellants did that the plaintiffs had a right urgently calling for a remedy while s 80 is a mere procedure is fallacious for s 80 imposes a statutory and unqualified obligation upon the Court So too the contention that the act purporting to be done by the Collector in his official capacity in respect of which the suit was begun was his threatened enforcement of payment is fallacious also since the illegality if any is in the order for recovery of the tax If that was valid there was nothing to be restrained Hence though the act to be restrained is something apprehended in the future the act alone in respect of which the suit lie if at all is the *order already* completed and issued In a Bombay case it was left open whether if with notice of a suit the intended defendant proceeded to act in such a way as to anticipate a hostile order of the Court in the intended suit the Court could restore the status quo ante on an interlocutory application before the trial (*n*)

By what name public officer to be sued—The suits referred to in this section are suits against the public officer personally in respect of acts done in his official capacity The public officer cannot be sued by his official name unless he is a corporation sole (*o*)

Death of complainant after notice but before suit—*Notice is given by A* under this section to the Secretary of State of a proposed suit *A* dies before the institution of the suit The notice by *A* does not enure for the benefit of his legal representative and he must give a fresh notice under this section before instituting the suit (*p*)

Amendment of plaint—Where notice of a proposed suit is once given it is not necessary to give a fresh notice of two months if the plaint has to be amended owing to discovery of facts not within the plaintiff s knowledge at the time of the institution of the suit (*q*) But no amendment will be allowed if the effect of the amendment is to convert the suit into another of a different character *e g* a suit based on negligence into one based on nuisance In such a case a fresh suit must be brought after giving fresh notice as required by this section (*r*)

Notice to Collector—A collector is entitled to notice under this section of a suit for damages in respect of an act done by him in his official capacity as agent of the Court of Wards but he is not entitled to such notice if he is sued or joined as a party not by reason of any act purporting to be done by him in his official capacity but merely for the protection of a minor s title (*s*)

Notice to Cantonment Committee—A Cantonment Committee constituted under the Indian Cantonments Act 1889 is a public officer within the meaning of this section (*t*)

Notice to Official Assignee—The Official Assignee is a public officer and he is entitled to notice under this section before a suit is filed against him in respect of any act purporting to be done by him in his official capacity (*u*) The same rule applies to a Receiver appointed under the Provincial Insolvency Act 1920 (*v*) But no notice is necessary when the Official Assignee or Receiver is made a party to a suit to realize a charge on the property of the insolvent which has vested in him and no act or omission

(*m*) *Secretary of State v Gaj an* (1911) 3 Bom 36 10 I C 639 *Nag lal v Official Assignee* (191) 37 Bom 43 17 I C 8 6 *Secretary of State v G l m Ra ul* (1916) 40 Bom 33 34 I C 535

( ) *N r i n v Secretary of State* (19 7) 29 Bom L R 14 7 10 I C 7 6 ( ) A L 649

(*o*) *Sheriff of L b y v Hakmaji* (19) 51 Bom 749 104 I C 635 (7) A B 5 1 61 t L J 18 61 I C 989 (1) A P 3

(*p*) *B hchu Secretary of State* (190) Al 18

(*q*) *Erra v Secretary of State* (1903) 30 Cal 36

(*r*) *McInerny v Secretary of State* (1911) 38 C 1 37 13 I C 3 0

(*s*) *Anantharaman v I am ami* (1888) 11 Mad 317 *Bhau v Na a* (1889) 13 Bom 343

(*t*) *Cecil Gray v The Cantonment Committee of Poona* (1910) 34 Bom 583 7 I C. 6 9

(*u*) *Joosub v Kemp* (190) 6 Bom 809

(*v*) *De Silva v Govind* (1920) 44 Bom 89 I C 411 *Mu am Lal v Daud* (1921) 47 All 291 84 I C 39 ( ) A A

on the part of the Receiver is alleged (w) The Bombay High Court had held that no notice was necessary in a suit to restrain an Official Receiver from selling goods claimed by the plaintiff (x) but as stated above this case has been overruled by Privy Council (y)

Notice to Official Trustee—By s. 16 of the Official Trustees Act 2 of 1913 it is enacted that nothing in s 80 of the Code shall apply to any suit against the Official Trustee in which no relief is claimed against him personally

Notice to Administrator General—By s 41 of the Administrator General's Act 3 of 1913 it is enacted that nothing in s 80 of the Code shall apply to any suit against the Administrator General in which no relief is claimed against him personally

Notice to common manager appointed under sec 95 of the Bengal Tenancy Act 8 of 1885—Such a manager is a public officer within the meaning of this section and he is entitled to notice under this section (z)

Limitation—In computing the period of limitation prescribed for a suit under this section the period of the notice should be excluded (a)

Place of suing—See note to s 79 above Jurisdiction

81 [Ss 427, 428] In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

Exemption from arrest and personal appearance

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree and,

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service it shall exempt him from appearing in person

Otherwise than in execution of a decree—The object of clause (a) is to exempt a defendant who is a public officer from mesne arrest and his property from mesne attachment See O 38 r 5

82 [S 429] (1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied and if the decree is not satisfied within the time so specified the Court shall report the case for the orders of the Local Government

Execution of decree

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report

(w) [illegible] (1[illegible]) 45 All [illegible] 93 I C [illegible] A A 1 [illegible] AI C 1 6
(x) [illegible] (191[illegible]) Bom 13 17 I C [illegible] 6
(y) [illegible] Secretary of State (19[illegible]) 54 I A 3[illegible] 51 Bom [illegible] I C [illegible]7
(z) [illegible] D b Na[illegible] (1912) [illegible] C W N 13 53 I C 747
(a) [illegible] North [illegible] 35 Lal (1911) [illegible] 34 I C 6[illegible]

Suits by Aliens and by or against Foreign and Native Rulers

83 [S 430] (1) Alien enemies residing in British India with the permission of the Governor General in Council, and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty

When aliens may sue

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts

Explanation —Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country

Alien enemy — As to who are alien enemies see the undermentioned cases (*b*)

Alien enemy residing in British India with permission of Government of India — A filed a petition in the Allahabad High Court for judicial separation against her husband The parties were Germans and the petition was filed while England was at war with Germany At the time of filing the petition *A* was residing in Lucknow apparently with the permission of the Government of India while her husband was in Germany After filing the petition A applied for an order directing the summons together with a copy of the petition to be sent to the Probate Divorce and Admiralty Division of the High Court in England for transmission to the Foreign Office for service upon the respondent The Court granted the application (*c*)

Limitation —Where the right of alien enemies to sue is suspended by an order of the Government the period during which the right is suspended is not to be excluded from the time prescribed by the Limitation Act for the suit (*d*)

When foreign States may sue

84 [S 431] (1) A foreign State may sue in any Court of British India

Provided that such State has been recognised by His Majesty or by the Governor General in Council

Provided, also that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity

(*b*) *Ja* [illegible] *Dr fo* [illegible] *M* *Ltd* [190] [illegible] *D* [illegible] *P J Ltd* [illegible] *Ltd* [1916] A C 38 [illegible] *Abd* [illegible] (1920) 1 Lah [illegible]

(*c*) [illegible] (191) 39 All 37 [illegible]

(*d*) *De* [illegible] *Hira Lall* (1919) [illegible]

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor General in Council

Sub section (1) proviso (2)—The second proviso to the corresponding s 431 C P C 1882 ran as follows —

Provided that the object of the suit is to enforce the private rights of the head or of the *subjects* of the foreign State

The language of that proviso was liable to be construed as conferring upon the head of a foreign State a general power to litigate in respect of the private rights of his subjects. Such however was not the object and the language has accordingly been modified to make it clear that the object of litigation by a foreign State must be the enforcement of a private right vested in the head of the State or in an officer of the State as such.

Private right vested in the head of a State—That is those private rights of a State that must be enforced through a Court of Justice as distinguished from its *political* rights (e)

Foreign State as plaintiff—A suit by a foreign State must be brought in the name by which it has been recognized by His Majesty (f)

85 [S 432] (1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief

Persons specially appointed by Government to prosecute or defend on behalf of Princes or Chiefs

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto

(e) [illegible] 11 Cal [illegible]
(f) United States of America v. Wagner (186[illegible]) [illegible] Ch App

Recognized agents specially appointed under this section—This section is an enabling section. It enables a Sovereign Prince or Ruling Chief to prosecute or defend suits through recognised agents *specially* appointed in that behalf it does not prevent the institution of a suit by a Sovereign Prince in his own name or through a recognized agent appointed under O 3 r 2 [Code of 1882 s 37] (g)

A plaint in a suit instituted on behalf of a Ruling Chief is signed by *A B* At the time of signing the plaint *A B* was not *specially* appointed to sue on behalf of the Chief under this section. The plaint is nevertheless good if *A B* is subsequently appointed to sue on behalf of the Chief and if the appointment is made before the expiration of the period of limitation prescribed for the suit (h)

A Political Agent not specially appointed under this section cannot sue on behalf of a Prince (i)

Discovery—A foreign State is not exempt from giving discovery (j)

Suits against Princes Chiefs ambassadors and envoys

86 [S 433] (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued, but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy

(g) *Maharaja of Bhartpur* v *Kacheru* (1897) 19 All 510 *Beer Chunder* v *Ishan Chunder* (1884) 10 Cal. 136 See also *Rameshchand a* v *Maharaja Birend a* (1924) 29 C W N 87 80 I C 100, (5) A C 613

(h) *Maharaja of Rewah* v *Swami Saran* (1903) 25 All 635

(i) *Venkatrav* v *Madhavrav* (188) 11 Bom 53

(j) *United States of America* v *Wagner* (1867) 2 Ch App 590 *Republic of Peru* v *Waguel n* (1875) L R 20 Eq 140

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(4) The Governor General in Council may, by notification in the Gazette of India, authorize a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing sub sections to the Governor General in Council and a Secretary to the Government of India, respectively

(5) A person may, as a tenant of immovable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property

Consent shall not be given unless it appears to the Government that — The words it appears to the Government that have been added in sub section (2) to make it clear that the decision of the Government is final and not open to question by the Court The contrary was assumed in the undermentioned cases (*k*)

Consent must be obtained before institution of suit —This section provides that a Sovereign Prince or Ruling Chief may be sued in any competent Court with the consent of the Governor General in Council. Such consent must be obtained before the institution of the suit consent given after the institution of the suit is not a sufficient consent under this section. If the consent is not obtained before the institution of the suit the proper course is to dismiss the suit or perhaps allow the plaintiff to withdraw it with liberty to bring a fresh suit under O 23 r 1 [Code of 1882 s 373] (*l*)

Waiver of objection to want of consent —As stated in the notes to s 21 where a Court has *no jurisdiction at all* to entertain a suit the objection to its jurisdiction may be taken *at any stage of the suit* even though the defendant may have at one time waived the objection for a defect in the jurisdiction *cannot be cured by waiver* but if the case is one of *irregular exercise of jurisdiction* the defect *may be cured by waiver* on the part of the defendant If a suit is entertained against a Sovereign Prince without the consent of the Governor General in Council the case is one of *irregular exercise of jurisdiction* and if the defendant does not object until the suit is ripe for hearing he will be deemed to have *waived* the objection to jurisdiction. This was decided by the High Court of Bombay after an exhaustive review of the authorities on the subject (*m*) This view has been dissented from by the High Court of Madras on the ground that the recognition of cases of waiver as excepted from the ordinary provisions of International law as under stood in England, cannot be imported into the clear language of the Indian Code (*n*) The Patna High Court has gone to the length of holding that applications for adjournment made on behalf of a Ruling Chief amount to a waiver of his privilege and disentitle him from objecting to the jurisdiction of the Court (*o*)

The fact that a Sovereign Prince chooses to waive his privilege in one suit does not preclude him from pleading it in another suit (*p*)

(*k*) *Beer Chunder* v *Raj Coomar Nobodeep Chunder* (1883) 9 Cal 535 *Maharaja of Jaipur* v *Lalji Sahai* (1907) 29 All 3 9

(*l*) *Chandulal* v *Awad bin Umar* (189) 21 Bom 351 355 56 See also *Maharaja Sir Nripendra* v *Maharaja Manindra* (1912) 17 C W N 124 2 I C 839

(*m*) *Chandulal* v *Awad bin Umar* (189) 21 Bom 3 1 As to what amounts to a submission to jurisdiction see *Mighel* v *Sultan of Johore* [1893] 1 Q B 149

(*n*) *Narayana* v *The Cochin Sircar* (1916) 39 Mad 661 30 I C 511

(*o*) *Maharaj Bahadur* v *Sita Saran* (19 1) 6 Pat L J 185 61 I C 989 ('21) A P 3

(*p*) *Beer Chunder* v *Raj Coomar Nobodeep Chunder* (1883) 9 Cal 35

Suit against person who subsequently becomes a Ruling Chief—Where a person attains the rank of a Ruling Chief after the institution of a suit against him, the suit cannot be continued against him without the consent of the Governor General in Council (q)

Immovable property—Where a Ruling Chief and a private individual are co sharers in the profits of land within British India a suit by the latter against the Ruling Chief for his share of the profits under s. 165 of the Agra Tenancy Act [U P Act 2 of 1901] cannot be instituted in a Court of British India without the consent of the Governor General in Council (r)

Money charged on immovable property—Unless maintenance has been made a charge upon immovable property a mere claim for maintenance is not a claim for money charged on immovable property within the meaning of sub section (2) cl. (c) (s)

Suit against Ruling Chief in his private capacity—The provisions of this section apply whether the suit is brought against a Ruling Chief in his Sovereign capacity or in his private capacity e g as a trustee of a temple in British India (t)

Sovereign Prince—The Maharaja of Hill Tipperah is a Sovereign Prince within the meaning of this section in that the Tipperah State governs itself without dependence on any foreign power It makes and administers its own laws and the Maharaja admittedly exercises the power of life and limb within his own territory Its acknowledgment of the British Government as the paramount power and the nazar paid on the recognition by that Government of succeeding Maharajahs do not take away from it the status of a Sovereign State (u)

Ruling Chief—The Desai of Patadi is a Ruling Chief within the meaning of this section (v) The Kurundwad Jahageerdars are also Ruling Chiefs (w) The Maharaja of Benares is also a Ruling Chief (x)

Sub section (4)—For notifications issued under this sub section, see General Statutory Rules and Orders Vol I pp 625 638

Limitation—In computing the period of limitation the plaintiff is not entitled to deduct the time spent in obtaining a certificate under this section (y) Sec 13 of the Indian Limitation Act 1908 provides that in computing the period of limitation prescribed for a suit the time during which the defendant has been absent from British India shall be excluded The Calcutta High Court has held that the time must be excluded even if the defendant was carrying on business in British India through an authorised agent during his absence (z) The High Court of Bombay however has held that ec 13 of the Limitation Act mu t be read with secs 85 86 and 87 of the Code so far as a Sovereign Prince or a Ruling Chief is concerned and that such a Prince or Chief can be held to reside in British India within the meaning of sec 13 of the Limitation Act in so far as he actually carries on business through his representatives in British India (a)

(q) *Maharaj Bahad r v Si a Sa* (1921) 6 Pat L J 185 61 I C 989 (1) A P 3

(r) *K }a ya Lal v H H the M }araja of Benares* (19 4) 46 All 355 78 I C 655 (24) A A 4 2

(s) *Beer Chunder v Raj Coomar Nobodeep Chunder* (1883) 9 Cal. 535

(t) *Var ya a v The Cochin Sircar* (1913) 38 Mad 635 1 I C 930 affirmd (1916) 39 Mad 661 30 I C 511

(u) *Beer Ch nder v Raj Coomar Nobodeep Chunder* (1883) 9 Cal 53

(v) *Kambha v H mat S gj* (1884) 8 Bom 415

(w) *Krishnaj v Secretary of State* (1918) 1 Bom. L R 376 51 I C 8

(x) *Kanha ya Lal v H H the Maharaja of Bena s* (19 4) 46 All 3 5 356 8 I C 559 (4) A A 4

(y) *Shrimant S vaji Maharaj v Madhavrao* (19 9) 53 Bom 1 115 I C. 369 ('29) A.B 14

(z) *Poorno Chunder v Sassoon* (1898) 25 Cal. 496

(a) *Shrimant Savaji Maharaj v Madhavrao* (19 9) 53 Bom 1 115 I C 369 ('9) A B 14

87 [S 434] A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State

Style of Princes and Chiefs as parties to suit

Provided that in giving the consent referred to in the foregoing section the Governor-General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name

INTERPLEADER

88 [S 470, R S C, O 57, rr 1 2] Where two or more persons claim, adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself

Where interpleader suit may be instituted

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted

See O 35 below

Changes in the section —This section corresponds with s 470 of the Code of 1882 except in the following particulars —

(1) The words, the same debt sum of money or other property movable or immovable have been substituted for the words, the same payment or property

(2) The words who claims no interest therein other than for charges or costs have been borrowed from R.S C O 57 r 2 and have been substituted for the words whose only interest therein is that of a mere stakeholder

What is an interpleader suit.—An interpleader suit is one in which the real dispute is between the defendants only and the defendants *interplead* that is to say plead against each other instead of pleading against the plaintiff as in an ordinary suit. In every interpleader suit there must be some debt or sum of money or other property in dispute between the defendants only and the plaintiff must be a person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it

to such of the defendants as may be declared by the Court to be entitled to it. Thus suppose certain property is claimed by *A* as well as by *B* and *X* is in possession of that property and claims no interest in the property himself and is ready and willing to deliver it to such party as may be declared by the Court to be the rightful owner of it. *X* as plaintiff may institute an interpleader suit against *A* and *B* as defendants. In such a case *X* will as a rule be dismissed from the suit at the first hearing after his costs are provided for and *A* and *B* will be left to interplead and to fight the matter out between themselves as if one of them was plaintiff and the other was defendant (O 35 r 4) But before the plaintiff is dismissed from the suit he must deposit the property in dispute in Court (O 35 r 2)

Who claims no interest other than for charges or costs —These words indicate that the plaintiff in an interpleader suit must be in a real position of [illegible]. A railway company which claims no interest in goods in its possession other than a lien on the goods for wharfage demurrage and freight may institute an interpleader suit where the goods are claimed by two persons adversely to each other (*b*)

A holds in his hands a sum of Rs 5 000 which is claimed by *B* and *C* adversely to each other *A* institutes an interpleader suit against *B* and *C* It is found at the hearing that *A* had entered into an agreement with *B* before the institution of the suit that if *B* succeeded in the suit he should accept from *A* Rs 4 000 only in full satisfaction of his claim. Here *A* has by virtue of the agreement an interest in the subject-matter of the suit and he is not therefore entitled to institute an interpleader suit The suit must be dismissed (*c*)

A party who has taken an indemnity from one of the claimants is not entitled to [illegible] an interpleader suit (*d*)

A suit is not necessarily an interpleader suit and subject to the provisions of this section merely because *one* of the reliefs claimed by the plaintiff requires [illegible] to interplead together concerning certain claims The Court must look at [illegible] the prayers of the plaint to determine the exact nature of the suit (*e*)

(*b*) *Bombay and Baroda Rly Co* v *Sassoon* (1894) 18 Bom 31 *Allenborough* v *St Katharine s Docks* (1878) 3 C P D 450

(*c*) *Murrietta* v *South American Co* (1893) 6 L J Q B 396

(*d*) *Hari Karmakar* v [illegible] 46 [illegible] C 985 [illegible]

(*e*) *Juggannath* v *Tulka* [illegible] 59

PART V

Special Proceedings

Arbitration

89 [*New*] (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second Schedule

Arbitration

(2) The provisions of the second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code

Arbitration —The provisions of the Code of 1882 relating to arbitration have been transferred with certain modifications to a separate Schedule [Sch II] in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act

Indian Arbitration Act 9 of 1899—Application of the Act.—The Act came into force on the first day of July 1899 It relates to arbitration by agreement without the intervention of a Court of Justice that is to say to private arbitrations only Sec. 3 of the Act provides that sections 523 to 526 of the Code of 1882 [now paras 17 19 and 20 of Sch. II] shall not apply to any submission or arbitration to which the Act applies. The question then arises to what cases does the Act apply? Sec 2 of the Act provides that the Act shall apply only in cases where if the subject matter submitted to arbitration were the subject of a suit the suit could whether with leave or otherwise be instituted in a Presidency town The terms of that section show that two conditions must be present before the provisions of the Arbitration Act can be applied to an agreement to refer matters in dispute to arbitration namely (1) that there should not be a suit pending in respect of those matters (*f*) and (2) that the case must be one in respect of which if either party wanted to bring a suit the suit could be instituted in a Presidency town. It is only to such cases that the Arbitration Act applies. In other cases the provisions of paras 17 19 and 20 of Sch. II apply

Sec 2 of the Arbitration Act empowers the Local Government with the previous sanction of the Governor General in Council, to declare the Act applicable to local areas other than Presidency towns as if they were Presidency towns

Any other law for the time being in force —See notes to O 23 r 3 Submission and award.

(*f*) *Ramjidas* v *Howse* (1908) 35 Cal 199 200 *Perurı* v *Gullapud* (1910) 34 Bom 372 373 4 I C 133.

Suit on an award —As to the form of a suit on an award see Sch. I App A form No 10 See also notes to Sch. II para 20 This paragraph is no bar to a regular suit to enforce an award.

In this connection may be noted the provisions of s 30 of the Specific Relief Act of 1877 by which it is enacted that the provisions of Chapter II of the Act relating to the specific performance of contracts shall *mutatis mutandis* apply to awards See Pollock and Mulla s Indian Contract and Specific Relief Acts notes to s 30 of the latter Act

Special Case

90 [*New*] Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed

Power to state case for opinion of Court.

See O 36 below

Re opening of case —It is settled practice that where a special case is stated by consent it can only be re opened by mutual consent (*g*)

Suits relating to Public Matters

91 [*New*] (1) In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case

Public nuisances

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions

This section is new It creates a right of action where there was none before

Remedies for a public nuisance —Nuisances are of two kinds—(1) public and (2) private

A public nuisance is an act or illegal omission which causes any common injury danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury obstruction, danger or annoyance to persons who may have occasion to use any public right [Indian Penal Code s 268]

Where a person commits a public nuisance—

(a) he is liable to criminal prosecution under the Indian Penal Code

(b) he may be proceeded against under this section

(*g*) *Mo ie v Scott* (1919) 43 Bom 31 ?38 47 I C 64

(c) he is liable to damages in a suit at the instance of a private individual who suffers *special damage* by reason of the nuisance that is, damage *beyond* what is suffered by him in common with other persons affected by the nuisance (*h*).

These remedies it is conceived, are concurrent. The institution of a criminal prosecution does not bar a suit under this section (*i*) nor does the institution of a suit under this section bar a criminal prosecution, though cases may occur where the Advocate-General may in the exercise of his discretion, refuse his consent under this section where a criminal prosecution is pending in respect of the same act or omission.

Illustrations—*A* keeps his horses and waggons standing for an unreasonable time in the highway

(a) This is a public nuisance for which a criminal prosecution may be instituted against *A*

(b) Further a suit may be instituted against *A* under the present section by the Advocate General, or by two or more persons with the consent in writing of the Advocate General, though no special damage has been caused for an order requiring *A* to abate the nuisance and for an injunction restraining him from continuing the nuisance. If the nuisance is repeated or continued, notwithstanding the injunction, he is liable for contempt where the decree granting the injunction is passed by a High Court (*j*) or he may be proceeded against under O 21 r 32 below or he may be punished with imprisonment or fine or both under s. 291 of the Penal Code.

(c) If the horses and waggons are kept standing opposite a man s house so that the access of customers is obstructed, the house is darkened, and the people in it are annoyed by bad smells a suit may be brought against *A* by the occupiers for damages, the damage so caused being sufficiently *special* to entitle them to maintain the action (*k*) The mere fact that a suit has been instituted under this section against *A* by the Advocate General at the relation of the occupiers or by the occupiers themselves as plaintiffs with the consent of the Advocate-General will not preclude the occupiers from maintaining a *private action* against *A* for the *special* damage caused to them. *Quaere* whether they can claim damages for the special damage in a suit brought under this section? It is conceived they cannot. It is submitted that the words such other relief as may be appropriate do not include such damages. In England, however persons who have suffered special damage from a public nuisance may join the Attorney General as a co plaintiff in a suit brought by the Attorney General at their relation and the Attorney General may claim an injunction, and the persons specially damnified by the nuisance may claim damages (*l*) The present section does not warrant such a procedure in India The suit contemplated by this section is a suit of a public nature, exclusively brought to vindicate a *public* right. The section finds its place in the Part headed *Special* Proceedings under the division Suits relating to *public* matters and this affords a sufficient indication of the object of the section.

Nature of proceedings under this section.—Proceedings for a public nuisance in England were formerly commenced by an *Information* filed by the Attorney General

(*h*) *Hubert* v *Groves* (1794) 1 Esp 148 *Winterbottom* v *Lord Derby* (1867) L R 2 Ex 316 *Satku* v *Ibrahim* (1878) 2 Bom 457 *Bhawan Singh* v *Narottam Singh* (1909) 31 All 444 2 I C 36 *Muhammad Raza* v *Muhammad Askari* (1924) 46 All 470 85 I C 304 (24) A.A 599 *Manilal* v *Ishvarbhai* (1925) 27 Bom L R 421 87 I C 934 (25) A B 367 *Ardeshir* v *Aimai* (1929) 53 Bom. 187 117 I.C. 513 ('29) A B 94

(*i*) Compare *Attorney General* v *Proprietor of the Bradford Canal* (1866) L. R. Eq 71

(*j*) See *Kochappa* v *Sachi Devi* (1903) 26 Mad 494

(*k*) *Benjamin* v *Storr* (1874) L. R. 9 C P 400 *Poorobashi Pal* v *Bhoobun Chunder Dey* (1874) 21 W R. 408

(*l*) See for instance *Attorney General* v *Logan* [1891] 2 Q B 100

in the High Court of Chancery They are now instituted by action in the High Court of Justice [See R S C O 1 r 1] The action may be brought like the Information—

(1) by the Attorney General acting *ex officio* of

(2) by the Attorney General at the relation of a private individual

Under the present section a suit for a public nuisance may be instituted—

(1) by the Advocate General acting *ex officio* or

(2) by the Advocate General at the instance of relators or

(3) by two or more persons having obtained the consent in writing of the Advocate General.

Difference between suit by Advocate General acting ex officio and suit by him at the relation of private individuals —Except for the purposes of costs there is no difference between an *ex officio* suit and a suit at the relation of private individuals In both cases the Sovereign as *parens patriae* sues by the Advocate General (*m*) When the Attorney General proceeds at the relation of a private person or a corporation he takes the proceeding as representing the Crown and the Crown through the Attorney General is really a party to the litigation. It is quite true that when the proceeding is taken at the relation of a subject the practice is to insert his name in the proceedings as the relator and to make him responsible for the costs but I do not think that this practice in any sense makes the relator a party to the proceedings although he is responsible for the costs any more than (to take a converse case) an infant who brings an action is responsible for the costs of it If I am right it would seem that the practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant but of the Crown (*n*) When once the matter is in the hands of the Attorney General it becomes substantially a public proceeding in which the Attorney General if there be no relator becomes as prosecutor responsible for the costs while if a relator is introduced the responsibility for costs is upon the latter (*o*)

Relator s interest in the suit — A relator need not have a personal interest in the matter except as one of the public he need not in fact be himself damaged at all (*p*)

Interest of persons suing with consent of Advocate General —Persons suing for a public nuisance with the consent of the Advocate General under the section need not have any personal interest in the matter of the suit except as members of the public They are entitled to sue under this section though to use the words of the section no special damage has been caused [to them] In the other words they need not have a cause of action in themselves

Injunction —The following are some of the leading principles by which the Courts are guided in granting injunctions —

1 The injury complained of must be either irreparable or continuous (*q*) The remedy by way of injunction is therefore not appropriate for damage which is in its nature temporary and intermittent (*r*) or is accidental and occasional (*s*) or for an interference with legal rights which is trifling in amount and effect (*t*)

2 Apprehension of *future* mischief from something in itself lawful and capable of being done without creating a nuisance is no ground for an

(*m*) *Attorney General* v *Cockermouth Local Board* (1874) L R 18 Eq 17? per Jessel M R

(*n*) *Attorney General* v *Logan* (1891) 2 Q B 100 106 per Vaughan Williams J

(*o*) *Ib* p 103 per Wills J

(*p*) *Ib*

(*q*) *Attorney General* v *Cambridge Gas Consumers Co* (1869) L R 4 Ch 71 81

(*r*) *Attorney General* v *Sheffield Gas Consumers Co* (1853) 3 D M G 304 *Attorney-General* v *Cambridge Gas Consumers Co* (1869) L R 4 Ch 71

(*s*) *Cooke* v *Forbes* (186) L R 5 Eq 166

(*t*) *Gaunt* v *Fynney* (18) L R 8 Ch Cr *Lland and Urban District Council* v *Woods* [1899] 2 Ch 05

injunction (u) There must, *if no actual damage is proved* be proof of *imminent* danger and there must also be proof that the apprehended damage will if it comes be very substantial (v)

3 Though no substantial damage is proved, the Court may grant an injunction if the defendants claim the right to continue doing that which the Court has held they are not entitled to do (w)

4 Where an illegal act is committed which *in its nature tends to the injury of the public* an injunction will be granted to restrain the act without proof of actual injury to the public (x)

5 Where the plaintiff has proved his right to an injunction against a nuisance it is no part of the duty of the Court to enquire in what way the defendant can best remove it the plaintiff is entitled to an injunction at once and it is the duty of the defendant to find his own way out of the difficulty whatever inconvenience or expense it may put him to But where the difficulty of removing the nuisance is considerable the Court may suspend the operation of the injunction for a time (y)

6 No length of time can legalize a public nuisance Though twelve years user may bind the right of an individual yet the public have a right to demand the suppression of a nuisance apart from the length of time for which it may have continued (z)

7 A public nuisance is not excused on the ground that it causes some convenience or advantage [Indian Penal Code s 268]

Declaration'—A suit may be instituted under this section by two or more Mahomedans for a declaration that they are entitled to carry *tabuts* in procession along a public road for immersion in the sea against persons who obstruct them in doing so and for an injunction restraining interference in the exercise of this right (a)

Other relief —The *removal* of a public nuisance *e.g* encroachment on a public street may be directed by the Court under this part of the section (b)

Sub section (2)—The Code of Criminal Procedure contains provisions for the removal of a public nuisance by summary proceedings before a Magistrate (c) The High Court of Calcutta has held that where special damage is caused to a private individual by a public nuisance he has a right of suit against the person causing the nuisance for a *removal* of the nuisance and a Civil Court may pass a decree to that effect notwithstanding that an order for the like purpose might be made by a Magistrate (d) This right is saved by sub section (2)

Instances of public nuisance — Public or common nuisance affect the King s subjects at large or some considerable portion of them such as the inhabitants of a town and the person therein offending is liable to criminal prosecution. A private nuisance affects only one person out of a determinate number of persons and is the ground of

(u) *Attorney General v Corporation of Manchester* [1893] Ch 87 (a leading case on injunctions in *quia timet actio*)

(v) *Fletcher v Bealey* (1884) 28 Ch 688 at p 698

(w) *Attorney-General v Acton Local Board* (188) 2 Ch D 2 1

(x) *Attorney General v Shrewsbury Bridge Co* (188) 1 C D 752

(y) *Attorney General v Colney Lunatic Asylum* (1868) L R 4 Ch 146

(z) *Municipal Commissioner of the Suburbs of Calcutta v Mahomed Ali* (1871) 7 B L R 499; *Weld v Hornby* (1806) 7 East 195 199

(a) See *Sutku v Ibrahim* (1878) 2 Bom 457 *Kandasami v Subroya* (1909) 3 Mad 4 8 1 I C 716

(b) *Manilal v Ishvarbha* (19 5) 27 Bom L R 4 1 87 I C 934 ( ) A B 367

(c) As to conditional orders by Magistrates for the removal of nuisances see ss 133 to 143 of the Criminal Procedure Code As to the power of a Magistrate to issue orders in urgent cases where a speedy remedy is desirable see s 144 of the same Code

(d) *Raj Koomar Singh v Sahebzada* (18 8) 3 Cal 20 See also *Jina Ranchod v Jodha Ghella* (1863) 1 B H C., A C. 1 which appears to be imperfectly reported

civil proceedings only (e) Building over any part of a public street is a public nuisance for such act *must necessarily cause obstruction* to persons who may have occasion to use their public right over the part encroached upon. The public is entitled to the full width of the public street however wide it may be and whoever appropriates any part of the street by building over it infringes the right of the public *quoad* the part built over (f) An obstruction is not the less a nuisance because it is on a part of the street not commonly used or otherwise leaves room enough for the ordinary amount of traffic (g) On the other hand the High Court of Calcutta has held that as regards tidal navigable rivers a slight encroachment does not necessarily constitute a public nuisance. It seems to us rather the Court said that there must be some evidence that such encroachment *causes* one of the results specified in section 268 [of the Indian Penal Code] (h)

Acts which merely offend the sentiments of a class do not amount to a public nuisance In India it must often happen that acts are done by the followers of one creed which must be offensive to the sentiments of those who follow other creeds. Upon this principle it has been held that the placing of a Mahomedan symbol in the neighbourhood of a Hindu temple is not a public nuisance though likely to cause annoyance to Hindus (i) Similarly it is not a public nuisance to expose on the verandah of a house meat cut up for a dinner though it may annoy the feelings of Jains frequenting a temple close by the house (j) But wilfully slaughtering cattle in a public street so that the groans and blood of the animals could be heard and seen by the passers by is a public nuisance for it must necessarily cause annoyance to every one of the passers by Hindu European Mahomedan or other who was not utterly devoid not merely of refinement but also of all proper feelings (k)

92 [S 539] (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

Public charities

(a) removing any trustee,
(b) appointing a new trustee,
(c) vesting any property in a trustee,
(d) directing accounts and inquiries,

(e) Pollock on Torts 11th ed p 405
(f) *Queen Empress* v *V appa Chett* (1897) 0 Mad 433
(g) *Turner* v *R gwood Highway Board* (18 0) L. R 9 Eq 418
(h) *J gal D s* v *Queen Emp ess* (1893) 0 Cal 655 dissenting from *dicta* to the contrary in *U sh Chand a K r n the matter of* (1887) 14 Cal 656
(i) *M tt m a* v *Q een E pr* (1884) Mad 590
(j) *Q een Emp ess* v *B j m j* (1883) 1 Bom 43
(k) *Q een Empress* v *Zakhiuddin* (1888) 10 All 44

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust,

(f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged,

(g) settling a scheme, or

(h) granting such further or other relief as the nature of the case may require

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub section

Changes introduced by the section—This section corresponds with s 539 of the Code of 1882 except in the following particulars

1 The words "public purposes of a charitable or religious nature" have been substituted for the words "public charitable or religious purposes" to remove the misconception that "public" is merely co ordinate with "charitable" or "religious"

2 The words "whether contentious or not" have been added to give effect to a Calcutta decision See note below "Whether contentious or not"

3 The words "in the principal Civil Court of original jurisdiction" have been substituted for the words "in the High Court or the District Court"

4 The words "or any other Court empowered in that behalf by the Local Government" have been added in order to invest *Courts subordinate to District Courts* with power to try cases under this section

5 Clause (a) is new It is intended to supersede a Madras decision and to give effect to the Calcutta Bombay and Allahabad decisions cited in note below "Clause (a) removing any trustee"

6 Clause (d) is also new It gives legislative recognition to a Bombay decision cited in note below "Clause (d) directing accounts and inquiries"

7 Sub section (2) is new It is intended to give effect to the view of the section taken by the Bombay High Court that this section is mandatory and to supersede the decision to the contrary of the other High Courts See note below "Sub section (2) this section is mandatory"

Romilly s Act—The present section has been borrowed in part from 52 Geo 3 c. 101 called Romilly s Act As to the applicability of decisions under that statute to cases under the present section see the undermentioned case (*l*)

Object of the section— The real object of the special provisions of this section seems to us to be clear Persons interested in any trust were if they could *all* join, always competent to maintain a suit against any trustee for his removal for breach

(*l*) *P gasami Naickan* v *Varadappa Naickan* (1894) 17 Mad 46

of trust but where the joining of all of them was inconvenient or impracticable it was considered desirable that some of them might sue without joining the others provided they obtained the consent of the Advocate General or of the Collector of the District and this condition was imposed to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust (m)

Representative suit and res judicata—The suit contemplated by this section is a representative suit that is a suit which is prosecuted by individuals not for their own interests but as representatives of the general public (n) A decree in a suit under this section will therefore operate as res judicata under s 11 Explanation VI of the Code (o)

Jurisdiction—Where the trustees and the trust fund are within the jurisdiction of a Court but the charity is to be founded in a territory outside the jurisdiction the Court has jurisdiction to pass a decree declaring the trusts upon which the fund is to be held, but it cannot go further in the way of settling a scheme and it will leave it to the Court of the place in which the charity is to be carried out to settle the scheme (p) Nor can a Court apply the cy pres doctrine extra territorium (q)

Who may sue under this section—A suit under this section may be brought—

(1) by the Advocate General and outside the Presidency towns by the Collector or such officer as the Local Government may appoint in that behalf [see s. 93] or

(2) by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General

Interest in the trust—When a suit under this section is not instituted by the Advocate General it must be brought by at least two persons and such persons must have an interest in the trust S 539 of the Code of 1877 contained the words a direct interest Those words seem to have been taken from the judgment of Lord Eldon in *In re the Bedford Charity* (r) Those words also occurred in s 539 of the Code of 1882 That section was amended by s 44 of Act 7 of 1888 and the words an interest were substituted for the words a direct interest It must have appeared to the Legislature that the limitation of a direct interest was not expedient in India and hence the section must have been amended (s) The effect of the amendment has been to widen the class of p rsons who are entitled to institute a suit under this section (t) Thus p rsons entitled to worship in a temple have such an interest in the trust as to enable them to institute a suit under this section against the trustees of the temple (u) Similarly persons residing in a village whose business it was to conduct pilgrims to a shrine and perform the worship of the idol on their behalf were held to have a sufficient interest to entitle them to sue the shevaks or ministers of the idol under this section (v) Likewise worshippers at a mosque have an interest

(m) *S jedu Paja* v *Coi r Moh n Das* (189) 4 Cal 418 4 *Bud ee Das* v *Choo i I l* (1906) 33 Cal 89 804 *D Cru* v *D S lva* (1909) 3 Mad 131 13 1 I C 99

(n) *Ana d F o* v *I am las* (19 1) 48 I A 1? 16 48 Cal 493 49 498 6 I C 737 (21) A PC 1 3, *Gopu* v *Pajammal* (19?) 43 Mad L J 448 6) I C 15 ( ) 4 M 394

(o) *Abdur Lalim* v *Mahomed Barlat Ali* (19 8) 55 I A 96 55 Cal 519 108 I C 361 (8) A I C 16 *Dinsl a* v *Ja setji* (1903) 33 Bom 01 per Da ar J at pp 6 31 per Leaman J at pp 6 68 I C 01

(p) *Advocate G eral* v *Pu jaba* (1894) 18 Bom 551 61 See al o *Pamlal* v *K sl a i el d* (19 4) 51 I A 81 8 51 Cal 361 3 373 83 I C 531 (4) A PC 95

(q) *Ka ji* v *Advocate Ge eral* (1916) 18 Bom L R 60

( ) (1819) _ Swans 18

(s) *I a d i n tha* v *Swam natha* (19 4) 51 I A _8 38 47 Mad 884 891 8 I C 804 (4) A I C 1

(t) *Sh lajinanda* v *Umeshanunda* (1905) _ Cal L J 460 4 0

(u) *S jetur* v *Co r Moh in* (1897) 4 Cal 418; *J galk l e* v *Lakshmandas* (1899) 3 Bom 6) *Ch ntaman* v *Dhondo* (1888) 1 Bom 61 6 6 3 *Ram Churn* v *P otab* (190) Cal L J 448

(v) *Manohar* v *Lakhmiram* (1888) 12 Bom 47

within the meaning of this section in the trusts of the mosque (*w*) If the persons suing have an interest in the trust it is not necessary that they should have been personally affected by any act done by the person sued (*x*) But the interest must be an existing interest and not a mere contingency the mere possibility of succession to the managership of trust properties in respect of which the suit is brought is not sufficient to give a right to sue (*y*) It has been held by a Full Bench of the Madras High Court that the interest contemplated by this section must be a present and substantial interest and not sentim ntal or remote Thus public Hindu temples are prima facie taken to be dedicated for the use of all Hindus resorting to them But the bare possibility however remote that a Hindu of another place might desire to visit a temple does not give him an interest in the trust sufficient to entitle him to sue under this section Hence where a suit was brought under this section by a Hindu residing in Madras and another residing in Tellicherry in respect of a temple situated in Tellicherry and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry it was held that though he had a right as a Hindu to worship in the temple he had not such an interest in the trust as to entitle him to sue under this section (*z*) A different view has been taken by the Lahore High Court (*a*) It has been held by the Judicial Committee that *descendants of the founder* of a public Hindu chattiram although only in the female line are persons having an interest in the trust and consequently they are entitled to maintain a suit under this section even though they might never themselves make use of the chattiram (*b*)

Consent of Advocate General—The consent in writing required by this section must be a specific permission given to two or more persons *by name* a permission given to one applicant by name and another is not a sufficient compliance with the terms of this section (*c*) The High Court of Bombay has held that a suit under this section brought by only one plaintiff with the consent of the Advocate General is bad at its institution and the plaint cannot be amended by the addition of a second plaintiff though the Advocate General may consent to the amendment the reason given being that the section nowhere speaks of the consent of the Advocate General to an *amendment* of the plaint and that a suit which was bad at its inception is not bettered by its amend m nt (*d*) On the other hand, it has been held by the High Court of Madras that persons interested may be added as parties to the suit with the consent of the Advocate General under O 1 r 10 It has thus been held by that Court that if a suit is brought by *A* alone under this section (*e*) or by *A* and *B* of whom *B* has no interest in the trust (*f*) the plaint may be amended by adding *C* a person interested as a party plaintiff in either case with the consent of the Advocate General Similarly it has been held by that Court that if a suit be brought by *A* and *B* and neither of them has any interest in the trust the plaint may be amended by adding the Advocate General as a plaintiff on his application (*g*)

The consent in writing required by this section is a condition precedent to the institution of the suit to which such consent relates If therefore no valid consent is given before the institution of the suit the suit must be dismissed, or the plaintiff

(*w*) *J walra* v *Akb r Hus n* (188) All 1 8 183 184 *Vaidya atl a* v *Swam tla* (19 4) 51 I.A 8 88 4 M d 884 891 82 I C 804 (4) A PC 2 1

(*x*) *S g am* v *Srinavasa* (19) 50 Mad 7 6 10 I C 0 (27) A M 46

(*y*) *Mohi ddi* v *S y dudd n* (1893) 0 Cal 810

(*z*) *Ram ch dra* v *Pa ame hwaran* (1919) 4 Mad 360 50 I C 693 ref rred to it seems with approval i *Vaidyanatha* v *Swam n tha* (19 4) 51 I.A 28 288 47 Mad 884 891 8 I C 804 (4) A PC 1

(*a*) *Nari j* v *K rpal* (19 4) 5 Lah 455 8 I (111 ( ) A L 189

(*b*) *Va dyanatha* v *Sw m n tha* (19 4) 51 I A 82 47 M d. 884 8 I C 804 (4) A PC 1 affirming (19 1) 41 Mad 1 J 0 63 I C 631 (1) A M 563

(*c*) *Gop l Dei* v *Ta o Dei* (1903) 6 All 16

(*d*) *Darves* v *Ja nudi* (1906) 30 Bom 603

(*e*) *Ramayyangar* v *Krish yj ga* (188) 10 Mad 185

(*f*) *Jekkam* v *Si S S bramania* (19 0) 43 Mad 7 0 56 I C 450

(*g*) *A bal v a* v *The Ad ocate Ge eral* (19 0) 43 Mad 0 5 I C 546

may be allowed to withdraw the suit with liberty to bring a fresh suit The defect cannot be rectified *after* the institution of the suit (*h*) And where such consent is given the suit must be confined to the matters included in the consent it is not competent to the Court to grant reliefs other than those included in the terms of the consent (*i*) Further where a suit is brought under this section no amendment should be permitted without the sanction of the Advocate General. Where a plaint in a suit brought under this section is amended without the consent of the Advocate General *e g* where a new party is added as a defendant and possession of the trust property is claimed from him the Court must dismiss the suit (*j*) It is an invariable practice in the Bombay Presidency for the Advocate General to endorse his consent upon the plaint (*k*)

The Advocate General in giving his consent has to exercise his judgment in the matter and see not only whether the persons suing are persons who have an interest in the trust but also whether the trust is a public trust of the character defined in the section and whether there are *prima facie* grounds for thinking that there has been a breach of trust (*l*) Where the sanction given by the Advocate General is so worded as to indicate that the Advocate General has not exercised his judgment it is *not a defect fatal to the suit* but a mere irregularity falling within the scope of s 99 hence the decree in the suit will not be interfered with in appeal unless the irregularity is shown to have affected the decision of the suit on the merits (*m*)

When an order is made against the trustee of a charity under s 5 (3) of the Charitable and Religious Trusts Act 1920 and the trustee without reasonable excuse fails to comply with it he shall be deemed to have committed a breach of trust affording ground for a suit under s 92 of the Code and such suit may so far as it is based on such failure be instituted without the previous consent of the Advocate General

Public purposes —This section relates to those charities only in which the public are interested. A trust for a public Hindu temple is a trust for a public purpose of a religious nature within the meaning of this section (*n*) A *mutt* that is otherwise private does not become public simply because some persons are fed when *gurupuja* is performed and a water *pandal* is maintained in the *mutt* during the hot season (*o*) But where a number of the public had always used a temple to which a dharmashala was attached and the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *adavart* it was held that the intention of the founder was to devote the property to public purposes of a religious and charitable nature (*p*) A trust is not the less a trust for a public purpose because the main object of the trust is the support of *fakirs* of a *particular* sect and the propagation of the tenets of that sect (*q*)

Any alleged breach of trust —These words are not equivalent to any alleged breach of any *admitted* trust It is not therefore a condition precedent to the applicability of the section that the trust alleged by the plaintiffs is admitted by the defendants (*r*)

Where the direction of the Court is deemed necessary for the administration of any such trust —To bring a suit within this section there mu t

(*h*) *Tricumda s* v *I l ji* (189) 16 Bom 6 6 *Copal De* v *I anno Dei* (1904) 6 All 16

(*i*) *Sajad H ss* v *C llector of Kaira* (1837) 1 B m 7 *N am ul H q* v *M ham m d* (1910) I 1 no 144 p 3 0 51 I C 611

(*j*) *Abd l Pehman* *Cass m* (191) 36 Bom 168 11 I C 7 6

(*k*) *Sulem n* v *Sha kh Ismail* (1915) 39 Bom 5 0 30 I C 1

(*l*) *Saj l P ja* v *Go r Mo! n Das* (1897) 4 Cal 418 4 8

(*m*) (1897) 4 C l 419 4 8 *s p a*

(*n*) *Ma h r* v *L Kl m am* (1888) 1 Bom 47

(*o*) *S th ppayyar* v *Periasami* (1891) 14 Mad 1 6

(*p*) *Jt a lkishore* v *L kshmandas* (1899) 23 Bom 6 9

(*q*) *M h nt* v *D rshan* (191) 34 All 468 14 I C 698

(*r*) *Jaf r Khan* v *D d Shah* (1911) 13 Bom L R 49 53 9 I C 358

either be a breach of trust *or* the directions of the Court must be necessary for the administration of the trust The directions referred to in this section are such as are necessary for the carrying out of the trust and as are given to a *trustee* either the existing trustee where there is one or the new trustee where one is to be appointed. The nature of the reliefs (specified in the section) shows what is meant by the words deemed necessary for the administration of any such trust (*s*) The mere appointment of a Mutawalli is not a direction within the meaning of this section (*t*)

Whether contentious or not—These words are new They are intended to give effect to a decision of the Calcutta High Court under s 539 of the Code of 1882 that the section was not confined to non contentious proceedings and that it applied to contentious suits also (*u*) and to the opinion to the same effect of Best and Weir JJ in an earlier Madras case (*v*)

Who may be sued under this section—It is not necessary that the defendant should be either a de jure or de facto trustee otherwise no suit can be brought under this section in a case in which all trustees are dead or refuse to act (*w*) Thus a suit may be brought under this section against persons in possession of the trust property who claim adversely to the trust that is claim to be the owners of the property (*x*) or against persons who deny the validity of the trust (*y*) But a suit against one who is merely a servant for misappropriation of the trust property does not fall under this section ( ) See notes below Trustee and Suits for possession of trust property

Order for security for costs against defendant trustee—Section 10 of the Charitable and Religious Trusts Act 1920 provides that if in any suit instituted under the present section the Court trying such suit may if on the application of the plaintiff and after hearing the defendant and making such inquiry as it thinks fit it is satisfied that such an order is necessary in the public interest direct the defendant either to furnish security for any expenditure incurred or likely to be incurred by the plaintiff in instituting and maintaining such suit or to deposit from any money in his hands as trustee of the trust to which the suit relates such sum as such Court consid rs sufficient to meet such expenditure in whole or in part and that when any money has been so deposited the Court may make over to the plaintiff the whole or any part of such sum for the conduct of the suit but that before making over any sum to the plaintiff the Court shall take security from the plaintiff for the refund of the same in the event of such refund being subsequently ordered by the Court

Clause (a) removing any trustee—This clause is new Though this clause did not occur in the corresponding s 539 of the Code of 1882 it was held by the High Courts of Calcutta Bombay and Allahabad (*a*) following an earlier decision of the Madras High Court (*b*) that a suit for the removal of a trustee of a public trust and for the appointment of a new trustee came under that section though the *removal* of a trustee was not one of the reliefs specified in that section Such a relief it was said was either covered by the words such further or other relief as the

(*s*) *Per* Woodroffe J in *Bud e Das* v *Choon L l* (1906) 33 Cal 89 at p 809 But see *Amritram* v *Tamji* (1908) 10 Bom L R 8

(*t*) *Abdul Alim Abed* v *Abir Jan B bi* (1928) 55 Cal 1 84 110 I C 416 (28) A C 368

(*u*) *Moh udd n* v *Sayidudd n* (1893) 20 Cal 810

(*v*) *S bbaya* v *Krishna* (1891) 14 Mad 186 09 1

(*w*) *Venk ta ara [ ] a* v *S bba Rao* (19 3) 46 M d 300 318 3 1 3 I C 991 (23) A M 376

(*x*) *Ragh ba* v *Ke ho* (1889) 11 All 18 [F B] *B dh S gh* v *Niradbar* (190) 2 Cal L J 431 *Chintaman* v *Dhondo* (1891) 15 Bom 61 *Jafarkhan* v *Daud h h* (1911) 13 Bom L R 49 9 I C 358 *Deo S a* v *D l* (19 4) 3 Pat 84 80 I C 990 (4) A 1 6

(*y*) (19 3) 46 Mad 300 3 I C 991 (23) A M 3 6 n p a [tru t cre t d by a will h ir in possession and denyi g validity of the trust]

(*z*) *Baldeo* v *Gop l j* (1903) 1 All L J 310 (3) A A 4

(*a*) *S j l r I ja* v *Go r Moh n Das* (1897) 24 Cal 418 *S jad* v *Collector of K ra* (189) 1 Bom 49 *H eni Begam* v *Coll ct r of Morad bad* (1898) 0 All 46 *(rdhari Lal* v *R m Lal* (1899) 1 All 00

(*b*) *S bbayya* v *Krishna* (1891) 14 Mad 186

nature of the case may require or it was implied in the clause providing for the appointment of new trustees On the other hand, the Madras High Court held in a later case that such a suit did not come under that section (c) Sub s (1) cl (a) of the present section gives effect to the Calcutta Bombay and Allahabad decisions A suit for the removal of a trustee must therefore be instituted in conformity with the provisions of this ection The High Court of Madras has held that a suit by the trustees of a temple for a declaration that the appointment by the Devastanam Committee of the defendant as a trustee in place of a decea ed trustee is invalid and for an injunction to restrain him from interfering with the management of the temple is *in effect* a suit for the removal of the defendant from the office of trustee and that it cannot be instituted without the sanction required by this or the next section (d) A similar view has been taken by the Patna High Court (e) This view has been dissented from by the High Court of Bombay on the ground that to bring a suit within this section there must either be an alleged breach of trust or the direction of the Court must be deemed necessary for the administration of th trust and that neither of these conditions was present in the Madras case The Bombay case was similar to the Madras case and it was held that the case did not fall within this section (f)

In a suit under this section by two trustees of a temple against a co trustee for his removal the Court has the power to investigate charges of misconduct made by the defendant against the plaintiff and even to remove them (g)

In framing a scheme of management und r this section [see clause (g)] it is desirable to include a provision for the removal of trustees for breach of trust for where such a provision is included the removal of a defaulting trustee may be obtained by an *application* in execution of the decree and the costs and trouble of a *regular suit* which would otherwise be probably necessary may thus be avoided (h) But some recent Madras cases consider such a provision ultra vires (i)

In connection with the removal of a trustee it may be noted that there is no hard and fast rule that because a manager of a shrine has arrogated to himself the position of owner he should be removed from the office of trustee Each case must be decided with reference to its circumstances (j) Thus it has been held that mere lax and improvident management on the part of the manager of a shrine fostered by the belief that he was entitled to manage the trust property free from control and very much as though he was its absolute owner is no ground for removing him from the trust (k)

Trustee —A person appointed trustee by the Court though his appointment may be impeached as being illegal is a trustee within the meaning of clause (a) and not a trespasser (l) So is a trustee *de son tort* that is a person who has not been appointed trustee b it who takes charge of the trust property and purports to manage it as trust property (m) The Acharya of a temple is a constructive trustee within the meaning of this section and he may be sued as such (n) And so is the head of a mutt (o)

(c) *Pangas mi* v *Varadappa* (1894) 17 Mad 46 S e al o *Va ya ia* v *F m ra a* (1900) 23 Mad 53
(d) *Sub am a* v *Krish swamy* (1919) 4 Mad 669 6 1 per Spencer J 3 I C 60
(e) *Syed* v *B b* (19) 4 Pat 41 88 I C 103 ( ) A I 44
(f) *Nilka th* v *I k isl d* (19) 46 Bom 101 64 I C 3 3 (3) A B 6
(g) *B lkr shna* v *J ja la* (19) 43 Mad L J 34 8 I C 194 (5) A M 8 0
(h) *D mod bhat* v *Bh g l l* (1900) 24 Bom 4
( ) *Abd l Hak m* v *M h med B r n d* (19 6) 49 Mad 580 95 I C 0 (6) A M 59 *B h ayya* v *V enk t i ya r nam rth* (19 6) 50 M d L J 403 94 I C 4 (6) A M 5 *Veer ragha a h ar* v *Ad ocat G e l* (19) 51 Mad 31 106 I C 66 (7) A M 10 3 F B
(j) *Da od r Bh tji* v *Bhat Bh jilal* (1898) 22 Bom 493
(k) *Annaji* v *Na ay* (189) 21 Bom 5 6
(l) *S iyud Al* v *Ali Jan* (1913) 3 All 98 18 I C 573
(m) *Jug l Kishore* v *Lakshm nd s* (1899) 3 Bom 6 9 *B dree Das* v *Cl oon L l* (1906) 33 Cal 89 80 -806 *Ram Bilas* v *Nitya and* (19) 44 All 6 69 I C 990 ( ) A A 54 *Bih ri Lal* v *Shiva* (19) 47 All 1 84 I C 631 (4) A A 884
(n) *Shripatprasad* v *Lakshm das* (19 3) 2 Bom L I 47 84 I C 803 (4) A B 193
(o) *Velliappa* v *Pu naiyanam* (19) 50 Mad 56 101 I C 490 (2) A M 614

Clause (b) appointing new trustee—A suit for the appointment of new trustees of a temple on the ground that the defendants are not lawful trustees and that the office of trustees is therefore vacant is a suit under clause (b) of this section (*p*)

Under this section the Court in sanctioning a scheme may provide for the appointment of additional or new trustees though such appointment may not be in conformity with the original constitution of the trust or with the rules in force in respect to it (*q*)

Clause (d) directing accounts and inquiries—This clause is new Under the corresponding s 539 of the Code of 1882 the High Court of Bombay held that a suit to remove the trustees of a public charity and to compel them to account and to make good the losses sustained by the charity by reason of default on the part of the trustees and for the appointment of new trustees was a suit within that section though a relief for *accounts* was not one of the reliefs specifically mentioned in that section. Such a relief it was said was covered by the words further or other relief (*r*) The present clause gives legislative recognition to the above decision (*s*)

Clause (e) apportionment of income—A suit for a declaration as to what proportion of the trust property [*e g* offerings placed by devotees before an idol] should be allocated to the pujaris (officiating priests) and what to the guravs (temple servants) relates to a relief covered by cl (e) of the section (*t*)

Clause (f) authorizing trust property to be let—An *application* by a mutawali for sanction of the Court to grant a lease of the wakf property is not a suit under this section (*u*)

Clause (g) settling a scheme—This section vests a very wide discretion in the Court as regards directions to be given for the administration of public trusts In giving effect to the provisions of the section and in appointing new trustees and settling a scheme the Court is entitled to take into consideration not merely the wishes of the founder so far as they can be ascertained but also the past history of the institution and the way in which the management is carried on theretofore in conjunction with other existing conditions that may have grown up since its foundation (*v*) The Court may refuse to frame a scheme where no mismanagement is proved (*w*)

A scheme framed by the Court may be varied if good cause is shown (*x*) But where a scheme is once settled it precludes a suit to establish a private right to manage the property [*e g* hereditary trusteeship] which if established would interfere with the scheme settled by Court (*y*)

The Court has power under this section to frame a scheme in respect of a public temple though it be under the control of a Temple Committee constituted under the Religious Endowments Act 20 of 1863 (*z*) But where a trust is a *private* trust *e g* for a family idol the settlement of a scheme under this section is inappropriate (*a*)

In decrees passed under this section liberty is generally reserved to the parties to apply to the Court as occasion arises as to the effect of such a clause see the under

(*p*) *\ l Pa ia* v *Venkatacl arulu* (1903) 0 M d 450
(*q*) *I raj g Doss* v *T r malu* (190) 8 M d 319
( ) *Syad* v *Collector of Kai a* (189) 1 Bom 48 *Amru am* v *I amj* (1908) 10 Bom I 1 87
(*s*) *Lalakrishna Chettiar* v *Krishnamurthi A yar* (19 7) 5 Mad L J 18 100 I C 841 (27) A M. 416
(*t*) *Sak/ m* v *Ga u* (1 1) 45 Bom 683 600 60 I C 9 4 (1) A B 29
(*u*) *Fakrun ssa* v *District Judge* (19 0) 47 Cal 59 6 I C 4
(*v*) *Mah med Ism il* v *Ahmed* (1916) 43 I A 1 7 13 43 Cal 1085 1101 110 35 I C 30
(*w*) *Ad ocate Ge e al* v *Yusuf Ali* (19) 4 B m L R 1000 84 I C 7 9 (1) A B 3 8
(*x*) *Pr i g Dass* v *Tirumala* (190) 28 Mad 31 *R m do* v *Ha ma t a* (1913) 36 Mad 364 1 I C 449
(*y*) *Ramados* v *Hanumantha* (1913) 36 Mad. 364 12 I C 449 *S kharam* v *Ganu* (19 1) 45 Bom 683 60 I C 9 4 (1) A B 297
(*z*) *Sul rama* v *S bramania Iyer* (1916) 39 Mad 00 3 I C 11
(*a*) *Gopal Lal* v *Purna Cha d a* (19 2) 49 I A 100 49 Cal 459 67 I C 561 ( ) A PC 3

mentioned case (b) The Madras High Court has in recent cases held that liberty to apply for modification of the scheme or for a relief coming under section 92 is ultra vires (c) although such clauses have appeared in schemes approved by the Privy Council (d) The High Court of Rangoon has followed the Madras decisions (e) These decisions it is submitted are incorrect The suit having been filed with the consent of the Advocate General and the Court being in *sei in* of the case it is perfectly competent to it to provide for a modification of the scheme and no fresh suit is necessary to modify the scheme

Where it is quite clear that a public trust has been properly constituted by will it is not necessary that a suit for the administration of the estate of the testator should precede a suit under this section But it is otherwise where it is doubtful whether there would be funds sufficient for the charitable bequest In the latter case an administration suit may become necessary before any scheme can be framed under this section (f) Where the trust funds are not ascertained and the defendants are accountable for their management of the trust property the proper course is to take the accounts before a scheme is framed (g)

In a suit brought under this section in respect of a public religious trust the Court has jurisdiction to frame a scheme regulative of the conduct of the institution as the owners of moneys and property which it possesses even in cases where the Acharya as the head of its spiritual and temporal affairs is worshipped by the members of the sect as the representative of the god. In drawing up the scheme however the Court must not encroach upon the rights and prerogatives of the Acharya as a religious preceptor of the community but while the institutional trust must be respected the sect and body of worshippers for whose benefit it was set up have the protection of the Court against their property being the subject of abuse speculation and waste (h)

Where provision is made in a scheme for an application being made to the Court for the purposes mentioned in it and an order is made on the application the order is not one execution and no appeal lies from it (i)

Clause (h) further or other relief — The words granting such further or other relief as the nature of the case may require must be read with what has preceded as referring to further relief to which the party may be entitled which arises out of the *existence of the trust* in respect of which the suit has been brought Therefore where the *only* relief claimed in a suit is for a *declaration* that certain property is wakf property the suit does not come within the purview of this section. Such a relief does not come within the words further or other relief (j) The general clause dealing with further or other relief ought to be read with the preceding specific clauses and the nature of the eliefs which may be properly granted under it is of the same character as the relief *which may be granted under the preceding clauses The specific clauses are not m rely* illustrative but furnish an indication of the nature of the relief which may be granted in a suit under this section (k)

(b) *Ma adana da* v *Tar k anda* (19 3) 3 Cal L J 291 76 I C 0 (4) A C 330 See al *N ayan m rtl* v *Acl ay ya* (19 4) 47 M d L J 714 85 I C 188 (5) A M 411

(c) *Abd l Hakim* v *Mahomed Burrammudin* (19 6) 49 Mad 580 95 I C 0 (6) A M 5 9 *Brahmayya* v *Venkatasn rya n aj n m rth* (1926) 50 Mad L J 403 94 I C 6 4 (26) A M 557 *Ve ra aghava hariar* v *Ad oc te Ge eral* (19 7) 51 M d 31 106 I C 665 (7) A M 10 3 [F B]

(d) *P jagl sy taru* v *T Sr rangach ryl ru* (1907) 30 M d 138 1 C *J n hod* v *Dakor T mple Comm ttee* (19) 7 Bom L R 8 8 I C 313 (2) A I C 165

(e) *U Po Ma ng* v *U Jun Pe* (19 8) 6 Rang 594 114 I C 293 (9) A R 0

(f) *Ve kata ra mha* v *S bba Rao* (19 3) 46 M d 300 3 0 3 1 73 I C 991 (3) A M 376

(g) *Chot lal* v *Manohar* (1900) 24 Bom 50 6 I A 199

(h) *Sripat prasadji* v *Laxmidas* (19 9) 31 Bom 43 114 I C 10 ("9) A PC 7

(i) *Sevak Jeranchod Bhogilal* v *The Dakore Templ Committee* (19 5) 49 Mad L J (25) A PC 155 *Abdul Hakim Baig* v *Buram ddin* (19 6) 49 Mad. 580 95 I C 7 0 (6) A M 559

(j) *Jam l udd n* v *Mujtaba Husain* (1903) 5 All 631 635 *S l q Ram* v *Bassao Mal* (1919) 1 Lah L J 1 0

(k) *Budre Das* v *Choo i Lal* (1906) 33 Cal. 789 810

The question as to the precise scope of clause (h) is of great importance for if the words such further or other relief as the nature of the case may require mean relief of the same nature as clauses (a) to (g) a relief in a suit against strangers to a trust for a declaration that property in their possession is trust property would be outside the scope of this section as it would not be of the same nature as clauses (a) to (g) and the suit could be maintained without the consent of the Advocate General This very question arose in *Abdur Rahim v Abu Mahomed Barkat Ali* (l) where the Privy Council held that a suit for a declaration that property belongs to a wakf can be maintained by Mahomedans interested in the wakf without the consent of the Advocate General. It was argued in that case on behalf of the defendants that the words further or other relief must be taken not in connection with the previous clauses (a) to (g) but in connection with the nature of the suit—namely any relief other than (a) to (g) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case and that a breach of trust having been alleged the suit came under this section and it could not be maintained without the consent of the Advocate General. But this argument was not accepted and it was held that the words further or other relief in clause (h) must on general principles be taken to mean relief of the same nature as clauses (a) to (g) and that as the relief for a declaration that the property belonged to the wakf was not of that nature the suit was outside the scope of the section. Their Lordships said that the construction suggested on behalf of the defendants would cut down substantive rights which existed before the enactment of the Code of 1908 and a Code regulating procedure should not be construed as having that effect in the absence of express words Before the enactment of that Code a person interested in a public trust had the right to maintain a suit for such a declaration as the above without the consent of the Advocate General and this is the substantive right referred to above It follows that when a suit is brought for some of the reliefs mentioned in this section with the consent of the Advocate General and a prayer for a declaration is afterwards added and strangers to the trust are joined as defendants the suit ceases to that extent to be one under sec 92 or of a representative character

There is a conflict of opinion as to whether a prayer that a deed of trust may be construed by the Court and that the true scope and object of the trust fund may be determined by the Court comes within the words further or other relief (m) See note below Suits merely for a declaration of trust

Suits outside the scope of the section—This section does not apply unless—

(1) there is a trust created for public purposes of a charitable or religious nature

(2) there is a breach alleged of such trust *or* the direction of the Court is deemed necessary for the administration of such trust and

(3) the relief claimed is one or other of the reliefs mentioned in the section (n) [see note below sub sec (2)]

If all the three conditions mentioned above are fulfilled the suit must be instituted in conformity with the provisions of this section that is to say it must be instituted either by the Advocate General *or* by two or more persons interested in the trust with the consent of the Advocate General if it is not so instituted it must be dismissed [see notes above Consent of Advocate General]. But if any one of the three conditions is absent the suit is outside the scope of this section and it may be instituted in the

(l) (19 8) 55 I A 96 85 Cal. 519 108 I C 361 (8) A. PC 16

(m) *D ha I et t v J marty* (1909) 33 Bom 609 per Davar J at pp 0 31 per Beaman J., at pp 56 69 2 I C. 01

( ) See th judgment of Woodroffe J in *Budree Das v Choont Lal* (1906) 33 Cal 89

ordinary manner (o) The mere fact that a suit *relates* to a public charitable or religious trust or that it *relates* to property held on such trust is not sufficient to bring it within the scope of this section [see notes below Suits to enforce private rights and Suits for possession of trust property against trespassers and against alienees from trustees] At the same time a suit which is clearly within the scope of this section cannot be treated as one outside its scope because in addition to reliefs under this section it claims reliefs not allowed by the section [see notes below Suits for removal of trustees, etc and Where some of the reliefs are outside the scope of this section

Suits to enforce private rights —The suit contemplated by this section is a *representative* suit [see note above Representative suit and res judicata] Suits brought not to vindicate or establish the right of the *public* in respect of a public trust but to remedy an infringement of an *individual right* or to vindicate a *private right* do not fall within this section (p) Such suits are instituted in the ordinary manner and not under this section. The following are instances of suits of this character —

(1) A suit by a person claiming to be a co trustee of a certain *darga* and entitled as such to a share with the defendant trustee in the management and profits thereof *Miya Vali Ulla* v *Sayad Bava* (1898) 22 Bom 496

(2) A suit by the trustees of a fire temple for the vindication of the right of management which was vested in and actually being exercised by them at the date of the obstruction by the defendants *Nairoji* v *Dastur Kharshedji* (1904) 28 Bom 20 54

(3) A suit between two individuals each claiming certain rights as *mutawali* over *wakf* property *Manijan* v *Khadem Hossein* (1905) 32 Cal. 273

(4) A suit between two persons as to which of them is the lawful trustee of a charity *Budree Das* v *Chooni Lal* (1906) 33 Cal 789 808 *Muhammad* v *Ahmed* (1913) 35 All. 459 20 I C 37 *Niamat Ali* v *Ali Reza* (1914) 37 All 86 26 I. C 778 *Puttu Lal* v *Dayanand* (1922) 44 All 721 68 I C 786 (22) A A 499 *Ayatunnessa* v *Kulfu* (1914) 41 Cal 749 22 I C 677 *Giyana* v *Kandusami* (1887) 10 Mad 375 *Kashinath* v *Gangubai* (1929) 31 Bom L R 349 117 I C 523 (29) A B 193 The High Court of Bombay has held that where the defendant is in management of the trust property and the plaint also contains a relief for accounts against him the suit is one under this section *Narayan* v *Vasudeo* (1924) 26 Bom L R 950 86 I C 490 (24) A B 518 This view it is submitted is not correct See 45 Mad 113 69 I C 304 (22) A M 17 cited in ill (6) below

(5) It has been held by the High Court of Allahabad that the right of a Mahomedan to use a mosque is not a public but a *private* right It is like the *right to use a private road any one who has the right may maintain a suit* in respect of it [*Jawahra* v *Hussain* (1885) 7 All 178 at pp 182 183] To such a suit the provisions of this section do not apply Thus it has been held that *any* Mahomedan entitled to frequent a mosque may if property belonging to the mosque is sold by the manager of the mosque for his private debts maintain a suit for a declaration that the property is wakf property and to set aside the sale and evict the purchaser [*Zafaryab Ali* v *Baktawar Singh* (1883) 5 All 497] Similarly if land attached to a mosque is encroached upon *any* Mahomedan entitled to use the mosque may sue to eject the trespasser And if the mosque be in a dilapidated condition and a Mahomedan frequenting the mosque or one looking after it is desirous of repairing it but is obstructed by a third person he may

(o) *Madhavrao* v *Shri Omkaresh a Ghat* (19 9) 31 Bom L R 19 (9) A B 153

(p) See per Davar J in *Dinsha Petit* v *Jamsetji* (1909) 33 Bom 509 5 9 0 I C 01

maintain a suit to establish his right to repair the mosque [*Jawahra* v *Akbar Husain* (1885) 7 All 178]. The contrary however has been held by the High Court of Calcutta in *Jan Ali* v *Ram Nath* (1882) 8 Cal. 32 and *Lutifunnissa Bibi* v *Nazirun Bibi* (1885) 11 Cal 33 According to these decisions the right sought to be established in suits such as the above is not a private but a *public* right and it can only be enforced by a suit brought in conformity with the provisions of this section. But in a later Calcutta case [*Mohiuddin* v *Sayiduddin* (1893) 20 Cal. 810] it was pointed out that the reasoning of the Allahabad cases showing that the right of worship of each worshipper in a Mahomedan mosque or religious endowment was an *independent* right wholly irrespective of the rights of the other worshippers was correct The view taken in the earlier Calcutta decisions is it is submitted not correct (q) and it cannot be sustained since the decision of the Privy Council in *Abdur Rahim* v *Abu Mahomed Barkat Ali* (r)

(6) A suit by a trustee against a co trustee for accounts *Appanna* v *Narasing* (1922) 45 Mad 113 69 I C 304 (22) A M. 17 [F B] *Bapuji* v *Govindlal* (1916) 40 Bom 439 34 I C 167

(7) A suit by an idol as a juristic person against persons who interfere unlawfully with the property of the idol or the income thereof *Darshan Lal* v *Shibji* (1923) 45 All. 215 71 I. C 420 (23) A A. 120 *Madhavrao* v *Shri Omkareshwar Ghat* (1929) 31 Bom L R 192 (29) A. B 153

(8) A suit for a declaration that the plaintiff is entitled to appoint mutawallis *Rugghan Prasad* v *Dhanno* (1927) 49 All. 435 99 I. C 1045 (27) A. A. 257

Suits for a declaration and for possession of trust property against third persons that is strangers to the trust—Suits against strangers to the trust that is against trespassers and against transferees from trustees for a declaration that property in their hands is trust property and for possession are outside the scope of this section. The reason is that the relief claimed is not one of those mentioned in clauses (a) to (h) Such suits must be instituted in the ordinary manner and not under this section (s) This has now been definitely held by the Privy Council in *Abdur Rahim* v *Mahomed Barkat Ali* (t) [see case (1) below] The following are instances of suits of this character —

(1) A suit for a declaration that property belongs to a wakf can be maintained by Mahomedans interested in the wakf without the sanction of the Advocate General *Abdur Rahim* v *Mahomed Barkat Ali* (1928) 55 I A 96 55 Cal 519 108 I C 361 (28) A.P.C. 16.

(2) A suit by the disciples of a *mutt* for a declaration that the defendant was not the duly appointed successor to the late head of the *mutt* and that he was in possession under a false claim of title and for ejecting the defendant from the *mutt* properties *Srinivasa* v *Srinivasa* (1893) 16 Mad. 31 *Ganga Charan* v *Ramchandra* (1928) 50 All. 165 106 I. C. 389 (28) A.A. 33 [Here the claim against the defendant is as against a trespasser]

(3) A suit for a declaration that a certain piece of land of which it was alleged the defendants had taken wrongful possession was a public graveyard, and for the ejectment of the defendants from the land *Muhammad* v *Kallu* (1899) 21 All 187 *Ghazaffar* v *Yawar Husain* (1906) 28 All 112 117 120 121 *Dasondhay* v *Muhammad* (1911) 33 All 660 11 I C 36 *Muhammad*

(q) See *Vaidyanatha* v *Swaminatha* (1924) 51 I A 282 47 Mad 884 891 81 I C 804 (24) A P C 221

(r) (1928) 55 I A 96 55 Cal. 519 108 I C 361 (28) A. PC 16

(s) *Budree Das* v *Chooni Lal* (1906) 33 Cal 789 80

(t) (1928) 55 I A 96 55 Cal. 519 108 I C. 361 (28) A PC 16

Baksh v *Muhammat Piari* (1921) 19 All L J 236 62 I C 744 [Here also the claim against the defendant is as against trespassers.] Compare *Latifunissa Bibi* v *Nazirun Bibi* (1885) 11 Cal 33 where the suit was for a declaration that certain property was *wakf* property and for recovery of possession thereof from a third party and where the Court held that the suit ought to have been instituted in conformity with the provisions of this section This decision would appear to be no longer law see *Mohiuddin* v *Sayiduddin* (1893) 20 Cal 810 p 816

(4) *A suit to set aside an alienation of trust property alleged to have been wrongfully made by the trustees and for the recovery of property from the alienee* *Kazi Hassan* v *Sagun* (1900) 24 Bom 170 *Lakshmandas* v *Ganpatrav* (1884) 8 Bom 365 *Vishvanath* v *Rambhat* (1891) 15 Bom 148 *Ghelabhai* v *Uderam* (1911) 36 Bom 29 12 I C 577 [Here the defendants are transferees from trustees]

(5) A suit by the trustees of a temple against the manager and treasurer of the temple for accounts and for a decree for what may be found due on taking such accounts *Malhar* v *Narasinha* (1912) 37 Bom 95 17 I C 665

(6) A suit by two of the worshippers of a temple with the leave of Court under O 1 r 8 against the committee of management (not being trustees) and *archakas* of the temple for a declaration that a transfer made by the committee to the *archakas* of the right to collect and receive offerings made by the pilgrims is invalid *Venkataramana* v *Kasturiranga* (1917) 40 Mad 212 38 I C 73 [F B]

(7) A suit by the newly appointed trustees of an imambara for possession of the imambara against a former trustee who has been dismissed *Inayat* v *Faiz Muhammad* (1923) 45 All 335 71 I C 767 ('23) A.A 319 [the defendant in such a case is a trespasser] *Ganga Puri* v *Mohan Lal* (1923) 4 Lah 295 73 I.C 645 ('24) A L 131

See notes above Trustee

Suits for removal of trustees for unlawful alienation of trust property and against transferees from those trustees—A common type of suits under this section is a suit against the trustee of a charity for his *removal* on the ground that he has unlawfully alienated the trust property treating it as his private property and for the appointment of a new trustee in his place It is clear that such a suit is within this section for the relief claimed is one under cl (a) of this section and the ground on which the relief is claimed is a breach of trust in alienating the property It is also clear that the Court cannot remove the trustee unless it finds that the property is trust property and that it has been wrongfully alienated by the trustee The question to be considered is whether the Court has power in the absence of the alienee to declare that the property is trust property and that the alienation is unlawful It has been held by the High Court of Madras that an alienee is *not a proper party* to a suit under this section and that if he is joined as a party the suit as against him should be dismissed But this it has been held does not preclude the Court from determining in a suit against the trustee alone whether the property is trust property and declaring if it is so found that it is trust property But the transferee not being a party to the suit is not bound by the declaration and if a suit is subsequently brought against him for *possession* of the property it is open to him to contend that the property is not trust property (*u*) A similar view has been taken by the High Court of Calcutta (*v*) On the

(*u*) *Paglalu* v *Pellati* (1914) M d L J 6 I C 34 *l gas m / v Ch nna samy* (191) 28 Mad L J 3 6 8 I C 898 *Evalappa Mudaliar* v *Balakri h amm l* (19 7) 53 Mad L J 183 40 L C 74 ('27) A M 710

(*v*) *B dhsi gh* v *Aitradba* (190) Cal L J 431 439 dissenting from *Saj d r* v *G r Moh n Da* (189) 24 C 1 418 *Bud ee Dass Choon L l* (1906) 3 C 1 9 805 *Chol m M ulah* v *H Hafiz* (1918) 8 Cal L J 4 4 I C 111

other hand, it has been held by the High Court of Allahabad that the alienee though not a *neces ary* party to the suit (*w*) *is a proper party* (*x*) and that if he is joined as a party and the Court declares that the property is trust property he will be bound by such declaration in a subsequent suit for *possession* against him (*y*) The High Court of Bombay has gone further and held that the transferee is *not only a proper but a necessary party* and that no such declaration can be made in his absence ( ) But all the High Courts are agreed that in a suit such as the above a decree cannot be passed against the alienee directing him *to deliver possession* of the property to the plaintiffs though he is a party to the suit as such relief is neither specifically mentioned in the section nor implied in cl. (h) and that the remedy of the newly appointed trustee is to institute a separate suit for *possession* against him (*a*) The proposition that the Court has no power under this section to pa s a decree against an alienee directing him to deliver possession to the plaintiffs is in accordance with a recent ruling of the Privy Council where it was held that a relief or a remedy against third persons that is strangers to the trust was not within the scope of this section (*b*) It is submitted that the Court has also no power under this section to make a declaration that the property in suit is not trust property *so as to bind the alienee* such a relief also being outside the scope of the section

Suits only for a declaration of trust—This section presupposes the *existence* of a trust for the administration of which it is necessary to make provision. Hence it does not apply to a suit brought solely for the purpose of having a *declaration* of the Court that certain property is wakf the fact of endowment being denied on the other side (*c*) Nor does this section apply to a suit brought merely for a declaration that the plaintiffs are trustees of an endowment (*d*) See note above Suits for a declaration and for possession of trust property against third persons i e strangers to the trust

Suits for a declaration that the defendant is not a properly appointed trustee and for an injunction against him—See note above Clause (a) removing any trustee

Courts competent to try suits under this section—A suit under this section must be instituted either in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government But this does not empower the Local Government to direct the transfer of a *particular* suit pending in a District Court to a particular Judge The authority must be a *general* one to receive suits under this section (*e*)

The expression principal Civil Court of original jurisdiction in this section does not include the Court of an Additional District Judge appointed under s 8 of the Civil Courts Act XII of 1887 (*f*) unless the District Judge has under sub sec (2) of that section assigned to him the functions of a District Judge relating to all suits cognizable by the District Judge (*g*)

(*w*) *Huseni Begam* v *Collector of Moradabad* (1898) 20 All 46

(*x*) *Ghazaffar* v *Yawar Husain* (1906) 28 All 11 116 118 119

(*y*) *Ma ohar* v *Muhammad* (1911) 33 All 5 11 I C 18

(*z*) *Collector of Poona* v *Ba Chanchalbai* (1911) 35 Bom 4 0 1 I C 30

(*a*) *Budhsi gh* v *Niradbaran* (1905) 2 Cal L J 431 *Gholam Mowlah* v *Ali Hafiz* (1918) 23 Cal. L. J 4 47 I C. 11 reversing (1915) 4 Cal. 1135 3 I. C. 111 *Budree Das* v *Choo i Lal* (1906) 33 Cal 89 805 *Ragha alu* v *I ellati* (1914) 7 Mad L J 66 25 I C 794 *Collector of Poo a* v *Bai Chanchalbai* (1911) 3 Bom 4 0 1 I C 30

(*b*) *Abdur Rahim* v *Abu Mahomed* (19 3) 55 I A. 96 55 Cal 519 108 I. C 361 ('28) A PC 16

(*c*) *Jamal-udd n* v *Mujtaba Husain* (1903) 25 All 631 *Nihal Shah* v *Mimi Malan* (19 0) Lah L J 457 *Khursaidi Begum* v *Secretary of State* (19 6) 5 Pat 539 94 I C 433 (26) A P 3 1 *Mi an Baksh* v *Allah Baksh* (19 7) 8 Lah 111 99 I C 756 (7) A L 3 0

(*d*) *B dree Das* v *Chooni Lal* (1906) 33 Cal 789 810 *Ramados* v *Han mantha* (1913) 36 Mad 364 1 I C 440

(*e*) *Abdul K rim* v *Abdus Sobhan* (1911) 39 Cal. 146 13 I C 43

(*f*) *Mahomed* v *Abdul Hassan* (1914) 41 Cal 836 2 I C 9 1

(*g*) *Mohabor* v *Hazi* (1921) 48 Cal 53 6 I C 115 ('21) A C 10

Where a suit is brought against an executor in the Court of a Subordinate Judge for the administration of the testator s estate the mere facts, that the will contains directions for applying portions of the estate to charitable purposes does not bring the suit within this section The Subordinate Judge *has* jurisdiction to entertain such a suit but if any questions relating to charitable bequests arise before him and a scheme has to be framed under this section he should hold the amount appropriated for charities in the possession of a Receiver until the Advocate General or the Collector obtains the directions of the District Court (*h*)

Where some of the reliefs are outside the scope of the section—When *some of the reliefs claimed are outside the scope of the section the Court is not justified* in returning the plaint It should require the plaintiff to amend his plaint by confining himself to reliefs within the section or it might wait till it came to pronounce judgment and dismiss the suit as to reliefs without the section (*i*) So in a suit by worshippers for the appointment of trustees and for the ejectment of trespassers the Court may appoint trustees without passing a decree in ejectment (*j*) But worshippers cannot sue under O 1 r 8 to recover the property unless they are supported by the trustees They should sue to remove the trustees first and then let the new trustees sue in ejectment (*k*)

Sub section (2) this section is mandatory—The Legislature has by enacting this section constituted a special tribunal for the trial of a class of suits which it has removed from the cognizance of the ordinary Courts Those are suits for any of the reliefs specified in sub sec (1) in cases where there is an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust This class of suits can only be instituted in the special Courts mentioned in this section and they can only be brought either by the Advocate General or by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General This is enacted by sub s (2) of the present section Under the corresponding section 539 of the Codes of 1877 and 1882 it was doubtful whether *every* suit of the character described above was to be instituted in the manner aforesaid Sub-s (2) makes it clear that every such suit must be so instituted it enacts that no suit claiming any of the reliefs specified in sub sec (1) shall be instituted without the consent of the Advocate General (*l*) But sub sec (2) must be read with sub sec (1) Reading sub-sec (2) with sub sec (1) it follows that it is not every suit claiming any of the reliefs specified in sub sec (1) that should be brought with the consent of the Advocate General but those suits only which besides claiming any of those reliefs are brought by individuals as representatives of the general public Accordingly a Full Bench of the Madras High Court has held that a suit by a trustee of a public religious trust against a co trustee for accounts does not fall within this section though the relief claimed is the one specified in sub sec (1) cl. (d) Such a suit is not a representative suit The relief is sought not in the larger interest of the public but merely for the purpose of vindicating the private rights of one of the trustees and of enabling him to discharge the duties and liabilities which are imposed upon him by the trust (*m*)

The doubt referred to in the preceding paragraph arose in the following way The Code of 1859 did not contain any special provisions for the institution of suits relating to public charities Such provisions were introduced for the first time by s 539 of the Code of 1877 They were reproduced in s 539 of the Code of 1882 and they now find a place in sub sec (1) of the present section But neither the Code of 18 7 nor the Code

(*h*) *Bapuji* v *Govindlal* (1916) 40 Bom 439 34 I C 167

(*i*) *Ramrup* v *Ramdhari* (19?5) 47 All 0 89 I C 40 (5) A.A 683

(*j*) *Lachman* v *Munia* (19_5) 47 All 867 89 I C 639 ('25) A.A 759

(*k*) *Vadlamudi* v *Ve kataseshayya* (19 8) 110 I C 894 (8) A.M 614

(*l*) *Syed* v *Bibi* (19 5) 4 Pat 741 88 I C 1035 (5) A P 544 *S w* v *B ggah* (19 5) 3 Ran 13 89 I C 6 3 (5) A P 294 [suit for possession of a church and for accounts from the defe dants]

(*m*) *Appan a* v *Narasinga* (19) 45 Mad 119 69 I C 304 ( ) A M 17 [F B]

of 1882 contained any provision corresponding to sub s (2) Before the enactment of the Code of 1877 suits relating to public charitable or religious trusts could be instituted in the *ordinary* Courts by certain persons as plaintiffs Thus—

(1) *persons appointed supervisors over trustees* could sue in any *ordinary Court* competent to hear the suit for the removal of the trustees for malversation and to obtain the appointment in their place of other fit and proper persons (*n*) similarly

(2) *one or more of the members* of a defined class of the general public [such as the Satchasi community of Chatra] could sue on behalf of the whole class *with the leave of the Court under s* 30 [now O 1 r 8] in any *ordinary Court* competent to hear the suit to obtain a declaration of their right to take part in the management of the worship of a goddess (*o*)

It is obvious that the above suits fall within the purview of the present section. They also came within the terms of s 539 of the earlier Codes In the absence of any provision in s 539 similar to that contained in sub s (2) the question arose whether these suits were to be instituted in the special Courts mentioned in s 539 and by the Advocate General as plaintiff or whether they could be instituted as before in ordinary Courts and by persons who could have sued if s 539 had not been enacted The High Court of Bombay held that s 539 was mandatory in other words that *every* suit of the character mentioned in that section must be brought in accordance with its provisions and not otherwise. Therefore the suits referred to above could not be brought by the supervisors as plaintiffs in the one case and by the members of the community in the other but they had to be instituted either by the Advocate General or by two or more persons interested in the trust after obtaining the sanction of the Advocate General and further these suits could only be brought in the *special Courts* indicated in that section, namely the High Court or the District Court as the case might be (*p*) On the other hand the other High Courts held that section 539 was permissive and that it did not take away the right of suit which existed prior to and independently of it According to the latter view suits of the character mentioned above could, notwithstanding the enactment of section 539 be brought as before by the *abovenamed parties* as plaintiffs in *any Court* competent to entertain those suits and it was not obligatory to institute them in accordance with the provisions of s 539 (*q*) Sub section (2) gives effect to the Bombay decisions and supersedes the decisions of the other High Courts It provides in distinct terms that no suit claiming any of the reliefs specified in sub section (1) shall be instituted except in conformity with the provisions of that sub section At the same time it declares that the special provisions of the Religious Endowments Act 20 of 1863 for the institution of suits governed by that Act are not affected by the provisions of this section The provisions of that Act and their bearing on the present section are discussed in the next paragraph

Save as provided by the Religious Endowments Act 1863 —After the downfall of the Mogul Empire in India it was discovered that the income of many endowments granted in land by the presiding Governments of this country and by individuals for the support of mosques temples colleges and for other pious and beneficial purposes was misappropriated by persons managing the endowments It was therefore deemed expedient that the British Government should take charge of these endowments and for that purpose and the purpose also of providing for the maintenance of bridges serai uttaras and other buildings erected for the use of the

(*n*) *Nellayappa v Thangama* (1898) 21 Mad 406 *Ram Das v Badri Narain* (1907) 29 All ?

(*o*) *Monmotho v Harish Chandra* (1906) 33 Cal 905

(*p*) *Tricumdass v Khimji* (189) 16 Bom 6 6 *Sajal H ... v Collector of Kaira* (1897) 21 Bom 48

(*q*) *Nellayappa v Thangama* (1898) 21 Mad 406 *Budree Das v Chooni Lall* (1906) 33 Cal 789 800 804 *Monmotho v Harish Chandra* (1906) 33 Cal 905 *Ram Das v Badri Narain* (190) 9 All 7

public Regulation 19 of 1810 was passed whereby *the general superintendence of all the religious and charitable* endowments referred to above was vested in the Board of Revenue That Regulation applied to endowments in Bengal A similar Regulation Regulation 7 of 1817 was subsequently passed to provide for like endowments in the Madras Presidency (r) Several years after the passing of these Regulations it was thought that the connection of a Christian Government with the religious establishments of Hindus and Mahommedans was inexpedient and a report was therefore called for by the Government of India in the year 1841 from the Collectors of all Districts with a view to divest themselves of the management of *religious* endowments and transfer the management to properly qualified individuals As a result Act 20 of 1863 was passed whereby such of the provisions of the abovementioned Regulations as related to *religious* endowments were repealed, and provision was made for the transfer of all such endowments in certain cases to trustees and in others to committees (s 3 8) But the duty of superintending *charitable* endowments imposed on the Board of Revenue by the old Regulations is still retained, and, in fact expre s care is taken in the Act to declare that this duty as to *charitable* endowments is not intended to be affected or interfered with (ss 21 23)

The Religious Endowments Act applies only to *public* religious endowments as did the old Regulations It does not apply to *private* religious endowments S 14 of the *Act provides that any person interested in any mosque temple or religious* establishment may sue the trustees or members of a committee *for any misfeasance breach of trust or neglect of duty* committed by them in respect of the trust vested in them and the Court may in such suit direct the specific performance of any act by them and may decree damages and costs against them and may also direct the removal of any of the trustees or any member of a committee A suit which does not charge the trustees or member of a committee with misfeasance breach of trust or neglect of duty does not fall under that section (s) S 18 provides that *no suit under the Act shall be instituted without th leave of the Court*

The Act is in force in all Presidencies except the Pr sidency of Bombay where it is in force in North Canara only But it does not apply to presidency towns so that a suit instituted in a Chartered High Court in the exercise of its ordinary original jurisdiction inherited from the Supreme Court charging neglect of duty on the part of a temple trustee does not require the leave of the Court under s 18 of the Act (t)

After the passing of the Regulations above referred to the Board of Revenue took over the management of some endowments but in the large majority of cases they did not take charge of endowments created by private individuals The operation of the Act however is not confined to such endowments as *had actually been taken under the management* of the Board of Revenue under the old Regulations The Act applies to every public religious endowment to which the provisions of the old Regulations applied, that is to say to every public religious endowment created by the preceding Governments of this country and by individual whether the management of the endowment was taken over by the Board of Revenue or not (u)

Reading s 92 of the Code and the Religious Endowments Act together we have the following result —

(1) No suit in respect of *charitable* endowments of a public nature claiming any of the reliefs specified in sub section (1) of section 92 can be brought except in conformity with the provi ions of that sub section

(r) See *Suh ra na v S brama a Iyer* (1916) 39 Mad 00 03 3 I C 11

(s) *Subrama ia v Krishnaswamy* (1919) 4 Mad 668 53 I C 605

(t) *Pa ch Courie Mull v Chumroo Lall* (1878) 3 C I 563 *A n ami Pillai v Rama Krish a Mudal a* (1901) 4 Mad 19

(u) *J Ali v R m Nath* (188) 8 Cal 3 *Sh oratan v Ram Pargash* (1896) 18 All 2 7 *Muthu v Ga gathara* (1894) 1 Mad 9

of 1882 contained any provision corresponding to sub s (2) Before the enactment of the Code of 1877 suits relating to public charitable or religious trusts could be instituted in the *ordinary* Courts by certain persons as plaintiffs Thus—

(1) *persons appointed supervisors over trustees* could sue in any *ordinary Court* competent to hear the suit for the removal of the trustees for malversation and to obtain the appointment in their place of other fit and proper persons (*n*) similarly

(2) *one or more of the members* of a defined class of the general public [such as the Satchasi community of Chatra] could sue on behalf of the whole class *with the leave of the Court under s* 30 [now O 1 r 8] in any *ordinary Court* competent to hear the suit to obtain a declaration of their right to take part in the management of the worship of a goddess (*o*)

It is obvious that the above suits fall within the purview of the present section They also came within the terms of s 539 of the earlier Codes. In the absence of any provision in s 539 similar to that contained in sub s (2) the question arose whether these suits were to be instituted in the special Courts mentioned in s 539 and by the Advocate General as plaintiff or whether they could be instituted as before in ordinary Courts and by persons who could have sued if s 539 had not been enacted The High Court of Bombay held that s 539 was mandatory in other words that *every* suit of the character mentioned in that section must be brought in accordance with its provisions and not otherwise. Therefore the suits referred to above could not be brought by the supervisors as plaintiffs in the one case and by the members of the community in the other but they had to be instituted either by the Advocate General or by two or more persons interested in the trust after obtaining the sanction of the Advocate General and further these suits could only be brought in the *special Courts* indicated in that section, namely the High Court or the District Court as the case might be (*p*) On the other hand the other High Courts held that section 539 was permissive and that it did not take away the right of suit which existed prior to and independently of it According to the latter view suits of the character mentioned above could, notwithstanding the enactment of section 539 be brought as before by the *abovenamed parties* as plaintiffs in *any Court* competent to entertain those suits and it was not obligatory to institute them in accordance with the provisions of s 539 (*q*) Sub section (2) gives effect to the Bombay decisions, and supersedes the decisions of the other High Courts It provides in distinct terms that no suit claiming any of the reliefs specified in sub section (1) shall be instituted except in conformity with the provisions of that sub section. At the same time it declares that the special provisions of the Religious Endowments Act 20 of 1863 for the institution of suits governed by that Act are not affected by the provisions of this section The provisions of that Act and their bearing on the present section are discussed in the next paragraph

Save as provided by the Religious Endowments Act 1863 —After the downfall of the Mogul Empire in India it was discovered that the income of many endowments granted in land by the presiding Governments of this country and by individuals for the support of mosques temples colleges and for other pious and beneficial purposes was misappropriated by persons managing the endowments It was therefore deemed expedient that the British Government should take charge of these endowments and for that purpose and the purpose also of providing for the maintenance of bridges serais uttaras and other buildings erected for the use of the

(*n*) *Nellayappa v Thangama* (1898) 21 Mad 406 *Ram Das v Badri Narain* (190) 29 All

(*o*) *Monmotho v Harish Chandra* (1906) 33 Cal 905

(*p*) *Trecumdass v Khimji* (189) 16 Bom 6 6 *Sajjad H ein v C ll tor of Pa a* (1897) 1 Bom 48

(*q*) *Nella ppa v Thangama* (1898) 21 Mad 406 *B dree Das v Chooni Lall* (1906) 33 C l 78 800-804 *Monmotho v Harish Chandra* (1906) 33 Cal 905 *Ram Das v Badri Narain* (1907) 9 All 7

public, Regulation 19 of 1810 was passed, whereby the general superintendence of all the *religious and charitable* endowments referred to above was vested in the Board of Revenue That Regulation applied to endowments in Bengal. A similar Regulation, Regulation 7 of 1817 was subsequently passed to provide for like endowments in the Madras Presidency (r). Several years after the passing of these Regulations, it was thought that the connection of a Christian Government with the religious establishments of Hindus and Mahomedans was inexpedient, and a report was therefore called for by the Government of India in the year 1841 from the Collectors of all Districts with a view to divest themselves of the management of *religious* endowments, and transfer the management to properly qualified individuals As a result Act 20 of 1863 was passed, whereby such of the provisions of the abovementioned Regulations as related to religious endowments were repealed, and provision was made for the transfer of all such endowments in certain cases to trustees and in others to committees (ss 3 ... B... the duty of superintending *charitable* endowments imposed on the Board of Revenue by the old Regulations is still retained, and, in fact, express care is taken in the A... to declare that this duty as to *charitable* endowments is not intended to be affected or interfered with (s 1 2...).

The Religious Endowments Act applies only to public religious endowments as did the old Regulations It does not apply to private religious endowments S 14 of the Act provides that any person interested in any mosque temple or religious establishment may sue the trustees or members of a committee *for any misfeasance breach of trust or neglect of duty* committed by them in respect of the trusts vested in them, and the Court may in such suit direct the specific performance of any act by them, and may decree damages and costs against them, and may also direct the removal of any of the trustees or any member of a committee A suit which does not charge the trustees or member of a committee with misfeasance breach of trust or neglect of duty does not fall under that section (s) S 18 provides that *no suit under this Act shall be instituted without the leave of the Court*

The Act is in force in all Presidencies except the Presidency of Bombay where it is in force in North Canara only But it does not apply to presidency towns, so that a suit instituted in a Chartered High Court in the exercise of its ordinary original jurisdiction inherited from the Supreme Court charging neglect of duty on the part of a temple trustee does not require the leave of the Court under s 18 of the Act (t)

After the passing of the Regulation above referred to the Board of Revenue took over the management of some endowments but in the large majority of cases they did not take charge of endowments created by private individuals The operation of the Act however is not confined to such endowments as *had actually been taken under the management* of the Board of Revenue under the old Regulations The Act applies to every public religious endowment to which the provisions of the old Regulations applied, that is to say to every public religious endowment created by the preceding Governments of this country and by individuals whether the management of the endowment was taken over by the Board of Revenue or not (u)

Reading s 92 of the Code and the Religious Endowments Act together we have the following result —

(1) No suit in respect of *charitable* endowments of a public nature can be brought ... any of the reliefs specified in sub section (1) of section 92 ... brought except in conformity with the provisions of that sub-section

(r) See *Suhar ma v Subrama a Iyer* (1916) 39 Mad 700 ... 3 I C 211

(s) *Subramania v Krishnaswamy* (1919) 4 Mad 668 53 I C 605

(t) *Panch Cowrie Mull v Chumroo Lall* (1878) 3 Cal 563 ... *Krish a ...* (1901) 24 Mad ...

(u) ... *Sh or tan v Ram Larga ...* ... *Muthu v Ga gathara* ... Mad 95

(2) In the case of *religious* endowments of a public nature *to which the Religious Endowments Act applies* a suit charging the trustee manager superintendent or a member of a committee of a mosque temple of religious establishment with *misfeasance breach of trust or neglect of duty* may be brought under the provisions of that Act with the leave of the principal Civil Court of original civil jurisdiction in the District in which the mosque temple or religious establishment is situate as provided by s 18 of the said Act or it may be brought under the provisions of the Code with the consent of the Collector as provided by s 92 of the Code (*v*)

(3) No suit in respect of *religious* endowments of a public nature *to which the Religious Endowments Act does not apply* claiming any of the reliefs specified in sub section (1) of section 92 can be brought except in conformity with the provisions of that sub section

Death of a plaintiff pending suit—It has been held by the High Court of Allahabad that where a suit is brought by two persons under this section and one of them dies pending the suit the suit abates unless some other person is brought on the record in place of the deceased. Such person must be one who has an interest in the trust and he must have obtained the consent of the Advocate General as required by this section (*w*) On the other hand the High Court of Madras has held that a suit brought under this section being a representative suit no question of abatement can arise and the Court has power under O 1 r 10 (2) to add other persons interested in the trust as parties not because they are the legal representative of the deceased plaintiff but because they had become parties to the representative suit by the very fact of its having been instituted on behalf of all persons interested in the trust and thatthe consent of the Advocate General to such addition is not necessary (*x*) The Madras decisions have been followed in Lahore (*y*) and Rangoon (*z*) It has since been held by the Judicial Committee that where one of the two plaintiffs dies the suit does not abate as a suit under this section is a representaive suit (*a*) The Allahabad decision it is submitted is not correct.

Death of defendant trustee pending suit—Where a suit is brought under this section against a trustee not only for his removal but for framing a scheme and the scheme is one of the main reliefs sought the suit does not abate on the death of the trustee and his successor in office may be brought on the record as a party defendant (*b*) The suit of course would abate if it was solely for the removal of the trustee

Specific Relief Act 1877 s 42—Where a suit falls within this section the plaintiffs cannot evade the requirements of the Code by framing the suit as one under s 42 of the Specific Relief Act (*c*) At the same time where the suit is one maintainable under this section and the plaintiff seeks any of the reliefs specified in the section s 42 of the Specific Relief Act does not apply Thus if a suit is brought under this section for a *declaration* that the defendants are not the lawful trustees and for the appointment of new trustees the suit will not be dismissed because consequential relief such as delivery of the trust property to the new trustees is not claimed (*d*) [Sec 42 of the Specific Relief Act provides in effect that where a suit is brought for a

(*v*) *Venkatara ga v Krishnama* (1914) 37 Mad 184 0 I C 515 *Hansraj v Anant* (1918) 4 Bom 74 756 48 I C 514
(*w*) *Chhabila Ram v D rga* (1915) 37 All ‗96 ‗8 I C 691
(*x*) *Pa meswaran v Narayanan* (1917) 40 Mad 110, 34 I C 394 *Sayyed v Dost* (19 4) 47 Mad L J 745 85 I C 666 (3) A.M. 244
(*y*) *Gopi Das v Lal Dast* (1918) 1 R no 97 p 3 1 47 I C 983
(*z*) *C E Dooply v M E Moolla* (1927) 5 Rang 263, 103 I C. 61 ('27) A R. 180
(*a*) *Anand Rao v Ramdas* (19 1) 48 I.A 12, 16 48 Cal 493 497-498 6 I C 737 ('21) A PC 1‗3
(*b*) *Sivag ana v Adv Gen* (1915) 28 Mad L J 174 27 I C 874
(*c*) *Mufti v Fazal* (19) 44 All 6 67 I C. 659 ( ) A.A 349
(*d*) *Neti Rama v Venkatacharulu* (1903) 23 Mad 450 *Srinivasa v Srinivasa* (1893) 16 Mad 31

declaratory decree and the plaintiff is able to seek further relief than a mere declaration but omits to do so the suit should be dismissed]

Dismissal of suit by trustees no bar to suit by Advocate General —The fact that de jure managers and trustees of a public charity have been held in a previous suit to have lost their right by limitation to oust de facto trustees does not confer on the latter immunity from suit on the part of the Advocate General under this section (e)

Limitation—Accounts against trustee de son tort —A suit for account under this section against a trustee de son tort is governed not by s 10 of the Limitation Act, but by art 120 of the Limitation Act Such a trustee is only liable to render accounts for 6 years preceding the suit (f)

Relators cannot appeal in their own right —Where a suit instituted under this section by the Advocate General at the instance of relators is dismissed and the Advocate General does not think fit to appeal the relators are not competent to file an appeal on their own account against the decree dismissing the suit (g) The reason is that relators are not parties to the suit (h)

Cy pres doctrine —Though the section does not expressly empower the Court to apply the cy pres doctrine in the settling of schemes it would seem that the Court has the power to apply the doctrine (i) But it has no jurisdiction to apply the cy pres doctrine extra territorium (j)

Exercise of powers of Advocate-General outside presidency towns.

93 [S 539, last para] The powers conferred by sections 91 and 92 on the Advocate General may, outside the Presidency towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf

Collector —An Assistant Collector has no power under this section to give his consent to the institution of a suit of the kind contemplated by s 92 [or s 91] in the absence of the Collector Where such a suit is instituted with the consent of the Assistant Collector but not with the consent of the Collector the plaint must be rejected under O 7 r 11 (k)

Visitatorial power of Collector —Formally the Collector had a visitatorial power enabling him to enforce an honest and proper administration of religious endowments The connection of the Government in its *executive capacity* with Hindu and Mahomedan foundations was brought to an end for Bombay by Bombay Act 7 of 1863 and for Bengal and Madras by Act 20 of 1863 (l)

Collector s refusal to sanction proceedings —The Advocate General it seems may give his consent to a suit to be instituted outside the Presidency towns though the Collector may have refused to give his consent under this section (m)

(e) *Lakshmandas* v *Jugalkishore* (1898) Bom 16 See also *Gopu* v *Rajammal* (19) 43 Mad L J 448 45 4 3 69 I C 15 ( ) A M 394

(f) *Bihari Lal* v *Shi a Narain* (19) 47 All 17 84 I C 631 (4) A A 884

(g) *Jan Mahom d* v *Syed Nurudin* (1908) 3 Bom 155

(h) *Attorney Ge e al* v *Wright* (1841) 3 Beav 447 *Attorn y Ge eral* v *Loga* [1891] Q B 100 106

(i) *Ma ior of Lyons* v *Advocate General of Bengal* (1876) 1 Cal 303 3 I A 3?

(j) *Kanj* v *Advocate General* (1916) 18 Bom L R 60

(k) *Somchand* v *Chhaganlal* (1911) 35 Bom 243 10 I C 803

(l) *Ma ohar* v *Lakhm ram* (188) 1 Bom 47 60

(m) *Aromalla* v *Arimanda* (5) A M 401 106 I C 375

PART VI

Supplemental Proceedings

Supplemental proceedings

94 [*New*] In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison,

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property,

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold,

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property,

(e) make such other interlocutory orders as may appear to the Court to be just and convenient

This section summarizes the general powers of the Court in regard to interlocutory proceedings The details of procedure have been relegated to Schedule I

Clauses (a) and (b) Arrest and attachment before judgment.—See O 38 below

Clauses (c) and (e) Temporary injunctions and interlocutory orders — See O 39 below

Clause (d) Appointment of receiver —See O 40 below See also notes to s 51 Receiver in execution proceedings

Compensation for obtaining arrest attachment or injunction on insufficient grounds

95 [Ss 491, 497] (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction

Changes introduced by the section —This section corresponds with ss 491 and 497 of the Code of 1882 except that the words by its order have been substituted for the words in its decree The words by its order indicate that the award should no longer form part of the decree but should be embodied in a separate order The order is now made appealable by s 104

Scope of the section —This section provides for compensation to the defendant in the two following cases —

I (1) Where an arrest or attachment before judgment *has been effected* or a temporary injunction *has been granted* (see Orders 38 and 39) and

(2) such arrest attachment or injunction was *applied for on insufficient grounds*

II (1) Where an arrest or attachment before judgment *has been effected* or a temporary injunction *has been granted*

(2) the plaintiff *fails* in the suit and

(3) there was *no reasonable or probable ground for instituting the suit*

In case II it is not necessary to show that the arrest attachment or injunction was applied for on insufficient grounds It is enough if the plaintiff *fails* in the suit and there was no *reasonable or probable ground* for instituting the suit The principle is that a plaintiff who has obtained an arrest attachment or injunction by instituting a *suit* without any probable ground should be punished as much as a plaintiff who has obtained the *process* on insufficient grounds

This section is no bar to a regular suit —This section provides a summary remedy for an injured defendant and enables him to seek compensation for the injury done to him by the plaintiff by an *application* to the Court instead of by a *suit* But the remedy under this section is optional and an injured defendant may if he so choses institute a regular suit against the plaintiff for compensation for wrongful arrest attachment or injunction (n) This clearly appears from sub section (2) which impliedly recognizes the right of a defendant to institute a regular suit for compensation (o) In a *suit* for compen ation however the plaintiff must prove malice in fact in addition to the facts required to be proved by this section (p) But whether the proceeding is by

(n) *Har Kumar* v *J gat Bandhu* (19) 3 Cal 1008 100 I C 318 (7) A C 247

(o) See *Pala* v *Ud yar* (1909) 3 Mad 170 I C 345

(p) *Nanjappa* v *Ganapath* (191) 3 Mad 598 1 I C 507 See *Imperial Tobac o Co* v *Bonnan* (1927) 47 Cal L J 4 106 I C 277 (28) A C 1

way of suit or by an application under this section the defendant is not entitled to any compensation unless the attachment has been effected Merely procuring an order *for attachment before judgment however maliciously is not sufficient to entitle the* defendant to compensation (*q*) As to the period of limitation for a suit see Limitation Act 1908 Sch I arts 19 29 36 and 42 and al o the undermentioned cases (*r*) As to suits for damages for temporary injunction improperly obtained see the undermentioned ca es (*s*)

On insufficient grounds —The e words are equivalent to ' without reason able and probable cause (*t*)

An award under this section is a bar to a regular suit —Once an appli cation is made by a defendant under this section for compensation for wrongful arrest attachment or injunction *and* an order is made under this section the defendant cannot institute a regular suit for compensation for the *same wrong* whether any com pensation is awarded to him or not In other words the disposal of an application under this section has the effect of res judicata so as to bar any subsequent suit in respect of the *same cause of action* Note that it is the disposal of the application and not the *mere presenting* of the application that is a bar to a regular suit

Amount of compensation —The amount of compensation that may be awarded under this section cannot exceed Rs 1 000 Where a defendant claims a larger amount of compensation he must institute a regular suit

Right of defendant not served with summons to apply for compensation under this section —If a defendant is arrested before judgment he is entitled to apply for compensation under this section though he has not been served with the writ of summons in the suit (*u*)

Counter claim for compensation in a summary suit —If a defendant who is arrested before judgment in a summary suit brought against him on a negotiable instrument under O 37 claims compensation for arrest under this section he is entitled on that ground to apply for leave to defend the suit under O 37 r 3 and if a *prima facie* case is made out leave to defend should be given (*v*)

Provincial Small Cause Courts —A Provincial Small Cause Court has no juris diction to make an order for the attachment before judgment of *immovable* property But it may order an attachment before judgment of *movable* property and if the attachment was obtained on insufficient grounds it may award compensation to the defendant under this section (*w*) See s 7 (b) (i) and O 38 r 13

Appeal —An appeal lies from an order under this section see sec 104 sub sec (1) cl (f)

S 491 of the Code of 1882 provided for compensation for wrongful arrest and attachment S 497 provided for compensation for wrongful injunction An order under s 497 was appealable under that Code (*x*) but orders under s 491 were held not to be appealable (*y*) The present section combines the provisions of ss 491 and 497 and s 104 gives a right of appeal from all orders under this section whether they are orders made on an application for compen ation for wrongful injunction or for wrongful arrest or attachment

(*q*) *Rama* v *Govinda* (1916) 39 Mad 9 3 I C 449
(*r*) *Ram Narain* v *Umrao Singh* (1907) 9 All 615 *S rajmal* v *Manekchand* (1904) 6 Bom L R 04 *Manavikraman* v *Arunlan* (1846) 19 Mad 80 *Murug a* v *Jattaram* (1900) -3 Mad 6 1 *Sokkal n gam* v *Krishnaswam* (19 0) 33 Mad L J 3*4 53 I C 786
(*s*) *Nand Coomar* v *Gour S nkur* (18 0) 13 W R 303 *Mohini* v *Surendra* (1915) 4- Cal 550 5 6-557 26 I C *96
(*t*) *Roulet* v *Fetteri* (1894) 18 Bom 717 7*0
(*u*) *Syed Ali* v *Adib* (1891) 15 Bom 160
(*v*) *Roulet* v *Fetterle* (1894) 18 Bom 717
(*w*) *Ibrahim* v *Sa garam* (1903) 6 Mad 504.
(*x*) See Code of 188 s 588 cl. (i)
(*y*) *Narasi ga* v *Govinda* (1901) 24 Mad 6 *Lok Nath* v *Amir Si gh* (1906) 28 All 61.

Undertaking —Where a temporary injunction has been granted on an undertaking by the plaintiff to compensate the defendant for any loss that may arise by reason of the injunction the undertaking is enforced by an application under this section to the Court which granted the injunction *A* attaches a house in execution of a decree again t *B* *C* sues for a declaration that the house belongs to him and obtains a temporary injunction staying the sale on his undertaking to pay interest to *A* at 6 per centum on the valu of the house if his suit be dismissed *C* s suit is dismissed In such a case the procedure to be adopted by *A* to recover the interest from *C* is to apply not to the Court executing the decree but to the Court which granted the injunction ( )

Chartered High Court —Where a temporary injunction was granted by the High Court of Bombay on an undertaking by the plaintiff under Rule 329 of that Court to pay such sum by way of damages as the Court may award as compensation in the event of the party aff cted sustaining prejudice by such injunction it was held that the Court had power under that rule to award comp nsation to the defendant exceeding Rs 1 000 on an *application* by the defendant in that behalf (*a*)

(z) *Varajlal v Ka t r* (1898) 2 Bom 4

(a) *H ji Abd l v Mu j bh i* (19 6) 8 Bom L R 10 0 I C 63 (6) A B 3

PART VII

Appeals

Appeals from Original Decrees

96 [S 540 Jud Act, 1873 s 49] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court

Appeal from original decree

(2) An appeal may lie from an original decree passed *ex parte*

(3) No appeal shall lie from a decree passed by the Court with the consent of parties

Changes introduced by the section—Sub section (3) is new In other respects this section corresponds with s 540 of the Code of 1882 As to the effect of sub section (3) see notes below under the head Sub section (3) consent decrees not appealable

Compare Judicature Act 1873 s 49 which provides that no order made by the High Court or any judge thereof by the consent of parties shall be subject to any appeal except by leave of the Court or judge making such order

Letters Patent appeals—The *right of appeal* from a decree of a single Judge *of a High Court to the High Court is governed not by this section but cl 15 of the* Letters Patent The Code makes no provision for an appeal within the High Court that is to say from a single Judge of the High Court This right of appeal depends on the cl 15 of the Charter (*b*) But as regards *procedure* the Court and the rules there in contained especially the rules contained in O 41 apply to proceedings in a High Court under the Letters Patent save so far as the Code expressly provides to the contrary (*c*)

Right of appeal—It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Court such right must be given by statute or by some authority equivalent to a statute (*d*) Unless a right *of appeal* is clearly given by statute it does not exist whereas a litigant has independently of any statute a right to institute any *suit* of a civil nature in some Court or another (*e*) No right of appeal can be given except by *express* words (*f*) Note in the present section the express words an appeal shall lie from every decree Rights of appeal again are substantive right They are not mere matters of procedure Hence an Act

(*b*) D be I Nath v B b dl I (1916) 43 Cal 90 93 94 33 I C 74 S Thapathi v S y (190) M 1 5 9 S wel B h n J g v H j S H al (1913) 3 I m 1 1 C 33 S J I H m ma (1918) 0 I m 1 1 18 1 18 47 I C 449

(*c*) S I H k n S (19 1) 48 I A 6 45 C 1 451 60 I C 4 C 1) A I C 60

(*d*) M ak h S br v (1888) 11 Mad 26 33 14 I A 160 I r I v S I rr (1904) 7 M 1 04 I i roo H t l g Co Coll cto f I poon (1913) 40 Cal 1 33 I A 19 00 16 I C 188

(*e*) Za r H n Kh n v Kh r k t J (1906) 28 All 4 0

(*f*) Na y v S t ry f St te (1896) 0 I m. 803

which takes away an existing right of appeal must not be applied retrospectively in the absence of express enactment or necessary intendment (g)

Agreement not to appeal —An agreement whereby the parties agree not to appeal from a decree is binding upon the parties thereto if it is for a lawful consideration and is otherwise valid (h) But an agreement by the next friend of a minor not to appeal is not binding on the minor (i)

Decree —As to the distinction between a decree and an order see p 5 above All decrees are appealable unless the appeal is barred under this Code or any other law But all orders are not appealable The only orders appealable are those specified in 104

Where decree not drawn up —No appeal can be entertained from a decree unless the decree has been drawn up (j) See notes to 33 also notes to s 97 Where preliminary decree not drawn up

Appeal from ex parte decree —S 540 of the Code of 1882 as it originally stood did not contain any clause allowing appeal from ex parte decrees The clause allowing such appeals was added by s 4o of the Civil Procedure Code Amending Act 7 of 1888 Prior to that Act it was doubted in some cases whether an appeal lay from an ex parte decree As to the powers of an appellate Court in the matter of ex parte decree see notes to O 9 r 13 Whether remedies concurrent

Forum of appeal —The value of a suit that is the amount or value of the subject matter thereof determines the forum of suit that is the Court in which the suit is to be filed It also determines the forum of appeal that is the Court to which the appeal lies What then is the value of a suit for the purposes of appeal Now a plaintiff may in his plaint fix a sum *definitively* as the amount of his claim as in a suit for debt or he may fix it *approximately or tentatively* as in a suit for accounts or for mesne profits [O 7 r 2] Where the plaintiff fixes a sum *definitively* it is that sum which determines the forum of appeal and not the amount awarded by the decree and involved in the appeal Where the plaintiff fixes a sum *approximately* there is a difference of opinion as to the forum of appeal According to the Calcutta High Court it is the amount decreed by the first Court as the amount due to the plaintiff which determines the forum of appeal (k) According to the Bombay (l) and Allahabad (m) High Courts it is the amount determined by the first Court as the amount due to the plaintiff *and* accepted by the plaintiff by payment of additional court fee which determines the forum of appeal According to the Madras High Court it is the amount or value of the subject matter as fixed in the plaint though approximately which determines the Court to which the appeal lies and not the amount decreed *It has accordingly been held by that Court that where in a suit for account filed in* the Court of a District Munsif whose jurisdiction is limited to suits of which the value does not exceed Rs 2,500 the plaintiff fixes his claim approximately at Rs 2 000 and the Munsif passes a decree for more than Rs 5 000 the appeal from the Munsif's decree lie not to the High Court but to the District Court (n) In a recent

(g) *Colonial Sugar Refining Company v Irving* [1905] A C 369 *Delhi Cloth and General Mills Co v Income Tax Commissioner Delhi* (19) 54 I A 4 1 9 Lah 54 *Nana v Sheku* (1908) 3 Bom 337 *Sadar Ali v Doliluddin* (19 9) 56 C l 51

(h) 4 Ali Ind jet (18 1) 14 M I A 03 I tap Ch ler v 4 Hoon (188)8 Cal 4 S alo G j d S gh D rg I ura (19 5) 4 All 63 88 I C 68 (5) A A 03 [F B]

(i) *Rhodes v Swithenbank* (1889) Q B D 57

(j) *Bai Dr h v Sh h I ush a* (1910) 34 Bom 18 4 I C 8 3 ... *Irr* ... *dI* (19 4) 33 ( ) 1 J 1 81 I C 5 (4) A C 1006 [Limitation]

(k) *M h* ... *Ch* ... *a* (18 0) 1 C I 04 (I I Ph ... *Abd I H* ... *b Kl* (1904) 31 C 1 36 *Ij t Ib Bh* ... *Ch* ... *M* (1907) 34 C 1 9 4 [F B]

(l) *Ib hi* ... *B j* (18 8) 0 B 1 6 B it ... *H j Ph* ... *J* ... *Ij* (1913) 15 Bom L R 10 1 1 I C 53

(m) (... *n L Ij* ... *L hri D* ... (1910) 3 All ... I C 8 ... See also 34 Cal 9 4 9 S p Mookerji J

(n) *K* ... *ayya* ... *Te k* (191) 40 Mad 1 39 I C 433 [F B]

case (o) the Allahabad High Court has adopted the same rule as Madras Where a suit is dismissed by the first Court—in which case the mesne profits remain undetermined—the sum stated in the plaint determines the forum of appeal (p) A Full Bench of the High Court of Calcutta has recently held that where a suit is properly brought in the Court of a Munsif for recovery of possession of land and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif the Munsif has jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction The value of such a suit for purposes of jurisdiction is the value of the immovable property plus mesne profits *up to the date of the suit* where such profits are claimed If a suit is rightly entertained as within the jurisdiction of the Munsif and a decree passed his power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit The forum of appeal is determined by the value of the suit and not by the amount decreed (q) The undermentioned decisions (r) of the same High Court must be taken to have been overruled by the Full Bench case See notes to s 6 on p 19 above also notes to s 15 Over valuation and Under valuation on p 89 above

A decree is passed by Court *M* in respect of a cause of action which arose at Kadiri Appeals from decrees of Court *M* lie to Court C Subsequently Kadiri is transferred to the territorial jurisdiction of Court *I* from which appeals lie to Court *B* To which Court does the appeal from the decree lie to Court *C* or to Court *B*? The answer is to Court *B* because a transfer of territorial jurisdiction *ipso facto* effects a transfer of venue (s)

Who may appeal—An appeal under this section may be preferred by any of the following persons —

1 Any party to the suit *adversely affected by the decree* (t) or if such party is dead by his legal representative (u) [see s 146]

2 Any transferee of the interest of such party who so far as such interest is concerned is bound by the decree provided his name is entered on the record of the suit (v) [See notes to s 4 Representative on p 156 above]

3 An auction purchaser may appeal from an order in execution setting aside the sale on the ground of fraud [See notes to s 47 Appeal on p 166 above]

No person unless he is party to the suit is entitled to appeal under this section (w)

We have said above that any party to a suit adversely affected by a decree may prefer an appeal from the decree The question whether a party is adversely affected by a decree is a question of fact to be determined in each case according to its particular circumstances It is clear that if a plaintiff s claim is decreed in its entirety and all the issues are found in his favour the plaintiff cannot appeal from the decree In case the plaintiff s claim is decreed in its entirety but one of the issues is found against him can the plaintiff appeal from the adverse finding ? It has been held that he cannot (x) The reason is that the very fact that the decree is entirely in the plaintiff s favour notwithstanding a finding adverse to him on one of the issues shows that such finding was unnecessary to the determination of the plaintiff s suit It has been stated in the

(o) *M ha mad* [illegible] *Bak h* (19) 47 All 534 86 I C 10 ( ) A A 3 6

(p) *S ly K* [illegible] (1919) 41 [illegible] I C 4

(q) *Budhyadh* v [illegible] (19) 53 [illegible] 10 6 [illegible]

(r) *Bh pend a* [illegible] (1910) 43 Cal 650 8 I C 34 [illegible] *Moh nanda* (1919) 24 C W N 34 [illegible]

(s) *S bbayya* v *Rach yya* (1914) 3 Mad 477 26 I C 19

(t) *Kr h a* v *M he h Chand a* (190) 9 C W N 84

(u) *Cajadh* v [illegible] (18 1) B I R 14

(v) *M* [illegible] (18 9) [illegible]

(w) *P* [illegible] v *Official L q* [illegible] (1919) P R no 9 p 19 49 I C 881

(x) *S tary of St te* v *Saminatha* (1918) 37 M I [illegible] 1 I C 16

notes to s 11 pp 70 71 above that when a finding on an issue is not necessary to the determination of a suit such finding does not operate as *res judicata* and it is an elementary principle that an appeal is not admissible on any point that does not operate as *res judicata* Similarly if a suit is brought by A against B and the suit is dismissed in its entirety B cannot appeal from the decree And even if one of the issues is found against B B cannot appeal from the finding for such finding does not *operate* as *res judicata* for the reason stated above (y) See notes to s 11 Decision in the former suit must have been necessary to the determination of that suit on p 71 above and the cases there cited

It sometimes happens where there are *two or more* defendants that although a suit is dismissed as against one of them in other words the decree on the face of it is entirely in his favour the decree impliedly negatives the right claimed by such defendant as against the plaintiff and the other defendants In such a case it has been held that an appeal lies at the instance of such defendant on the ground that he is adversely affected by the decree X owes Rs 2 000 to A A assigns the debt first to B and then to C C sues A and B to recover the debt alleging that the assignment to B had become void through non fulfilment of the conditions upon which it was made A decree is passed against A but the suit is dismissed as against B Here the decree *necessarily implies* the finding that the assignment to B had become void inasmuch as but for such a finding the decree could not have been passed in favour of C who admittedly was the *second* assignee of the debt B may therefore appeal from the decree though as against him the suit was dismissed ( )

In some cases an appeal may be preferred by a defendant against his co defendants A sues two Hindu brothers B and C on a promissory note passed by B for money borrowed by him (B) as manager of the family alleging that B and C were joint and that the loan was obtained by B for family purposes B does not appear at the hearing C appears and admits that he and B are joint but denies that the loan was obtained for family purposes An issue is raised as to whether the debt contracted by B was for family purposes It is found by the Court that the loan was obtained by B for family purposes and a decree is passed against B and C Here C can appeal from the decree as between himself and B The rule is that when a Court deals with a case as raising not only a question between the plaintiff and the defendants but also as between the defendants one of the defendants can appeal from the decree as between himself and the other defendants (a) See notes to s 11 Res judicata between co defendants on p 00 above

Joinder of appellants —It is irregular for defendants with different defences to a suit and with different grounds for appeal to join in a single appeal (b)

Sub section (3) consent decrees not appealable —*Sub section (3)* is new It declares that no decree passed by consent of parties shall be appealable Under the Code of 1882 consent decrees were passed under s 375 Under the present Code (c) a consent decree may be passed under O 23 r 3 This rule corresponds with s 375 of the Code of 1882 except that certain words which occurred at the end of s 375 have now been omitted S 375 ran as follows —

If a suit be adjusted wholly or in part by any lawful agreement or compromise or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit such agreement compromise

Compromise of suit

(y) [illegible] (19 4) 4 M 1 I J 44 84 I C 94 ( ) A M 264
( ) Ja D [illegible] (1891) I All 11 [illegible] (190) 9 C W N 844 [illegible] (190) 30 M 1 44 [illegible] (19 4) 4 M 1 633 83 I C 960 (4) A M 6 J [illegible]

[illegible] (1 4) 4 M I J 61 8 I C 86 (4) A M 8 8
( ) [illegible] (1894) 18 Bo 0
(b) Hodg [illegible] D [illegible] Lord Br [illegible] (1900) 5 C W N 1
( ) [illegible] (19) 3 Lah 1 68 I C 8 ( ) A L 30

or satisfaction shall be recorded and the Court shall pass a decree in accordance therewith so far as it relates to the suit *and such decree shall be final so far as it relates to so much of the subject matter of the suit as is dealt with by the agreement compromise or satisfaction*

O 23 r 3 is a reproduction of s 375 with the omission of the words italicized above (*d*) This omission has been supplied by sub section (3) of the present section The said words barred an appeal from a consent decree *only so far as* such decree related to so much of the *subject matter of the suit* as was dealt with by the agreement compromise or satisfaction on which the decree was based. If a consent decree dealt with any matter extraneous to the suit that is matters that *did not relate to the subject matter of the suit* it was held that the decree *though passed with the consent of parties* was appealable and that it should be modified by omitting such terms as did not relate to the subject matter of the suit (*e*) As regards the terms so excluded it was held that they might be enforced in a separate suit as a *contract* (*f*) It would be so also under the present Code See in this connection the observations of the Judicial Committee in *Hemanti Kumari Debi* v *Midnapur Zamindari Company* (*g*)

Both under O 23 r 3 and the corresponding s 375 of the Code of 1882 the agreement or compromise in terms of which the Court is invited to pass a consent decree must be lawful It was accordingly observed by the High Court of Bombay in *Cowasji* v *James Scott* (*h*) a case under s 375 that notwithstanding the declared finality of the decree an appeal against it would be maintainable where the party against whom the decree was passed alleged that there had been in fact no lawful agreement come to in which case the condition precedent to the making of the decree would not be fulfilled These observations were mere *obiter dicta* but they were adopted by the High Court of Madras in *Sridharan* v *Puramathan* (*i*) where it was held that an appeal would lie from a consent decree if the agreement in terms of which the decree was passed was not lawful The present Code does not allow an appeal from a consent decree in *any* case But it is competent to either party to appeal from the *order* recording the compromise where the compromise is not a lawful compromise on the ground that the Court had no power under O 23 r 3 to record a compromise that was not lawful [O 43 r 1 cl (m)] See notes to O 23 r 3 Appeal

Plaintiffs sued upon an account stated The Court found that the account stated was a deliberate fabrication and fraud and the plaintiff had to fall back on items in the general account Each of these was found to be barred by limitation but defendants consented to a decree for such items as plaintiff could prove A decree was passed on this footing The Privy Council held that it was a consent decree and not appealable and that if it were not a consent decree plaintiffs claim would have to be dismissed (*j*)

Procedure for setting aside consent decrees—Sub section (3) in so far as it bars an appeal from consent decrees gives effect to the principle that a judgment by consent acts as an estoppel (*k*) A consent decree however may be set aside on any ground which would invalidate an agreement such as misrepresentation fraud or mistake (*l*) This cannot be done by an appeal and it must be done by a fresh suit brought

(*d*) The present section was applied at the commencement of rule 3 of Order 23 with it [illegible] material to notice here. See notes to O 23 r 3

(*e*) *Sitaram* v *Thomas* (189) 18 Mad 410 *Ladji* v *Cedhurdas* (190) 26 Bom 6 9 *Mangesh* v *Mohini* [illegible] *Dewan* [illegible] *Kasim* (190) 30 Mad 141 [illegible]

(*f*) *Jasamdil* v *Phulan* (190) 31 Cal 46

(*g*) (1919) 46 I A 240 46 Cal 49 49 [illegible]

(*h*) (189) 16 Bom 0 at p 1 See also *Lakshmi* v *Cursetbari* (190) 26 Bom 6 9

(*i*) (1900) 3 Mad 101

(*j*) *Ramachandra* v *Chintaman* (19 0) 3 Mad 1 I J 68 4 I A [illegible] 39 [illegible]

(*k*) *R* [illegible] (1) 1 Ch 3

(*l*) [illegible] (189) [illegible] 3 (mistake common to both parties) *Wilding* v *Sanderson* [189] 1 Ch 34 (mistake of counsel) See also *Bibee Solomon* v *Abdool Azeez* (1881) 6 Cal 68 [illegible]

for the purpo e (m) In some cases it may be done by an application for a review (n) But it cannot be done by a rule (o) See notes to s 11 Consent decree and estoppel.

By consent of parties —To constitute consent there must be an agreement between the parties Mere acceptance by a party of an order offered by the Court does not amount to consent (p)

Appeal from final decree where no appeal from preliminary decree

97 [*New*] Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree

Preliminary decree —For definition of preliminary decree see s 2 (2) above

Appeal from preliminary decree —This section is new The object of the section is to estop parties aggrieved by a preliminary decree who do not appeal from such decree within the period of limitation from afterwards disputing its correctness in any appeal which may be preferred from a decree

This section enacts that where a party aggrieved by a preliminary decree does not appeal from such decree within the period of limitation he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree The reason of this enactment is that it is unreasonable that a party aggrieved by a preliminary decree should allow proceedings to be carried on to their final stage and large costs to be incurred and then object to the preliminary decree in an appeal from the final decree *Recent Calcutta decisions under the Code of 1882 were quite the other way* *According to* the e decisions a party aggrieved by an order in the nature of a preliminary decree was not bound to appeal from the order though the order was appealable as a decree he was at liberty to wait until the final decree was passed and then to dispute the correctness of the order in an appeal from the final decree though the period of limitation for an appeal from the order had then expired Thus it was held that when an order was passed in a suit for dissolution of partnership and accounts declaring the shares of the parties and referring the case to a commi sioner for taking accounts it was open to the party aggrieved by the order to dispute its correctness in an appeal from the final decree though no appeal was preferred from the order and the period prescribed by the law of limitation for appealing from the order had then expired (q) In a sub equent case it was held by a Full Bench of that Court in *Khadem Hossein* v *Emdad Ho ein* (r) [Maclean C J and Rampini J dis enting] that where an order was pa ed in a suit for partition declaring the rights of the parties (s) it was open to the party aggrieved by the order to dispute its correctne s in an appeal from the final decree though no appeal was preferred from the order within the time allowed by law The contrary had been laid down in an earlier case decided by the ame High Court (t) but that

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(m) *H H f ld B k g Co I te* [18] [Ch 2 3 1 *orth W l l g* [1836] 1 Ch 6 3 *W l l ng* v *Sa ter* [189] ( ) 34 *M ral I h oobl j* (1891) 1 B n 94

(n) *Foot* v *T* (1884) 10 Cal 61 61

(o) *F t ab S b* (191) 36 Bom 11 I C 68

(p) *H B r* (1890) W N 116 *Hal d* *F rdl* (1 93) 10 T L R 139

(q) *L a Nath B Ka* (1896) 3 Cal 406 See O 0 r 1

(r) (190) 9 Cal 8

(s) See O 0 r 18 below

(t) *B l a D F* v *Clu d Dey* (1 96) 3 Cal 9

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(*d*) There are certain words [illegible] at the [illegible] of Order 23 [illegible] See notes to O 23 r 3

(*e*) [illegible] v *Thomma* (18[illegible]) 19 M[illegible] 410 [illegible] v [illegible] (190[illegible]) 26 Bom 6[illegible] 9 [illegible] *Dread* [illegible] v [illegible] (190[illegible]) 30 Mad 4[illegible]

(*f*) *J*[illegible] v [illegible] (1907) 34 Cal 4[illegible] 6

(*g*) (1919) 46 I A [illegible] 10 46 [illegible] 48 [illegible] 49 3[illegible]

(*h*) (18[illegible]) 16 Bom [illegible] *Pr*[illegible] (190[illegible]) 6 Bom [illegible] 6[illegible] 9

(*i*) (1900) 3 Mad 101

(*j*) *Lamaha*[illegible] *Chata* (19[illegible]0) 3[illegible] M[illegible] L J [illegible] 1 A 200 [illegible]

(*k*) [illegible] (18[illegible]) [illegible] 37

(*l*) [illegible] v *Futer* (18[illegible]) [illegible] 3 (mistake common to both parties) [illegible] v [illegible] (189[illegible]) [illegible] 34 (mistake of counsel) See also [illegible] *Sdomo* [illegible] (1881) 6 Cal 6[illegible]06

for the purpose (m) In some cases it may be done by an application for a review (n) But it cannot be done by a rule (o) See notes to s 11 Consent decree and estoppel

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(m) *H d l r field l a k g (* *L st* [189] ( ) 3 1 *o ll* *W ll j* [1896] 1 ( ) 6 3 *H ld j* *S der* [189] (h 34 *M al* *F l* *ll j* (1891) 1 Bom 94

( ) 4 *Foot h* *T a* (1884) 10 Cal 61 61

(o) *F l l* *So h* (191) 36 Bom 11 I C 68

(p) *All* *Brow* (18 0) W N 116 *H l da F dl a* (1893) 10 T L R 139

(q) *B* *Natl* *Ba* *Ka ta* (1896) 23 Cal 406 S O 0 r 1

(r) (190) 29 Cal 8

( ) S O 0 r 18 below

(t) *Bol* *D* v *Pan Chu dra Dey* (1896) 3 Cal 9

decision was dissented from by a majority of the Full Bench in *Khadem Hossein's* case Under this section omission to prefer an appeal from a preliminary decree precludes objections to it in an appeal from the final decree (u) It is to be noted that the present section applies only to preliminary decrees passed after the commencement of this Code For preliminary decree see O 20 below

Where preliminary decree not drawn up —A right of appeal under this section only arises when a preliminary decree is passed that is drawn up It is the duty of the Court and not of the parties to see that a decree is drawn up Unless a decree is drawn up there is no appeal The provisions of this section do not therefore apply unless the preliminary decree is drawn up (v) See notes to s 33 and notes to s 96 Where decree not drawn up on p 289 above

Two preliminary decrees —The Code it seems contemplates only one preliminary decree (w) The High Court of Calcutta however has held that there may in an exceptional case be more than one preliminary decree (x)

Final decree passed prior to or during pendency of appeal from preliminary decree —Under the Code of 1882 it was held that where *after the passing of the final decree* a party appealed from an order in the nature of a preliminary decree but did not also appeal from the final decree that circumstance was a bar to the hearing of the appeal from that order (y) Under the present Code the High Courts of Madras and Allahabad have held that the mere fact that no appeal has been preferred from the final decree is no ground for not hearing the appeal from the preliminary decree whether the latter appeal is filed before or after the final decree if the preliminary decree is set aside the final decree falls with it (z) On the other hand it has been held by the High Court of Calcutta that where an appeal has been preferred only from the preliminary decree after the final decree has been passed the appeal is incompetent the reason given being that if the preliminary decree were reversed in appeal the final decree would remain unaffected as no appeal was preferred from it But it has been held by the same Court that the appellate Court may in a proper case allow the appellant to amend the memorandum of appeal so as to turn the appeal from the preliminary decree into one from both the preliminary and the final decree (a) If the final decree is passed after the filing of the appeal from the preliminary decree the appellant should file an appeal from the final decree (b) or at least inform the Court of the fact (c) In some cases where this course was not adopted it was held that the decree in appeal from the preliminary decree is infructuous because the final decree cannot be contingent on the result of the appeal (d) In a Calcutta case Mookerjee J enlarged the scope of the memorandum of appeal so as to convert it into an appeal against both the final and the preliminary decree (e)

(u) [illegible] (191[illegible]) 4[illegible] A 91 [illegible] Cal 914 [illegible] 10 [illegible]
(v) [illegible] (1[illegible]) [illegible] L R [illegible] 1014 [illegible] (1913) 3 [illegible] (1914) 16 [illegible] L R 6 [illegible] 60
(w) [illegible] (19[illegible]3) [illegible] L R [illegible] 834 [illegible] 1014 [illegible] A B 33
(x) [illegible] (19[illegible]3) Cal W N [illegible] 160
(y) [illegible] (1909) 36 C[illegible] 6 [illegible] 419 [illegible] (1910) 3 All [illegible] See [illegible] (191[illegible]) 34 All [illegible] 16 [illegible]
(z) [illegible] (1914) [illegible] 664 [illegible] (191[illegible]) 3 M [illegible] 14 I C 314 *Kashi* [illegible] *Lal* [illegible] (1914) 31 All [illegible] 4 I C 8 [illegible]
(a) [illegible] (19[illegible]) 41 Cal 1036 [illegible] 101 *Ibid* [illegible] (1913) 18 [illegible] L J [illegible] 10 See also [illegible] (19[illegible]) 3 [illegible] W N [illegible] A [illegible]
(b) [illegible] (1913) 18 Cal L J [illegible] 16 [illegible] *Mot Lal* [illegible] I R 14[illegible] 9 I C 45 [illegible] A B 43
(c) [illegible] *Mot Lal* [illegible] supra
(d) [illegible] (19[illegible]) 54 [illegible] 101[illegible] (19[illegible]7) A [illegible] 47 [illegible] (19[illegible]) [illegible] W N 61[illegible] 90 I C 3 0 (25) A [illegible] 90
(e) [illegible] (19[illegible]) 40 Cal L J [illegible] 84 I C 6[illegible] A [illegible] 19

98 [S 575] (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges

Decision where appeal heard by two or more judges

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal including those who first heard it

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court

Difference between the old and new section—This section corresponds with s 575 of the Code of 1882 except that the proviso to sub section (2) of the present section differs in several material respects from the proviso to the second paragraph of s 575 The proviso to the second paragraph of s 575 ran as follows —

Provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges and the Judges composing the Bench differ in opinion on a point of law *the appeal may be referred to one or more of the other Judges of the same Court and shall be decided* according to the opinion of the majority (if any) of all the Judges who have heard the appeal including those who first heard it

As to the points of distinction between the old and the new section see notes below The appeal shall then be heard upon that point only and By whom appeal to be heard upon point of law stated

Amendments—Sub sec (3) was added by the Repealing and Amending Act 18 of 1928

Difference of opinion as to part of decree—When a Bench of two Judges agree in reversing part of a decree but differ as to the rest the portion on which they agree will be reversed and the rest confirmed (*f*)

Differ in opinion on a point of law—No reference can be made under this section if the Judges differ on a question of *fact* The power to refer can only be exercised if there is a difference of opinion on a point of *law* (*g*)

(*f*) [illegible] (1[illegible]) 51 M [illegible] [illegible] 10[illegible] 1 3 [illegible] A M 1 0 [illegible] [illegible] Ogilr [illegible] (19[illegible]6) Lah 1 9 93 I C 344 ([illegible]6) A L 6

(*g*) Go[illegible] (1890) 17 C [illegible] 3

The appeal shall then be heard upon that point only —Under the old section it was the *appeal* that was referred to a third Judge when the Judges hearing the appeal differed in opinion on a point of law and it was held that on such reference *the whole appeal* was open for argument and not only the point of law on which the Judges had differed (*h*) Under the present section the Judges have to state the point of law upon which they differ and the appeal is to be heard *upon that point only*

By whom appeal to be heard upon point of law stated —Where a point of law on which the Judges hearing the appeal differ has been stated the appeal is to be heard upon that point by one or more of the *other* Judges of the Court This was in fact the practice followed in Bombay under the Code of 1882 (*i*) In Allahabad the appeal was heard by a Bench *including* the Judges who first *heard* it (*j*)

It is to be noted that while the appeal upon the point of law is under this section to be heard by a Judge or Judges other than those who first heard it the point is to be *decided* according to the opinion of the majority (if any) of the Judges who have heard the appeal *including those who first heard it*

Where Judges differ on a point of law but do not state the point.— *A* obtains a decree against *B* in the Court of a Subordinate Judge *B* appeals from the decree to the District Judge and the decree is confirmed in appeal *B* appeals to the High Court The appeal is heard by a bench of two Judges The Judges differ in opinion on a point of law but they do not state the point of law and deliver judgments as judgments of the Court without any reservation one Judge holding that the appeal should be allowed and the other that it should be dismissed In such a case the dissentient judgments operate as confirming the decree of the District Court under para 1 of sub sec (2) (*k*) The question still remains whether an appeal lies to the High Court under the Letters Patent from the confirming judgment of the two Judges Under the Letters Patent before they were amended in 1928 it was held that an appeal did lie from such judgment (*l*) Under the amended Letters Patent no appeal lies to the High Court (*m*) It may here be noted that where the Judges differ in opinion on a point of law but do not state the point of law and deliver judgments as judgments of the Court without any reservation they cannot afterwards state the point of law (*n*)

Appeal to High Court from award under Land Acquisition Act— This section applies to land acquisition appeals by virtue of the provisions of s 54 of the Land Acquisition Act 1894 (*o*)

Sub sec (3) Letters Patent appeal —This sub section is new It was added into the section by the Repealing and Amending Act 18 of 1928 It does no more than give effect to the decision before that Act namely that where an appeal is heard by a Bench of two Judges of a High Court and the Judges differ then if the appeal is a Letters Patent appeal the procedure is governed by cl. 36 of the Letters Patent (*p*) but if the appeal is one under the Code

(*h*) [illegible] (1899) [illegible]
(*i*) [illegible] (1891) [illegible] v Secretary of State (1884) 6 B [illegible] L R 131
(*j*) [illegible] (1884) 6 All [illegible]
(*k*) [illegible] (188[illegible]) 9 All [illegible] [illegible]
(*l*) [illegible] 9 All [illegible] [illegible] 13 B [illegible] 36 [illegible]
(*m*) See amended cl [illegible] of the Letters Patent of the High Court [illegible] amended [illegible] 13 of the Letters Patent [illegible] High Court of [illegible]
(*n*) [illegible] (1 [illegible]) 9 All [illegible]
(*o*) [illegible] v Collector of [illegible] (191[illegible]) 41 M [illegible] 913 [illegible]
(*p*) [illegible] (191[illegible]) 49 I A [illegible] [illegible] (1906) [illegible] (19[illegible]0) 13 W R [illegible] (1918) [illegible] Lachm[illegible] (1904) 6 All 10 [illegible] (1919) [illegible]

the procedure is governed by the present section (q) The difference of procedure between cl. 36 and sec 98 is (1) that while a reference on the point of difference is obligatory under cl. 36 it is optional under sec 98 and (2) while a reference under cl 36 may be on fact and law it can be on law only under sec 98 See notes under cl. 36

Income Tax Act — It is clause 36 of the Letters Patent that applies to a reference to the High Court under s 66 of the Income Tax Act 1922 and not sec 98 of the Code (r)

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction

99 [S 578] No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any

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Substitute the following for the last paragraph on p 296 and for foot notes (p) and (q) —

Sec 98 of Code and cl 36 of Letters Patent — Sub sec (3) is new It was inserted by the Repealing and Amending Act 18 of 1928 It provides that nothing in the section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court Before the Act of 1928 the trend of decisions was that where an appeal was heard by a Bench of two Judges of a Chartered High Court and the Judges differed then if the appeal was one from the Original Side of the High Court the procedure was governed by cl 36 of the Letters Patent (p) but if the appeal was from the decree of a Subordinate Judge the procedure was governed by the present section (q) At the same time it was held by the High Court of Allahabad (q1) that cl 27 of the Letters Patent of that High Court (corresponding to cl 36 of the Letters Patent of the High Courts of Calcutta Madras and Bombay) applied even to appeals from the decree of a Subordinate Judge All the cases were reviewed by a Full Bench of the Madras High Court (q2) and it was held that the effect of sub sec (3) was that cl 36 applied not only to appeals from the original side of a Chartered High Court but also to appeals to the High Court from decrees of subordinate Courts The difference of procedure between cl 36 and sec 98 is (1) that while a reference on the point of difference is obligatory under cl 36 it is optional under sec 98 and (2) while a reference under cl 36 may be on fact and law it can be in law only under sec 98 See notes under cl 36

(p) *Bhaidas* v *Ba G lab* (19 1) 48 I A 181 45 Bom 718 60 I C 8 (21) A PC 6 *Loop Laul* v *Lakshmi Doss* (1906) 29 Mad 1 *Vundeeput* v *Alexander Shaw* (1870) 13 W R 209 *Surajmal* v *Horn man* (1918) 20 Bom L R 185 218 47 I C 449 *Justin Hull* v *Arthur Francis* (1919) 4 Cal W N 352 58 I C 4 1

(q) *Bhuta* v *Laladu* (1919) 43 Bom 433 50 I C 715 *T n T n* v *Maung Ba* (19 3) 1 Rang 584 596 77 I C 385 (24) A R 148 *Prafulla* v *Bhaban* (19) 52 Cal 1018 91 I C 897 (26) A C 1 1, *P n jab Akbhar at & P ess Co* v *Ogilvie* (19 6) 7 Lah 179 93 I C 44 (26) A L 65 *Venkatas bb ah* v *Venkatasubbamma* (1924) 21 L W 721

(q1) *Lachman S ngh* v *Pam Lagan* (1904) 6 All 10

(q) *Dhanaraj* v *Balkissendas* (1929) 52 Mad 563 116 I C 343 (3) A M 641

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(4) misjoinder of defendants and causes of action (s) [O 2 r 3] [The practice was different under the Code of 1882 see notes to O 2 r 3 Procedure in case of multifariousness]

(q) *Bh ta* v *Lal I* (1919) 43 Bo n 433 0 I C 1 *T n T* v *Ma g Ba* (13 3) 1 Ran 84 96 I C 38 (4) A R 148 *P f ll* v *Bh I* (19) 5 Cal 1018 91 I C 8 (6) A C 1 1 *Pu j b Akbhar t & P s Co* v *Ogil ie* (19 6) 7 Lah 1 9 93 I C 344 (6) A L 6

(r) *E peror* v *Probh t* (1924) 1 Cal 04 84 I C 31 (4) A C 668

(s) *Gauri Sh nk* v *Keshab Deo* (19 9) All L J 04 114 I C 881 (9) A A 148

( ) misjoinder of causes of action (t) (O 2 rr 3 4 and 5) See notes to O 2 r 4 Leave of the Court

The words "on account of any misjoinder of parties or causes of action" have been inserted in the section to make it clear that such a misjoinder is to be treated as a *mere* irregularity

Non joinder —The Madras High Court has held that the expression "misjoinder" in this section includes "non joinder" (u) But this was doubted in a later Madras case (v) See O 1 r 9 and notes thereto

Error defect or irregularity not affecting the merits of the case —A decree will not be reversed or substantially varied in appeal for admitting a document not properly stamped (w) or for admitting a document declared invalid where the judgment is not based on that document (x) or because the wrong side was allowed to begin (y) or because the suit was decided on a Sunday ( ) or because the suit was instituted by an agent under a defective power of attorney (a) [O 3 r 2] or because an order allowing execution against the legal representative of a deceased judgment debtor was made by the transferee Court instead of by the Court which passed the decree (b) All these are irregularities not affecting the merits of the case or the jurisdiction of the Court and they are cured by this section The exclusion of evidence by the lower Court is an irregularity which may or may not affect the merits of the case if it does not the irregularity is condoned under this section (c) An omission to draw up a final decree under O 34 r 5 has been condoned under this section (d) For other cases see—

1 notes to s 1 Where a suit which ought to have been instituted in a Court of lower grade is instituted in a Court of higher grade
2 notes to s 92 Consent of the Advocate General
3 notes to O 6 r 14 Omission to sign plaint
4 notes to O 16 r 1 Remedy of party when witness summons refused
5 notes to O 21 r 13 Omission to verify inventory
6 notes to O 26 r 4 May issue
7 notes to O 3 r 1 Objection to authority of next friend
8 notes to O 32 r 3 Irregular appointment of guardian ad litem
9 notes to O 41 r 23 Effect of erroneous order of remand
10 notes to O 41 r 26 Sending back case for a revised finding
11 notes to Sch II para (1) Application shall be in writing

In any proceedings in the suit —These words have been substituted for the words "whether in the decision or in any order passed in the suit or otherwise" which occurred in s 578 of the Code of 1882 The latter words were held to apply [illegible] irregularities in proceedings *subsequent to* the institution of the suit and not [illegible] larities in the frame or institution of the suit ([illegible] present section irregularities in *any* proceeding in the suit

(t) [illegible]

(u) [illegible] 161 [illegible]

(v) [illegible]

(w) [illegible] 137 13 [illegible]

(x) [illegible]

(y) [illegible]

( ) [illegible]

(a) [illegible]

(b) [illegible]

(c) [illegible]

(d) [illegible]

Irregularity affecting jurisdiction of Court—See s 21 and notes thereto

Suits Valuation Act 1887 section 11—Sec 11 of the Suits Valuation Act 1887 modifies the provisions of the present section in cases where an objection is taken in appeal that by reason of the over valuation or under valuation of a suit a Court which had no jurisdiction with respect to the suit exercised jurisdiction with respect thereto That section is as follows —

(1) Notwithstanding anything in section [99] of the Code of Civil Procedure an objection that by reason of the over valuation or under valuation of a suit or appeal a Court of first instance or lower appellate Court which had no jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless—

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded or in the lower appellate Court in the memorandum of appeal to that Court and

(b) the appellate Court is satisfied for reasons to be recorded by it in writing that the suit or appeal was over valued or under valued and that the over valuation or under valuation thereof has prejudicially affected *the disposal of the suit or appeal on its merits*

(2) If the objection was taken in the manner mentioned in clause (a) of sub section (1) but the appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub section and has before it the materials necessary for the determination of the other grounds of appeal to itself it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower appellate Court

(3) If the objection was taken in that manner and the appellate Court is satisfied as to both those matters and has not those materials before it it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeal but if it remands the suit or appeal or frames and refers issues for trial, or requires additional evidence to be taken it shall direct its order to a Court competent to entertain the suit or appeal.

Appeals from Appellate Decrees

100 [S 584] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds namely —

Second Appeal

(a) the decision being contrary to law or to some usage having the force of law

(b) the decision having failed to determine some material issue of law or usage having the force of law ,

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits

(2) An appeal may lie under this section from an appellate decree passed *ex parte*

Changes introduction by the section—The word specified in the expression specified law or usage which occurred in cl (a) of s 584 of the repealed Code has been omitted see the undermentioned case (*f*)

Scope of the section—This section deals with second or special appeals A second appeal can lie to the High Court A Court of first appeal is competent to enter into questions of fact and decide whether the findings of facts by the lower Court are or are not erroneous But a Court of second appeal is not competent to entertain questions as to the soundness of a finding of *fact* by the Court below (*g*) A second appeal can only lie on one or other of the grounds specified in the present Section (*h*) A judge to whom a memorandum of second appeal is presented for admission is entitled to consider whether any of the grounds specified in this section exist and apply to the case and if they do not to reject the appeal summarily (*i*) The limitations to the power of the Court imposed by ss 100 and 101 in a second appeal ought to be attended to and an appellant ought not to be allowed to question the finding of the first appellate Court upon a matter of fact (*j*) Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in section [100] No Court in India or elsewhere has power to add to or enlarge those grounds (*k*)

No second appeal lies on the ground of an erroneous finding of fact—There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of *fact* however gross or inexcusable the error may seem to be No doubt a second appeal does lie where there is a substantial error or defect in procedure [see cl (c)] but an erroneous finding of fact is a different thing from an error or defect in procedure Where there is no error or defect in procedure the finding of the first appellate Court upon a question of fact is final *if that Court had before it evidence proper for its consideration in support of the finding* (*l*) The mere fact that the High Court would have upon the documents and evidence placed before the Court of first appeal come to a different conclusion is no ground for a second appeal it is precisely this revision of evidence which is excluded by the limited character of a second appeal This section was enacted for the express purpose of securing some measure of finality in cases where

(*f*) *Pam C pal* v *Sl m kh t n* (189) 19 I A 8 33 0 Cal 93 99 100

(*g*) *Rim G p l* v *Sla i khaton* (1893) 20 Cal 93 19 I A 8

(*h*) *Luchman* v *Puna* (1889) 16 C l 3 16 I A 1

(*i*) *Rudr Prasad* v *Br j Nath* (1893) 1 All 36

(*j*) *Pe t b Cl der* v *Mohen lra th* (1890) 17 Cal 291 16 I A 33

(*k*) *D i ga Cho dl ra i* v *Jewahir Singh* (1891) 18 C l 3 30 1 I A 1

(*l*) *D i ga Clowdh* v *J wal r S gh* (1891) 18 Cal 23 17 I A 1 *P n Copal* v *Sham kh to* (1893) 20 Cal 93 19 I A 8 *Pal ka n* v *Ma la Baksh* (1891) 18 Cal 448 18 I A 9 *Balkrish a G i d* (190) 26 Bom 617 *Lukh Narain* v *Jol Nath* (1894) 1 Cal 04 1 I A 39 *F t Ind a I y Co* v *Cha g i* (1915) 4 Cal 888 28 I C 45 *Nurala* v *Abd l* (19 0) 3 Cal L J 59 I C 3 *Ram S gh* v *G g R m* (19—) 3 Lah 389 0 I C 20 ( ) A I 3 6 [q e tion of intention] *Wali Muh m d* v *M l m d* (19 4) 5 Lah 84 80 I C 998 (4) A L 444 [finding that entries in Record of Rights are errone u] *D lip S gh* v *Isl ar* (19) 7 Lah L J 11 86 I C 250 ( ) A L 3 3 [wh ther tender d ly made] *Gajj S gh* v *Natha S gh* (19) 7 Lah L J 0 88 I C 88 ( ) A L 333 [whether possession was take in execution of a decree] *Raja of P ttapur* v *S creta y of State* (19 0) 27 All L J 0

the balance of evidence verbal and documentary arose for decision (m) Hence the High Court is not entitled in second appeal to go behind the findings of fact of the lower appellate Court which do not result from the misconstruction of a document or the misapplication of law or procedure but upon the oral evidence in the case (n) Similarly there is no ground for a second appeal upon a question of fact unless it can be shown that the lower appellate Court misdirected itself in point of law in dealing with the question upon the evidence (o) In *Ramratan Sukul* v *Mussamat Nandu* (p) their Lordships of the Privy Council said It has now been conclusively settled that the third Court which was in this case the Court of the Judicial Commissioner cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court if there is evidence to be considered the decision of the second Court however unsatisfactory it might be if examined must stand final And in *Nafar Chandra Pal* v *Shukur* (q) their Lordships said Questions of law and of fact are sometimes difficult to disentangle The proper *legal effect* of a proved fact is necessarily a question of law so also is the question of *admissibility of evidence* and the question of whether any evidence has been offered on one side or the other but the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact It has accordingly been held that a finding on appeal that an estate previously to its partition under the Estates Partition Act 1897 had not been partitioned privately or at all is binding on the High Court in second appeal it being entirely a question of fact (r)

Decision being contrary to law —A second appeal will lie where the decision of the lower appellate Court is contrary to law The term law in cl (a) is not limited in its meaning to statute law it means general law (s)

When the question is one of a right *construction* of a document (t) or of a *legal inference* from a document (u) the question is one of law and a second appeal will lie Thus where in a suit for a declaration of the plaintiff s proprietary title to the land in suit the lower appellate Court found on a construction of the wajib ul arz and other documentary evidence relating to the land that the plaintiffs were proprietors their Lordship of the Privy Council held that the right construction of the documents was a question of law which the High Court was not precluded from considering in second appeal In the course of the judgment their Lordships said That finding (namely that the plaintiffs were proprietors of the lands) of the Subordinate Judge was the result of his having mis construed the wajib ul arz The right construction of documents is a question of law which Judges in second appeal are not by ss 584 and 585 of the Code of Civil Procedure (now ss 100 and 101) precluded from considering by any finding of the lower appellate Court based upon such documents The Subordinate Judge arrived at his finding by inference drawn upon an incorrect construction of the wajib ul arz and the Judges in second appeal consequently were not bound by his finding that the plaintiffs were the proprietors of the land (v) Similarly the question whether a writing which is ostensibly a deed of ab olute sale and an agreement by the purchaser to reconvey the property to the vendor constitute an out and out sale and an agreement

(m) N f Ch d i I l v Sh k (1918) 4 I A 183 183 46 C 1 183 19 I C 60
(n) M In p r Ze I m v L Charan (1919) 4 Cal N W 01 I C 43
(o) M I ap r Z ir C Lt I v U Ch n (13 3) 9 C I N W 131 74 I C 48 (3) A I C 18 (1 C I
(p) (180) 19 I A I 3 19 Cal 249 9
(q) (1918) 45 I A 183 18 46 Cal 189 1 51 I C 60
(r) B am Sal Ro v I m F t n Po (19 7) 54 I A 190 54 Cal 586 101 I C 3 9
( ) A PC 11
( ) P Gop l v Sh k ton (1933) 0 Cal 93 19 I A 8
(t) F t h Ch nd I I I nur (19) 34 All 9 33 I A 4 16 I C 8 I t v M h (1918) 4 B 344 3 0 3 I 46 I C 34
(u) Ch nd r S g r v J u r L I (1919) 4 I A 19 01 4 All 1 156 I C 4 8
(v) (191) 34 All 5 9 8 39 I A 4 6 16 I C 6 G t v I (19 6) 48 All 588 9 I C 5 (6) A A 54

for reconveyance or a mortgage by conditional sale is a question of construction of documents and the High Court is entitled to interfere in second appeal (*w*) In a recent Privy Council case where the question was whether the possession of properties by a Hindu widow was merely in lieu of maintenance and not adverse to the plaintiffs their Lordships held that the question was one of inference from documents and not one of fact and that they were therefore entitled to draw their conclusion notwithstanding the concurrent opinions of the Courts in India (*x*) But where the question is not one of construction of a document or of legal inference to be drawn from a document but is one as to the effect to be given to a document *as evidence of a fact or facts in issue* a second appeal is not admissible Thus where a suit involves a question of the *fact* of adoption and documents are produced *as evidence of the fact of adoption* the question whether the documents do or do not support the alleged adoption is a question of fact and no second appeal will lie (*y*) The law on the subject was thus stated by Mookerjee J in *Mukand Deb* v *Gopi Nath* (*z*) We hold accordingly that unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of the suit a second appeal does not lie A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower appellate Court

Where the lower appellate Court arrives at a conclusion which is an inference based upon an erroneous view of the law the judgment is open to question in second appeal (*a*) A judgment is also open to question in second appeal where a defect in the judgment is due to an error as to the admissibility of evidence (*b*) or where secondary evidence is admitted in contravention of the provisions of ss 65 and 66 of the Indian Evidence Act (*c*) or where there is failure to invoke a presumption of fact under sec 114 of the Indian Evidence Act 1872 (*d*) The question of burden of proof is a question of law and the High Court is entitled to interfere in second appeal if the lower appellate Court has placed the burden on the wrong party (*e*) A second appeal will also lie where an unregistered document which requires registration is admitted in evidence (*f*)

Where the Court of first instance grants a mandatory injunction for the demolition of a building and the decree is reversed in appeal on an erroneous view of the law a second appeal will lie (*g*) Though a person may not have been duly appointed executor he may render himself liable as an executor if he intermeddles with the estate of the deceased misapplication of law on this point is a good ground for a second appeal (*h*) The question whether a stipulation in a contract is by way of penalty is a question of law which renders a second appeal competent (*i*)

Where an appeal which ought to have been preferred to the High Court is preferred to a District Court and the latter Court hears and decides the appeal the decision is contrary to law and a second appeal will lie from the decree of the District

(*w*) (e a v G a i Ma ani (19 4) 47 Mad I J 38 396 84 I C 50 (5) A M 3

(*x*) *Claudi Salgur* v *K shor Lal* (1919) 46 I A 1 01 4 All 15 156 5 I C 486

(*y*) *Jachan n Lal* v *Ka haja I l* (189) Cal 60 I A 1 1 *int Singh* v *Durga S jh* (1910) 37 I A 191 19 3 All 363 3 3 6 I C 8 *M d por Za n d ry C* *U Ch* (19 3) 9 Cal W N 131 4 I C 492 (3) A PC 187 *B l l* v *L tus* (1911) 1 C W N 10 I C 3 *L j r* v *Shadh* (19 2) 3 C I J 18 68 I C 1003 (2) A C 18 *J r K h a* v *J sa* (19 3) 37 C 1 L J 80 I C 55 (3) A C 3 8

(*z*) (191) 1 C I L J 4 5 I C 86 *J ll p* v *B* (19 0) Lat L J 1 I C 1 9

(*a*) *Ish Cla d* v *B h* (189) 4 Cal 8

(*b*) *Tara Ir n* (19) 36 Cal L J 389 30 74 I C 383 (3) A C 61 *Bulvant* v *Baldev* (19 1) 2 Lah 2 1 64 I C 9 9 (1) A L 119

(*c*) *L ch an Singh* v *M n nmat P na* (1889) 16 I A 1 16 Cal 3

(*d*) *S ta m* v *Na lu* (19 8) 50 All 145 106 I C 0 (8) A A 16

(*e*) *M dho Ra* v *M l* (19 0) 1 Lah 4 9 8 I C 82 (*g R R l a* (19 1) Lah 4 64 I C 001 (1) A L 1 8 *S p ja* v *Mah* (19 3) 1 t 919 6 I C 31 (4) A P 310

(*f*) *Basa Kill p* (18 8) 2 Bom 483

(*g*) *J a B l t r* v *I m Sh kar* (190) 7 All 688

(*h*) *Ma ra S* v *S th R p ha d* (1906) 33 C 1 104 33 I A 16

(*i*) *R g p l* v *I la a* (19 4) 4 Mad L J 60 606 8 I C 1 (2) A M 84

Court (j) The High Court of Madras has held that where a Court assumes jurisdiction which it would not have had if the facts necessary to determine the question of jurisdiction been rightly decided a second appeal lies from the findings of facts (k) S

A second appeal will lie where the question is one of proper inference in law from findings of facts —Though a second appeal does not lie from a finding of fact yet where a *legal* conclusion is drawn from the finding a second appeal will lie under cl (a) of the section on the ground that the legal conclusion was erroneous Thus the question whether possession is adverse or not is often one of simple fact but it may also be a conclusion of law or a mixed question of law and fact Where the question of adverse possession is one of simple fact no second appeal will lie but a second appeal will lie from a finding as to adverse possession when such finding is a mixed question of law and fact depending upon the proper legal conclusion to be drawn from the findings as to simple facts (l) Similarly the question whether a Hindu family is joint or separate is generally a question of fact but in certain circumstances it may be a mixed question of fact and law and open to reconsideration by the High Court in second appeal (m) Where the question in a suit was whether the defendant was bound by a mortgage executed by his mother and it was held that he was their Lordships of the Privy Council held that the finding was substantially one of law and that it was therefore open to question in second appeal In the course of their judgment their Lordships said The *facts* found (by the lower appellate Court) need not be questioned It is the *soundness of the conclusions from them* that is in question and this is a matter of law (n) As stated by their Lordships of the Privy Council in another case the proper legal effect of a proved fact is necessarily a question of law and the High Court is therefore entitled to interfere in second appeal (o) It has thus been held that the question whether a transfer was made with intent to defeat creditors within the meaning of 53 of the Transfer of Property Act (p) or whether the plaintiff has made out his title to the property in suit (q) or whether a railway company took as much care of the goods delivered to the company as a man of ordinary prudence would under similar circumstances take of his own goods within the meaning of ss 151 and 152 of the Contract Act (r) or whether a lumbardar was guilty of negligence or misconduct (s) or whether the plaintiff is entitled to the easement claimed by him (t) or whether property is ancestral or self acquired (u) or whether a decree was obtained by fraud (v) or whether a tenancy is permanent (w) is a question of law and a second appeal will lie to the High Court It has been held by the High Court of Calcutta that where from a certain set of facts a Court infers a lost grant the process is one of inference of fact and not of legal conclusion and that it is not a ground for a second appeal (x)

Usage having the force of law —The words usage having the force of law mean a local or family usage as distinguished from the general law (y)

(j) *B d ra v P r a Chaitir* (1918) 4 C l 9 6 43 I C 8
(k) *P dd yy v I r Inam U j* (19) f Mad L J 6 4 103 I C 331 ( ) M 653
(l) *L elp s ar M o r* (189) 19 C l 3 19 I A 48 *I lara v Syn a Charan* (19 0) 24 Cal W N 10 7 60 I C 18 *Jog d a v th v Raje ir* *W* (19) 26 Cal W N 810 63 I C 00 ( ) A C 4
(n) *S bal S gh v S I I P* (19) 44 All 60 6 I C 6 ( ) A A 188 *Ms t I I v S I tar S gh* (11) 0 All 180 10 I C 1 ( ) A A 33
( ) *I C p l v Sl* *Mat n* (1893) 20 C l 93 18 19 I A 8
( ) *f Ch d a I I Sh I r* (1918) 4 I A 183 18 46 Cal 1 J 19 1 I C 60 *Dl a al M t j* (19) 4 I A 1 8 8 Lah 3 101 I C 35 ( ) A P C 10
(p) *I la Ch I r I I t* (189) 4 C l 8
(q) *I tj ir n v C a e l* (18) 21 Bo 91
(r) *L xt n v S cr t r f State* (19 3) 27 Cal W N 1017 80 I C 19 (4) A C 9 *B drala* *C I P III Co* (19 6) 48 All 66 96 I C 1046 (6) A A 334
(s) *Chhat j v G nga* (19 1) 43 All 9 60 I C 643 (1) A A 314
(t) *D v J gta* (19 0) 1 Lah 06 6 I C 28
(u) *C r l t S jl v M t I I a I a* (19) 3 Lah 63 I C 5 1 ( ) A L 37
( ) *I I j t S jh v I Ila* (1) Lah L J 68 88 I C ( ) A L 3
( ) *M a M l v Mot S ar* (19) 54 I A 1 8 8 Lah 3 101 I C 3 ( ) A P C 10
(x) *I th M n* (19 0) 31 C l L J 01 I C 3 0
(y) *P a t p l v Sta at t* (1893) 20 C l 93 19 I A 8 dissenting from th ber v tl f I th r m C J i v *rath S jh v Bl kh S jh* (1) All 649 at p 6 3

If the decree appealed from is based on a misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved the High Court may interfere in second appeal ( ) It has been laid down by the Judicial Committee that questions of the existence of an ancient custom are generally questions of mixed law and fact (a) The present section precludes the High Court from interfering in second appeal with the *findings* arrived at by the lower appellate Court *on all actual facts* from which the existence of the custom has been inferred But the *inference* as to the exi tence and the decision as to the validity of the custom are matters of law and these may therefore be revised by the High Court in second appeal (b) Similarly where the que tion is as to the existence of a custom and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish the alleged custom (c) or has based its judgment on irrelevant matters (d) or has proceeded upon a wrong construction of a document (e) the error is one of law and the High Court is entitled to interfere in second appeal As to certificates under s 41 (3) of the Punjab Court Act VI of 1918 in cases of custom see the undermentioned cases (f)

Clause (c) substantial error or defect in procedure—

No evidence to go to a jury—Case not raised by parties—Misconception of evidence —Evidence misread or misunderstood—Overlooking material evidence—Irrelevant matters — A second appeal will lie where there is as an English lawyer would express it no evidence to go to the jury because that does not raise a que tion of fact such a arises upon the s ue itself but a question of law for the consideration of the judge (g) Thus where the lower appellate Court found that a deed of compromise was not for the benefit of a certain infant and there wa no evidence in the case upon which that Court could found t judgment it wa held by the Judicial Committee that the case was one of a substantial error or defect in the procedure of the first appellate Court and that it wa a ground for a second appeal to the High Court (h) Similarly where the lower appellate Court disposes of a suit upon a case not rai ed by the parties and to which the evidence has not been directed it is a substantial error or defect in procedure within the meaning of thi section and a second appeal lies to the High Court (i) A second appeal will also lie where the finding of the lower appellate Court is based on a mi conception of

(z) *Des P lollas Rau l* (1883) 1 P n 110 (u tom ex lu t wilows d dau h ters from inherit nc)

(a) *I d ajpa v D v d n onj* (1917) 44 I A 14 1 1 8 40 Mad 0) 1 39 I C (c t n of g ntin j na ent l of cn lowed [r]j rty) S el qu t may in som e s b p re qu ti ns f f ct See *Malo ed Imt* (1909) 36 I A 10 0 31 All 55 0 4 I C 457 (M l om l n c t t —custom x lul ing fem l s fr n inh ritance) *Anant S gh v D ja S ngh* (1910) 3 I A 191 197 39 All 363 3 3 6 I C 8 (Hindu e tat —c tom entitling st p broth r to s cceed equally with full br ther)

(b) *I i ar ppa v M na l* (1918) 41 Mad 3 4 44 I C 643 (Mira d s r ght to Th n l war m) o ruling *I k la v I j lenk tta* (1906) 29 M d 4 nd appr vin *F k j i I v Secret ry of St te* (191) 40 Mad 1108 1110 40 I C 16 *J al s l ad l or* (191) C l L J 613 41 I C 9 9 (wh ther a h ll g was tran f rabl l y local u age) *T j l v Ba u r Lal* (1906) 18 All 88 I C (6) A A 43

(c) *H k Al Abd l P h* (1906) 28 All 618 (t m of pre-empti n) *Pa n B llas v Lal B h l r* (1908) 30 All 311 (c t m of sal with ut con t of zem n lar)

(d) *Palak Har v Ma e s* (1896) 23 Cal 1 9 (wh th r hol ling tran ferable without lan llord c n ent)

( ) *Shohr t v (la* (19 0) 18 All L J 19 I C 366 (c t on of Dhardhur) *S/ I r v I j e I d* (19) 0 All L J 64 I C 9 6 ( ) A A 88 (u ton of pre-emption)

(f) *Mukl M l n* (19 1) Lah 348 66 I C 49 (1) A I 7 *Nall v B* (19) 3 L h 344 63 I C 507 ( ) A L 4 6 *I a Mehr v I d Ra n* (19 4) 5 Lah 63 8 I C 404 (4) A L 4

(g) *l g ra j n Tr pura S inl* (1887) 14 Cal 40 47 14 I A 101 110

(h) *Hema ti Broj l o* (1890) 1 Cal 8 88 1 A I 6 6) *Sh aba a v S n gapp* (190) 3 1 m 1 31 I A 1 4 *D t Abd l S al* (1919) 46 I A 140 4 Cal 10 51 I C 17 [tra d] *I r th Dlo l ppa* (1833) 1 Bom 4 [wh ther def n lants we e p rm n nt tenant h m l to pay a re nabl r nt] *L kh h t Jal l d* (1918) 4 Bom 3 3 6 4 I C [wh ther the more gi e d bt wa f lly tl d]

( ) (190) 29 B m 1 31 I A 1 4 *s pr Mat h S gh v I baz S gh* (19 1) 19 All L J 149 1 0 151 61 I C 6 (1) A A 1

what the evidence is (j) or on evidence which has been misread or misunderstood (k) or the lower appellate Court has mi directed itself in point of law in dealing with the question upon the evidence (l) or has overlooked or ignored material documentary evidence (m) On the same principle a second appeal will lie where the finding of the lower appellate Court e g a finding on the existence of a usage is based on irrelevant matters (n) A econd appeal al o lies where the Lower Appellate Court decides a question of fact not upon the evidence before it but on the authority of a previous finding of a Court of superior jurisdiction upon similar facts in a case between different parties (o)

Where the Courts below have mi conceived the real question they had to try —The High Court has jurisdiction under this section to set aside the decree of the trial Judge in favour of the plaintiff affirmed on the facts by the first appellate Judge on the ground that the evidence taken showed that the true question of fact which had not been considered and as to which no issue had been framed should have been answered in favour of the defendant (p)

Other cases of error or defect in procedure —Omitting to decide a material issue (q) omitting to examine witne ses tendered (r) refusing to receive documentary evidence which ought to have been accepted ( ) allowing the plaintiff in the lower appellate Court to change the nature of his suit (t) deciding an appeal without waiting for the return of a commission directed to be issued by the first appellate Court (u) have all been held to be good ground for special appeal But disregard of an Amin s second report as to a boundary line does not constitute a substantial error or defect of procedure within the meaning of this section and is no ground for second appeal (v) The refusal by a lower appellate Court to exercise the discretion vested in it by O 41 r 27 with respect to the admission of additional evidence is a substantial error or defect in procedure and affords a ground of special appeal But where the Court *has exerci ed its discretion* in a sound and reasonable way and in the exercise of its discretion refused to admit additional evidence the case is not one of substantial error or defect in procedure (w) Admission by the lower appellate Court of additional evidence tendered by the respondent without the consent of the appellant and without recording the reasons for its admission as required by O 41 r 27 is a substantial error in procedure and is a good ground for second appeal (x) Proceeding with a suit without the legal representatives of the deceased plaintiff being brought on the record is also a good ground for second appeal (y)

Refusal by Court of first appeal to extend time for filing appeal —Where an application is made to a Court of first appeal to admit an appeal from the original decree after the expiration of the period of limitation that Court has the power on sufficient cause being shown to admit the appeal [Limitation Act s 5] If the lower appellate Court refuses to admit the appeal holding *in the exercise of its discretion* that

(j) *G und v l ul l* (1896) 0 Bom 3 (lt f po ses i n of land) *S i edar* v *J g t* (19 4) 46 All 3 80 I C (4) A A 848 [whett r tl t tem nt alleged to be defamatory w f ls]
(k) *Mattar Si gh* v *R ba S gh* (19 1) 19 All L J 149 61 I C 6 (21) A A 1
(l) *Mid an r Z d r Co Ltd* v *Un Cla r n* (19 3) 2 Cal W N 131 4 I C 48 (3) A I C 187 [I C] *Sle p j n* v *M ha ja* (19 3) 2 Pat 919 9 1 6 I C 347 (4) A I 310
(m) *Ma i g Ill i g* v *M g Cl it* (19 3) 1 Rang 13 136 76 I C 449 (3) A R 196
(n) *I lakdla* v *Ma e s* (1896) 23 Cal 1 9
(o) *Balu K Ro it* v *Sr J unji Belar Deb* (19 7) 6 Pat 638 105 I C 633 (7) A P 209 (F B)
(p) *Da isa* v *Abdul Samad* (1919) 46 I A 140 47 Cal 107 1 I C 17
(q) *Ran ko* v *Ga g am* (18) 16 Bom 4
(r) *Mo ilal* v *Kl oda* (1893) 0 Cal 40
(s) *Tal war S ngh* v *Bl igwan Das* (1908) 1? C W N 31
(t) *Tervelpit* v *S de s n Das* (18 9) 4 Cal 46
(u) *Ma lho Si gh* v *Fash Si gh* (1894) 16 All 34
(v) *Lukl Nara n* v *Jodu Nath* (1894) 1 Cal 504 1 I A 39
(w) *Pa n P an* v *Kallu* (1901) 3 All 1 1 *Durga Pr l* v *J i N r n* (1911) 3 All 3 9 9 I C 26
(x) *K bal* v *P j ni* (19 4) 39 Cal L J 261 81 I C 999 ( ) A C 98
(y) *Nath* v *Amr a S ngh* (19 6) 10 Lah L J 497 117 I C 665 (3) A L 119

there was no sufficient cause for not presenting the appeal within the prescribed time there is no ground for a second appeal The principle is that where a Court has exercised its discretion in a sound and reasonable way the High Court has no power to interfere in second appeal But if the lower appellate Court does not exercise its discretion at all or exercises it capriciously and arbitrarily or without proper legal material to support its decision a second appeal will lie under cl (a) of the section (z)

Dismissal of appeal for default—Though a second appeal may lie from an appellate decree passed ex parte no second appeal lies from an order dismissing an appeal for default Such an order is not a decree (a) see O 41 r 11 (2) and s 2 cl (2) sub cl (b)

New case in second appeal—An appellant should not be allowed to set up a new case in second appeal (b) nor should he be allowed to raise a new issue not supported by the evidence on the record (c) See notes below

Pleas which may be taken for the first time in special appeal—An appellant will not be allowed to set up for the first time in second appeal a plea not taken by him in the lower Court But if the objection is one which goes to the very root of the case it may be taken for the first time in second appeal (d) Thus an objection to jurisdiction may be taken for the first time in special appeal if it is patent on the face of the record (e) except it is submitted in those cases which fall within s 21 above Similarly the plea of *res judicata* may be taken for the first time in second appeal provided it can be decided upon the record before the Court (f) So also the plea of want of notice in an ejectment suit (g) As to the plea of limitation see notes to O 41 r 2 Leave of Court Limitation which refer to first appeal apply also to second appeals (h)

The High Court will entertain in second appeal a point of law although it has not been raised in any of the lower Courts provided the point of law arises on the findings of the lower Court *or* on the issues as framed and on the evidence already recorded Thus where the lower appellate Court awarded to the plaintiff a *third* share of the property in suit on the ground that remoter *gotraj sapindas* inherited *per stirpes* and the defendant preferred a second appeal to the High Court on the ground that the plaintiff was *not entitled to any share at all* the defendant was allowed to contend *at the hearing* of the second appeal that the plaintiff was not entitled in any event to more than *a sixth share* as remoter *gotraj sapindas* inherited *per capita* and not *per stirpes* (i) But the High Court will not entertain a point of law raised for the first time in second appeal if the point cannot be decided without remanding the case for further evidence (j) Nor can a point of law be taken for the first time in second appeal if it sets up a new right differing in *kind* from that asserted throughout the trial and not merely *in degree* as in the above case Thus

(z) *Iar ... v ... p ...* (1893) 23 Bom 13 *... v ... (1903)* All 1 *H ... l ... (1904)* 6 All 3
(a) *S ... v ... J ...* (1896) 3 C ... 8
(b) *... Hom ... art* (188) 6 B ... 10 ... (189) 1 M ... 50 ... *Lal* (1888) 10 All 49 ... *Ch ... D ...* (1 ...) 3 I h 23 68 I C ... ( ) A I 383
(c) *... bl ...* (19) 46 B 13 1 64 I C ... 0 ( ) A B 1 0
(d) *I ... v ... D ...* (1883) 6 M 1 ...
(e) *B ... dbl ...* (18 1) 8 B H C A C 4 ... (1888) 12 L ... 1 ... (18 9) 13 I ... 4 4 ... (18 0) 13 M ... 3 *D ... H ...* (19 1) 43 All 18 ... I C ... 06 (1) A A 19
(f) *K ... v ... S ...* (1893) 1 All 440
(g) *Doll ... v ... rao* (1893) 18 Bom 110
(h) *S ... v ... D ...* (188) 11 Bom 114
(i) *... v ... G ...* (1893) 1 Bom 303 ... (1883) 1 Bom 100 ... (189) 19 Bom 331 ... (191) 44 C ... 34 I C 860 *D ... v ...* (19 3) ... I L R 4 ... I C 3 8 (3) A B ... 4 *Lal ... v ...* (19 4) 6 B ... L ... 1 ... 8 I C ... 0 (4) A B 463 ... *B ...* (19 1) 43 All 133 ... 9 I C 116 (1) A A 3
(j) (19 3) ... B ... L R 4 ... I C 3 6 (3) A B ... 4 ... (19 4) 6 B ... 1 1 404 ... I C ... 0 (4) A B 463 ... *J ...* (1919) 4 Cal W N 3 ... 4 I C ... 19 *K ...* v ... (19 6) 5 P ... 98 I C ... (6) A I 401

where the right claimed by one of the defendants was treated as one of *maintenance* only in the Courts below he was not allowed to contend in second appeal that besides maintenance she was entitled to a half *share* in the property (*k*)

Second appeal on no other ground

101 [S 585] No second appeal shall lie except on the grounds mentioned in section 100

No second appeal in certain suits

102 [S 586] No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed five hundred rupees

Suits of the nature cognizable by Courts of Small Causes —Whether a suit is or is not of the nature cognizable by a Court of Small Causes is to be determined in the light of the provisions of the Provincial Small Cause Courts Act 9 of 1887 [see ss 15 16 and 27] If a suit is of the nature cognizable by a Small Cause Court and the value of the subject matter of the suit does not exceed Rs 500 no second appeal will lie though the suit has not been tried in a Small Cause Court or though the Small Cause Court returns the plaint under s 23 of the said Act to be presented to another Court on the ground that it involves a question of title and is not therefore cognizable by that Court The reason is that it is the nature of the suit and not the Court in which it is tried that determines the right of appeal (*l*) The words any suit of the nature cognizable by Courts of Small Causes mean any suit relating to a subject matter over which a Court of Small Causes would have jurisdiction if the claim were within the pecuniary limits of its jurisdiction (*m*) In determining whether a second appeal lies under this section the original character of the suit is to be regarded rather than the character it may subsequently assume by operation of the findings of the Court (*n*) Nor should regard be had to the mode of trial of the suit thus a suit which is of the nature cognizable by a Court of Small Causes is none the less so because instead of being tried under the summary procedure it has been tried in the ordinary manner (*o*) In applying this section it makes no difference that the decree sought to be appealed from was passed by the lower appellate Court *in review* (*p*) A suit cognizable by a Small Cause Court was decreed by a first class Subordinate Judge in his Small Cause Court jurisdiction and it was transferred for execution against immovable property to his regular jurisdiction The order passed on an objection to attachment was appealable to the District Judge by virtue of the provisions of section 42 above as execution was in the regular jurisdiction but no second appeal lay as the suit was of the nature cognizable by a Court of Small Causes (*q*)

Suit for mesne profits —Section 15 of the Provincial Small Cause Courts Act gives jurisdiction to Courts of Small Causes to take cognizance of all suits of a civil nature of which the value does not exceed Rs 500 except such suits as are specified in the second schedule of the Act That schedule consists of several articles of which article 31 is the

(*k*) P [illegible] Sl [illegible] (1934) 19 B [illegible] 6 J
(*l*) Lal [illegible] (188) 9 Bom [illegible] Mahad [illegible] B [illegible] (1904) 6 All 3 8 S da [illegible] B [illegible] Mol [illegible] (1918) 0 All 4 0 L [illegible] Ra dha [illegible] (1898) [illegible] Cal 8 [illegible] (18) [illegible] (193) 15 M [illegible] 298 [illegible] Sell [illegible] (183) 1 Mad [illegible] The [illegible] de [illegible] of the [illegible] pal [illegible] (191) 41 Bom 36 38 I C 331 [illegible] v S [illegible] kar D [illegible] (19 4) 33 C L J 63 3 80 I C 10 ( ) A [illegible] 49
(*m*) [illegible] v Se [illegible] (1900) 3 M [illegible] 5 0
(*n*) L [illegible] v Lan [illegible] (1908) 3 P [illegible] 356
(*o*) I d [illegible] v S [illegible] h C [illegible] d a (1913) 40 C [illegible] 3 21 I C 1 0 [illegible] bh (1901) Bom 417
(*p*) F [illegible] v K [illegible] (19 1) 3 Lah L J 166 60 I C 9 ( ) A L [illegible]
(*q*) [illegible] v [illegible] (19 8) 30 Bom L R 144 ( ) A B 34

most important for the purposes of the present section That article excludes from the jurisdiction of Small Cause Courts any other suit for an account including a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant This article contemplates cases in which the plaintiff claims an *account* of moneys which the defendant *has received* and to an account of which the plaintiff is entitled because the moneys received belonged to him It has been held by a majority of the Full Bench of the Calcutta High Court that a suit for mesne profits does not fall under this article in other words it *is* cognizable by a Small Cause Court Such a suit is not a suit for the profits of immovable properties belonging to the plaintiff which have been wrongfully received by the defendant A suit for mesne profits is a suit for damages in which the defendant would be liable *even if no profits have been actually received* by him during the period of dispossession For in s 2 sub s (12) of the Code mesne profits are defined as profits which the person in wrongful possession of such property actually received or *might* with ordinary diligence *have received* therefrom (r) On the other hand it has been held by a Full Bench of the Madras High Court (s) that a suit for mesne profits does come within art 31 of the said Act and is therefore not cognizable by a Small Cause Court Recent Bombay decisions are difficult to reconcile but the general effect of them is that a suit for mesne profits is a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant within the meaning of art 31 (t) but that it does not come within the said article if the amount claimed is an *ascertained* sum so that *no account has to be taken* (u)

Suit for rent —The High Courts of Madras and Rangoon have held that a suit for rent is a suit of the nature cognizable by Courts of Small Causes (v) The High Court of Calcutta has held that it is not (w)

Suit for title —A Small Cause Court has no jurisdiction to entertain a suit for title relating to immovable property A suit however which is otherwise cognizable by a Small Cause Court does not cease to be so because it incidentally involves a question of title (x)

Suit for a declaration —A Small Cause Court has no jurisdiction to entertain a suit for a declaratory decree The mere fact however that there is a prayer for a declaration will not prevent a suit from being of the nature cognizable by a Small Cause Court if the other reliefs claimed in the suit could be obtained without asking for a declaration (y)

Execution —The expression suit in this section includes execution proceedings (z) from which it follows that if a suit is of the nature cognizable by a Small Cause Court no second appeal will lie from an order made in execution of the decree passed in the suit unless the value of the suit exceeds Rs 500 It is immaterial that the order in execution is made by a Court other than a Court of Small Causes or a Court vested with the powers of a Small Cause Court as where the property attached in execution of the decree is immovable property and the order in execution is made by a First Class Subordinate Judge in his *ordinary* jurisdiction The test is what was the nature of the *suit*

(r) *J jo B lary Si gh v Madl ub Chu d a* (1896) 3 C L 884

(s) *Sa rin tl u v Ath iru i* (190) M d 103

(t) *A t e v M h le* (1901) 5 Bom 8

(u) *Gi j b v I ajl th* (1906) 30 Bom 147 *I i ajak v Frish a ao* (1901) 3 Bom 6 s explained in *I a d o v Da i dar* (1904) 6 Bom L R 3 0

(v) *So dar m v Se ia* (1900) 23 Mad 47 *Ma P Mo g Ne U* (19) 3 Rang 390 91 I C 63 (6) A R 19

(w) *S h d a v Na* (1915) 4 Cal 638 7 I C 8

(x) *I i jik v I r sl narao* (1901) Bom 6 *J e r ang v Narans i g* (1908) 3 Bom 560

(y) *R macl e Ir iyar v Noori lla Sahib* (1907) 30 Mad 101

(z) *Gora I nd v Bayk to* (18 4) 1 Beng L R 61 [F B] *D n D yal v I atr kha* (1896) 18 All 481 *Aul ala v S bba na* (1889) 1 Mad 116 *M ll kar ppa v Pai ja* (19 3) 4 Mad L J 10 74 I C 9 6 (24) A M 3 *S l ya ia v Debendra* (1900) 27 Cal 484

n which the decree ought to be executed was passed and not the nature of the *proceedings in execution* (a) It is also immaterial that the amount sought to be recovered in execution exceeds R 500 The test is not the amount claimed in execution proceedings but the amount of the subject matter of the suit (b) An order of remand made by an appellate Court in an appeal from an order of the Court executing a decree in a suit of the nature cognizable by a Small Cause Court is also not appealable (c)

Where the plaintiff decree holder *applied* under O 21 r 71 to recover Rs 660 being the deficiency of price from a defaulting purchaser and both the lower Courts disallowed the plaintiff s claim it was held that no second appeal lay to the High Court the reason given being that but for the provisions of r 71 a *suit* would have to be filed for that amount in which case it would have been a Small Cause Court suit and the application therefore must be treated as one made in execution of a Small Cause Court decree (d)

103 [*New*] In any second appeal, the High Court may if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal which has not been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality omission, error or defect such as is referred to in sub section (1) of section 100

Power of High Court to determine issues of fact

Changes in the section—The last part of the section beginning with the words which has not been determined was substituted by Act 6 of 1926 for the words but not determined by the lower appellate Court which occurred after the word of the appeal

Scope of the section—This section is new It was amended by Act 6 of 1926 as stated above The section as it now stands empowers the High Court in second appeal to determine issues of *fact* (1) where such issues *have not been determined* by the lower appellate Court or (2) where they *have been wrongly determined* by that Court provided the evidence on the record is *sufficient* to enable the High Court to determine such issues. If the evidence on the record is not sufficient the proper course is to refer the issues for trial under O 41 r 25

In the absence of any such provision in the Code of 1882 there was a conflict of decisions as to the power of the High Court to determine in second appeal issues of *fact* which had not been determined by the lower appellate Court On the one hand it was held that where the evidence on the record was sufficient to enable the High Court to deliver judgment the High Court had the power at the hearing of a second appeal itself to fix and determine issues of fact necessary for the disposal of the appeal but not determined by the lower appellate Court as a remand in such a case would merely cause delay and increase costs (e) On the other hand it was held that even if the evidence on the record was sufficient the High Court had no such power and the only course open to it was to remand the issues for a finding

(a) Na y i v Nag d s (1906) 30 Bom 113

(b) *Mar la* ... *v Mar l Ma o r* (190) 30 M l 1 *B ll Bl u har* v *Bab a* (188) 11 Cal 16 ... v ... *Ram* (19) 3 Lah 141 6 I C 18 ( ) A L 30

(c) ... *Pra d* v *M shi q* (19 0) 4 All 00 54 I C 43 ... (19 1) 43 All 403 60 I C 831 (1) A A

(d) ... (1921) ... 3 ... I C 19 (1) A B ...

(e) ... (18) 7 ... 68 ... *per* ... *Deokishe v B* ... 1 6 1 8 *per* ... C J ... J

... Mad L J 409 90 I C ... 74

the lower appellate Court the ground of the decisions being that the High Court had no power in second appeal to determine any issue of *fact* (*f*) The pre ent section gives effect to the former view It has been held under this section that where the High Court has framed issues and referred the same for trial to the lower Court under O 41 r 25 and the findings of the lower Court on those issues are incomplete the High Court has power under this section to determine tho e issues if there are materials on which the High Court can come to a conclusion (*g*)

Under the section as it stood before it was amended by Act 6 of 1920 it was held that where a question of fact had been determined by the lower appellate Court but the decision could not be supported because it was based in part *on evidence improperly admitted* the High Court could not lool at the evidence to decide whether the remaining evidence after exclusion of evidence erroneou ly admitted was sufficient to warrant the finding of the Court below and the proper course it was held was to remand the case to the lower Court (*h*) This resulted in unnecessary remands and the section has now been amended to enable the High Court itself in second appeal to come to the necessary finding of fact in all cases where the finding of the lower appellate Court is vitiated by an error or illegality such as is described in s 100 (1) Since the amendment the High Court may itself determine the necessary issues of fact without remanding the case to the lower Court in cases such as th above (*i*)

Appeals from Orders

104 [S 588] (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders —

Ord rs from which appeal li

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court

(b) an order on an award stated in the form of a special case,

(c) an order modifying or correcting an award,

(d) an order filing or refusing to file an agreement to refer to arbitration,

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration,

(f) an order filing or refusing to file an award in an arbitration without the intervention of the Court,

(ff) an order under section 35 A,

(*f*) G H L I v Cra f rd (188) 9 All 14 (F B) Deok I Pan i (1896) 8 All 1

(*g*) S t t a v I e l t I I (19 0) 4 I A 6 43 M 1 56 6 I C 11 (A n l i a a v I ee a (19) 49 I A 56 4 M 1

86 68 I C 38 ( ) A I C

(*h*) J m t v Hard (19 4) 40 Cal L J 39 8 I C 19 (4) A C 104

(*i*) I) I a v M Ch dra (19) 31 C W N 3 99 I C 189 ( ) A C 1

(g) an order under section 95,

(h) an order under any of the provisions of this Cod imposing a fine or directing the arrest or deten tion in the civil prison of any person except wher such arrest or detention is in execution of decree,

(i) any order made under rules from which an appea is expressly allowed by rules

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made

(2) No appeal shall lie from any order passed in appea under this section

Appealable orders —This section and O 43 r 1 contain a full list of appealabl order The words save as otherwise expressly provided in the body of this Code o by any law for the time being in force are new See notes below under the head Letters Patent appeal

Clause (a)—See Schedule II paragraph (8) and notes thereto

Clause (b)—See Schedule II paragraph (11) and notes thereto

Clause (c)—See Schedule II paragraph (12) and notes thereto

Clause (d)—See Schedule II paragraph (17) and notes thereto

Clause (e)—See Schedule II paragraph (18)

Clause (f)—See Schedule II paragraph (21) and notes thereto It has been held by the High Court of Calcutta that this clause does not apply to proceedings under cl (2) of s 11 of the Arbitration Act 1899 and that no appeal therefore lies under this clause from an order refusing to set aside an award made and filed under that Act but the High Court has jurisdiction to hear the appeal under cl 15 of the Letters Patent (j) In Calcutta the practice is for the Registrar to *file* the award The party dissatisfied with the award may then apply to *have it set aside* In Allahabad the practice is to apply *to the Court* for an order *to file* the award Hence it has been held by the Allahabad High Court that if the District Judge refuses to file the award an appeal lies to the High Court under cl (f) from the order refusing to file the award (k)

Clause (ff)— This clause was inserted in the section by Act 9 of 1922 See the proviso to sub sec (1)

Clause (h)—An appeal lies from an order of arrest before judgment (l) See O 16 rr 10 12 17 and 21 (summoning and attendance of witnesses) O 26 r 17 (attendance and examination of witnesses before Commissioner) O 39 r 2 sub r (3) (disobedience of injunction)

Clause (i)—See O 43 r 1

Proviso —The proviso was inserted in the section by Act 9 of 192[illegible]

(j) *C mpbell & Co v Jeth aj* (1918) 4 Cal 0 46 I C 687
(k) [illegible] *Caja* [illegible] (19 1) 43 All 349 61 I C 63 (21) A [illegible]
(l) *Sy d Hoo* [illegible] *Chett a* (1924) 2 Rang 36 84 I C 0 (4) A R 361

Sub section (2)—Thus if an appeal is preferred under O 43 r 1 (a) from an order under O 7 r 10 returning a plaint to be presented to the proper Court and an order is made in appeal remanding the case under O 41 r 23 no appeal lies from such order (*m*) This sub section however does not take away the right of appeal conferred by cl 15 of the Letters Patent (*n*) The High Court of Allahabad is the only Court that has held that it does (*o*) See notes below Letters Patent Appeal See also notes to O 41 r 23 Appeal

Section 154—There are some orders which were appealable under sec 588 of the repealed Code which are not appealable under this section As to these it is provided by s 154 that where the right to appeal has already accrued to a party before the commencement of this Code such right shall not be affected by anything contained in this Code

Letters Patent appeal—Clause 15 of the Letters Patent provides that an appeal lies from every judgment of a single Judge of the High Court in the exercise of its original civil jurisdiction to other Judges of the Court Now an order refusing to set aside an award is a judgment within the meaning of the said clause (*p*) It is clear that if such an order is made by a Munsif s Court or by the Court of a Subordinate Judge or by the District Court no appeal will lie from it for it is not an order specified in the present section It is equally clear that if such an order is made by a Judge of the High Court an appeal will lie from it *under the Letters Patent* for the present section expressly saves the right of appeal given by *any law for the time being in force* Upon this point there was a conflict of decisions under the Code of 1882 The conflict arose from the provision contained in s 588 of that Code that an appeal lay from orders specified in that section *and from no other orders* [see sub sec (2) of the present section] The question accordingly arose whether s 588 by declaring that no appeal lie from any order other than those specified in that section took away the right of appeal given by the Letters Patent It was held by the High Courts of Calcutta Madras and Bombay following a decision of the Privy Council (*q*) that s 588 did not take away the right of appeal given by cl 15 of the Letters Patent (*r*) and that an appeal therefore lay from an order of a single Judge of the High Court refusing to set aside an award to the other Judges of the Court On the other hand it was held by the Allahabad High Court on a different reading of the Privy Council case referred to above that s 588 took away the right of appeal given by the Letters Patent (*s*) and that no appeal therefore lay from an order refusing to set aside an award though the order might be made by a Judge of the High Court It is submitted that the words save as otherwise expressly provided by *any law for the time being in force* include the Letters Patent and that they were added into the present section to give effect to the Calcutta Madras and Bombay decisions This is the view taken by the High Court of Lahore (*t*) The High Court of Allahabad however has adhered to its previous view in cases under the present Code (*u*)

Privy Council appeal—The provision in sub sec (2) deals with internal appeals within the limits of British India It does not take away the general right of appealing to the Privy Council given by s 109 *A* applies to the District Judge of East Berar under

(*m*) *Nut t S gh v B lleo S ngh* (1911) 33 All 4 9 9 I C 666 *Chh b t M an v Ha cha r n Das* (191) P P n 119 p 40b 18 I C 5 9 *Bh ir i v H rb* (19 0) L h I J 97 *Vdl th v B l a t* (19) Bom L R 635 88 I C " 3 ( ) A B 431

( ) *I H S gh Sa al S gh* (19) 3 Lah 188 6 I C 389 ( ) A I 390

( ) *I ar Lal v Mad n L l* (1916) 33 All 191 39 I C 460

(*p*) *Tool ee Mo y v Sud r* (1899) 6 Cal 361

(*q*) *H rr l Clu d r v Kali S de i* (1883) 0 Cal 48 10 I A 4

( ) *Toolse e M ey v S devi* (1893) 26 Cal 361 *S hapath v Nar ja a a n* (190) Mad I *Chapp n v Movl i* (1893) M d 68 *Se ry of State v J ha gir* (190) 4 B m I R 34

( ) *B no Bil Meld H sa* (1880) 11 All 3 *M h mm d v Ishan U th* (18) 14 All 2 6 [F B]

(*t*) *R ld Si gh v Sa wal S gh* (19) 3 Lah 189 67 I C 388 (2) A L 390

(*u*) *Pi n Lal v Mad i Lal* (1916) 39 All 191 39 I C 460

Sch II para 20 to file an award in Court *B* opposes the application The District Judge makes an order refusing to file the award *A* appeals from the order [see cl (f)] to the Judicial Commissioner The Judicial Commissioner makes an order filing the award *B* appeals to the King in Council from the order of the Judicial Commissioner Does the appeal lie to the King in Council? Yes for though no second appeal lies to the High Court by reason of the provision in sub sec (2) an appeal does lie to the King in Council under s 109 of the Code (v) Similarly though no second appeal lies from an order passed on appeal from the order specified in O 43 cl (j) an appeal lies to the King in Council under s 109 of the Code (w)

105 [S 591] (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction, but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal

Other orders

(2) Notwithstanding anything contained in sub section (1) where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness

Changes introduced by the section —This section corresponds with s 591 of the Code of 1882 except in the following particulars —

1 Sub section (2) is new See notes below Sub section (2) appeal from order of remand

2 S 591 contained the word in any *such* order after the word irregularity The word such has been omitted as the expression such order gave rise to the contention in some cases before the Privy Council that s 591 applied to non appealable order only a contention that was overruled by the Privy Council (x)

Scope of the section —An interlocutory order made in a suit is either appealable (s 104) or not appealable This section like the corresponding s 591 applies to *any* order that is to appealable as well as non appealable orders Where an interlocutory order is appealable the party against whom the order is made is not bound to prefer an appeal against it but he may make the irregularity in the order a ground of objection in the memorandum of appeal where an appeal is preferred from the decree in the suit in which the order was made In other words *s* 10 allows an appealable order which has not been appealed from to be made the subject of appeal in an appeal from the decree There is no law prevailing in India which render it imperative upon a party to appeal from every interlocutory order by which he may conceive himself aggrieved under the penalty if he does not do so of forfeiting for ever the benefit of the consideration of the appellate Court Nothing would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon a

(v) *Pa lal v K I had* (19 4) 1 I A 51 C 1 361 83 I C 531 (24) A PC 9

(w) *Tel r Krisl a v Mot Cha d* (1913) 40 I A 140 148 149 40 Cal 63 64-648 19 I C 926

(x) S the three Privy Council cases cited in note (z) below

party the necessity of appealing whereby on the one hand he might be harassed with endless expense and delay and on the other inflict upon his opponent similar calamities It was so observed by their Lordships of the Privy Council in *Moheshur Singh* v *The Bengal Government* (y) and in subsequent cases (z) and it is this principle that underlies the present section The present section makes it quite clear that an order appealable under s 104 may be questioned under s 105 in an appeal from the decree in the suit al though no appeal from the order has been preferred under s 104 (a) And even where the interlocutory order is one *from which no appeal lies* an error defect or irregularity in that order may be set forth as a ground of objection in the memorandum of appeal where an appeal is preferred from the decree in the suit in which the order was made (b)

Affecting the decision of the case —It has been held by almost all the High Courts that the words affecting the decision of the case mean affecting the decision of the case *on its merits* It has accordingly been held that an order cannot be attacked in appeal from a final decree unless the error defect or irregularity in the order is one affecting the decision of the case *on the merits* (c) It has thus been held by the High Courts of Allahabad Calcutta and Lahore that an order under O 9 r 13 setting aside an ex parte decree is not an order that affects the *merits* of the case such an order merely ensures a hearing upon the merits hence the order cannot be attacked in an appeal from the decree in the suit (d) But the High Court of Madras has held that such an order may be attacked in appeal from the final decree (e) In the Madras case how ever the ex parte decree was set aside as to one of two defendants who had not applied to et it aside and it was held that the order setting aside the ex parte decree as against that defendant may be attacked in an appeal from the final decree This decision was approved by the same High Court in a later case where also the facts were peculiar The point of the decision in the latter case seems to be that an order under O 9 r 13 may be challenged in an appeal from the final decree in the particular circumstances of a case (f) The Rangoon High Court refu es to read the words *on its merits* into this section and allows an order setting aside an ex parte decree to be impugned in final appeal (g)

An order remanding an appeal from an order returning a plaint for presentation to the proper Court is not an order affecting the decision of the case and cannot be challenged in second appeal (h)

An order under O 41 r 19 re admitting an appeal which has been dismissed for default is not one which affects the decision of the case on the merits and it cannot therefore be attacked in an appeal from the final decree (i)

It has been held by the High Courts of Bombay Madras Allahabad and Calcutta that an order setting aside an award and directing the case to be tried by the Court

(y) (18 9) 7 M I A 283

(z) *F b s* v *Ame oon a B g n* (186) 10 M I A 340 *Sh o th* v *R* *th* (186) 10 M I A 413 *Sh h M kh L l* v *e T hen S gh* (1869) 1 M I A 15

( ) See *Sh o Nath* v *I m D n* (1896) 18 All 19

(b) Se *J et* v *D labh* (1900) 24 Bo 30 and *God ar* v *(j p* (1900) 23 Mad 494

(c) *Tas d I q Hayati* v *a* (1903) All 80 *N ll Lal* v *C llector of B l h h* (1916) 14 All L J 610 614 3 I C 03 *Ch l o* v *R gl oonath* (189) Cal 981 *M ha ed* v *Mo ohar* (19 4) 40 C L J 588 8 I C 100 ( ) A C 4 3 *Nish Kanta* v *L ar Lal* (1) 41 Cal L J 186 86 I C 10 9 ( ) A C 11 *S j a B b* v *Madh s d* (19 5) 52 Cal 4 8 I C 100 ( ) A C 66 *Fazal* v *H shmat* (1916) P nj Rec n 40 p 115 31 I C 914 *S nda S ngh* v *N h ya* (19) 6 L h 94 88 I C 9 0 ( ) A L 466 *Dho l* v *I a* (19) 51 I m 49 103 I C 6 ( ) A B 455

(d) All 80 *p* Cal 981 *s p a* 6 Lah 94 88 I C 9 0 (2) A L 466 *s p a* A different opinion wa expr s ed by K ramat Hu J in *Na d am* v *Bhop l S ngh* (191) 34 All 59 59 16 I C 1

(e) *Gopal Chett* v *S bbie* (1903) 6 M d 604 60

(f) *Ithamsa* v *G e an* (19 4) 4 M d L J 641 64 8 I C 808 (24) A M 890

(g) *M S M h m l* v *Coll ctor* (19) 5 Rang 80 10 I C 3 9 ( ) A R 1 0

(h) *Ve lat a asu* v *Kot uya* (19 6) 51 Mad L J 119 9 I C 790 (6) A M 900

(i) *Gul b* v *Thak r* (190) 4 All 464

may be attacked in appeal from the final decree (j) the reason given in the Allahabad case being that such an order affects the decision of the case on the merits (k) The High Court of Lahore has taken a different view (l) but the attention of the Court was not drawn to the decisions of the other High Courts

An order setting aside an abatement under O 22 r 9 does not affect the decision of the case on the merits Rather it re opens the hearing of the case on the merits and it cannot therefore be challenged in appeal from the final decree (m) But there is a difference of opinion whether an order setting aside an abatement may be so attacked if it is made *simultaneously* with the final decree in the suit It has been held by the High Court of Allahabad that it may be so attacked if passed simultaneously with the final decree (n) On the other hand it has been held by the High Court of Calcutta that an order setting aside an abatement cannot be challenged in an appeal from the final decree whether it is passed before or simultaneously with the final decree (o)

An order refusing leave under 0 (b) cannot be attacked in an appeal from an order returning a plaint for presentation to the proper Court (p)

Error defect or irregularity —The error defect or irregularity referred to in this section must be an error defect or irregularity in law or procedure and not in matters of fact (q)

"Where a decree is appealed from —This section contemplates two things namely (1) a regular appeal from a decree and (2) the insertion in that appeal of a ground of objection relating to an interlocutory order The High Court of Allahabad has held that no appeal will lie where the appeal is *ostensibly* against the decree passed in the suit but the grounds of appeal are solely directed against an interlocutory order made in the suit (r) On the other hand the High Courts of Calcutta and Madras have held that an appeal will lie though the only reason for the appeal is an erroneous decision in regard to an interlocutory order (s)

It should be noted that in order to take advantage of the provisions of this section the ground of objection must be set out in the memorandum of appeal (t)

Sub section (2) appeal from order of remand —An order under O 41 r 23 remanding a case is appealable where an appeal would lie from the decree of the Appellate Court [O 43 r 1 cl (u)] Such an order was also appealable under the Code of 1882 [see s 588 cl (28)] Under s 591 of the Code of 1882 it was held that a party aggrieved by an order of remand could object to its validity in an appeal against the final decree though he might have appealed against the order under s 588 and had not done so (u) Sub section (2) has been added to preclude an appellant from taking on an appeal from the final decree any objection that might have been urged by way of appeal from an order of remand (v)

(j) *D in d r v Jagl* *tl* (190) 6 B m 1 *A lutl jj t v Ali nn jjt* (1908) 31 Mad 345 *R* *1 ta v D oki* (191) 3 All 4 6 31 C 411 *R dri v M tl* *n* (19) 3 All I J 6 6 89 I C 1 3 ( ) A A 66 *Bama Chara v Gad dh r* (19 9) 56 Cal 21

(k) 3 All 4 6 460 29 I C 411 *sra*

(l) *B dh P* *v Pa za* (19 1) 3 Lah L J 9 59 I C 6 6 (1) A L 14

(m) *Moh n d v Monol r* (19 4) 40 Cal I J 88 8 I C 100 (4) A C 4 3 *B l t* *I a n v B nke* (19) 4 All 8 I C 211 ( ) A A 4 6

(n) *He I ner* *v 4 ba Prasad* (1900) All 430

(o) *Mol* *l v Mo oh* (19 4) 40 Cal I J 88 8 I C 100 (4) A C 4 3 *Saj a* *Bib v Madlusud n* (19) C 1 4

8 I C 100 ( ) A C 66

(p) *Ille Br tl r v Ar* (1) Lal I J 66 88 I C 46 ( ) A L 338

(q) *S kal v M l ll* (1890) 1 All 00

(r) *M o v th v Ra D* (1896) 18 All 19 *M r* *S g* *D wan S gh* (1900) 2 All 366

(s) *I ji Dha tara v R kk j t a* (1911) 34 Mad 9 3 6 I C 3) *Coolee v I* *l ll* (1881) C I 148

(t) *T lak v Ch k ell a* (1893) 1 All 119

(u) *S l v P ij* (1890) 14 B m 23 *S bba* *v B l Ch tri* (183) 18 Mad 4 1 *I* *h r S gh v* *heol n* (1890) 1 All 10 *B t sre Ja* *l nd ka S bba v* *J m la Venkata y d* (1903) 3 Mad 318 I C

(v) *I* *S gh v I r S gh* (19 1) 2 Lal 63 I C 6 (1) A L 154

Privy Council appeal—This sub section does not apply to Privy Council appeals (u) See notes to s 109 Final Order

106 [S 589] Where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court

What Court to hear appeal

Forum of appeal—See notes under the same head to s 96 above

General Provisions relating to Appeals

107 [S 582] (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

Powers of Appellate Court

(a) to determine a case finally,

(b) to remand a case,

(c) to frame issues and refer them for trial,

(d) to take additional evidence or to require such evidence to be taken

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein

Prescribed — Prescribed means prescribed by the Rules contained in the First Schedule or made under s 122 or s 125 of the Code see s 2 cls (16) and (18)

Sub section (1)—Sub section (1) is new Note that the powers of the appellate Court referred to in cls (a) to (d) are limited by the Rules as appears from the opening words of the section (x)

Clause (a)—See O 41 rr 24 33

Clause (b)—See O 41 r 23

Clause (c)—See O 41 r 25

Clause (d)—See O 41 rr 27 28

Sub section (2)—This sub section corresponds to s 582 of the Code of 1882 The appellate Court has power under this section to give leave to a plaintiff to withdraw from a suit under O 23 r 1 (y) See also notes to O 41 r 20

(u) Abm I H s v G I K hna (1911) 33 All 391 9 I C 93 Venk ta a ga Nar h (191) 38 Mad 09 1 I C 84

(x) M M ha v Ram atan (1916) 43 Cal 148 33 I C 3 9

(y) See notes to O 23

108 [Ss 587, 590] The provisions of this part relating to appeals from original decrees shall, so far as may be, apply to appeals—

Procedure in appeals from appellate decrees and orders

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided

Compare O 42 r 1 and O 43 r 2

Appeals to the King in Council

109 [S 595] Subject to such rules as may, from time to time be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

When appeals lie to King in Council

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction, and

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council

Ss 109 and 110 are to be read together See also cl 39 of the Letters Patent For rules of procedure in appeals to the King in Council see O 45 below

Difference between the old and the new section —This section corresponds with s 595 of the Code of 1882 except that in cls (a) and (b) the words decree or final order have been substituted for the words final decree and in cl (c) the words or order have been added after the word decree This however does not introduce any change in the law The Code of 1882 contained section 594 which ran thus In this chapter (that is chapter XLV) unless there be something repugnant in the subject or context the expression decree includes also judgment and order Chapter XLV of the Code of 1882 relating to appeals to His Majesty in Council has been split into two parts in this Code ss 595 596 597 and 616 being retained in the body of the Code [now ss 109 112] and the remaining sections being relegated to O 45 S 594 has been reproduced with slight alterations in O 45 r 1 But it is not reproduced in this part of the Code as four only out of the twenty three sections of that chapter are retained in the body of the Code What has been done instead is that the words decree or final order have been substituted where the words final decree occurred in the four old sections and the words decree or order have been substituted where the word decree occurred in those sections

and dismis ed the suit but the High Court held on appeal that the will was valid and remanded the case under O 41 r 23 for the decision of subordinate points it was held that the order of the High Court was a final order as the order comprised a decision upon the cardinal issue in the suit and it was one that could never while the decision stood be questioned again in the same suit (*w*) Similarly where the cardinal point in a suit was whether notice under s 167 of the Bengal Tenancy Act 8 of 1885 to annul certain encumbrances was properly served or not and the High Court reversing the decision of the lower Court held that it was properly served and remanded the case to be tried on the other issues it was held that the order of the High Court was a final order (*x*) Where the lower Court held that the matter in issue in a suit was res judicata and the High Court held that it was not and remanded the case for trial on the merits it was held by the Calcutta High Court on an application for leave to the Privy Council that the order was final (*y*) The contrary has been held by the High Court of Allahabad (*z*) But where the lower Court refu ed to set aside an ex parte decree on the ground that O 9 r 13 did not apply and the High Court remanded the case *for an inquiry on the merits* it was held that the order of the High Court was not a final order but a *purely interlocutory order directing procedure* (*a*) Where the lower Court refused to set aside an abatement on the ground that the application was barred by limitation and the High Court reversed the order and directed the lower Court *to rehear the application* for permission to implead the heirs it was held that there was no adjudication on the merits and that the orde of the High Court was interlocutory and not final (*b*) It has also been held that where the lower Court dismisses a suit on the ground that the suit is barred under O 2 r 2 (*c*) or that the suit as framed is not maintainable (*d*) or that the plaintiff has no locus standi to maintain the suit (*e*) and the High Court reversing the decision of the lower Court remands the case for trial to that Court the order of the High Court is not final But there is a conflict of opinion whether where the lower Court dismisses a suit on the ground that it is barred by limitation and the High Court reversing the decision of the lower Court remands the case for trial to that Court the order of the High Court is final some cases holding that the order is interlocutory (*f*) and others that it is final (*g*)

In an Allahabad case an application was made by a company under sch II cl 17 to file an agreement to submit to arbitration The application was opposed (1) on the ground that the agreement not being under the seal of the company was invalid and (2) on the ground of misrepresentation and fraud The Court of first instance dismissed the application on the sole ground that the agreement not being under the seal of the company was invalid On appeal the High Court reversed the decree holding that the agreement did not require to be under the seal of the company and remanded the case for trial of the other issues i e issues as to fraud and misrepresentation From this order of remand the respondent applied for leave to appeal to His Majesty in Council It was held by a Full Bench that the order was not a final order within the meaning of cl (a) of this section there being other *important* issues to dispose of namely the

(*w*) I A 1 1 All 11 *supra*

(*x*) *Ananda Gopal* v *Nafar Chandra* (1908) 3 Cal 618

(*y*) *Khagendra* v *Sal a r m* (19 1) 25 Cal W N 836 61 I C 6 (1) A C 177

(*z*) *Sajj d* v *Ishaq* (1 0) 18 All L J 83 54 I C 04

(*a*) (1901) 8 I A 8 34 23 All 2 0 *supra*

(*b*) *M mt -ud D la* v *J mes Sk ner* (19) 47 All 335 86 I C 161 ( ) A A 63

(*c*) *Almal H sain* v *G b nd r a* (1911) 33 All 391 9 I C 9 v *Narasimha* (1915) 38 I C 84

(*d*) *Mehr Chand* v *Labh Ra* (19 1) Lah 106 60 I C 5 (21) A L 03

(*e*) *Sult n Si gh* v *Murli Dhar* (19 4) 5 Lah 3 9 80 I C 366 (4) A L 571 [F B]

(*f*) *Maha t* v *Ca dasar a* (1884) 8 Bom 548 *Hab b u Nissa* v *Munawar un Nissa* (1903 5 All 6 9 *Ba j Nath* v *Sohan Bibi* (1909) 31 All 54 3 I C 967

(*g*) *Sallappa* v *S brama an* (19) 43 Mad L J 8 71 I C 334 ( ) A M 510 *Sant L l* v *Paj Na a* (19 3) 4 All 74 9 I C 87 (4) A A 110 [whether application for decree under O 34 r 6 w s barred]

108 [Ss 587, 590] The provisions of this part relating to appeals from original decrees shall, so far as may be, apply to appeals—

Procedure in appeals from appellate decrees and orders

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided

Compare O 42 r 1 and O 43 r 2

APPEALS TO THE KING IN COUNCIL

109 [S 595] Subject to such rules as may, from time to time be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions herein after contained, an appeal shall lie to His Majesty in Council—

When appeals lie to King in Council

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction,

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction, and

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council

Ss 109 and 110 are to be read together See also cl 39 of the Letters Patent For rules of procedure in appeals to the King in Council see O 45 below

Difference between the old and the new section —This section corresponds with s 595 of the Code of 1882 except that in cls (a) and (b) the words decree or final order have been substituted for the words final decree and in cl (c) the words or order have been added after the word decree This however does not introduce any change in the law The Code of 1882 contained section 594 which ran thus In this chapter (that is chapter XLV) unless there be something repugnant in the subject or context the expression decree includes also judgment and order Chapter XLV of the Code of 1882 relating to appeals to His Majesty in Council has been split into two parts in this Code ss 595 596 597 and 616 being retained in the body of the Code [now ss 109 112] and the remaining sections being relegated to O 45 S 594 has been reproduced with slight alterations in O 45 r 1 But it is not reproduced in this part of the Code as four only out of the twenty three sections of that chapter are retained in the body of the Code What has been done instead is that the words decree or final order have been substituted where the words final decree occurred in the four old sections and the words decree or order have been substituted where the word decree occurred in those sections

Right of appeal to the Privy Council —The right of appeal from the High Courts to the Privy Council now rests on cl 39 of the Letters Patent and this is elaborated in ss 109 and 110 of the Code of Civil Procedure Therefore though there is no express provision in the Provincial Insolvency Act 1920 for appeal to the Privy Council from orders of the High Court made under that Act an appeal to the Privy Council is competent if the case comes under ss 109 and 110 of the Code ( ) Similarly a decree of a High Court in a testamentary matter is appealable to His Majesty in Council although sec 299 of the Indian Succession Act 1925 provides only for an appeal to the High Court (a) Thus an appeal lies from a judgment of the High Court on the appellate side granting probate of a will (b) But there is no right of appeal if sections 109 and 110 are not applicable e g from a decree of a High Court under section 91 (3) of the Rangoon City Municipal Act (c)

Decree —For definition of decree see s 2 (2) above An act of State is not a decree Hence no appeal lies to the King in Council from an order of the Viceroy and Governor General of India in Council deposing the Maharajah of a Native State in India such an order being an act of State (d)

Preliminary Decree —An appeal lies to the King in Council from a preliminary decree e g a decree declaring the liability of a party and directing accounts to be taken (e)

Final order —*A final* order within the meaning of clauses (a) and (b) of the section is an order which finally disposes of the rights of the parties (f) An order comprising the decision of a High Court upon *a cardinal issu in a suit* that issue being one that goes to the foundation of the suit *and one that can never while the decision stands be questioned again in the uit* is final within the meaning of this section notwithstanding that there may be subordinate inquiries to make (g) The expression final is used in contradiction to interlocutory (h) To determine whether an order is final or not it is necessary in each case to ascertain the nature of the proceedings (i)

In *Rahimbhoy* v *Turner* (j) which is the leading case on the subject their Lordships of the Privy Council held that where an order directing the taking of accounts which the defendant contends ought not to be taken at all decides in effect that if the result should be found to be again t the defendant he *is liable* to pay the amount the order is final within the meaning of this section In the course of the judgment their Lordships said

Now that question of *liability* was the sole question in dispute at the hearing of the cau e and it is the *cardinal* point in the suit The arithmetical result is only a con equence of the liability The real que tion in issue was the liability and that has been determined by this decree against the defendant in such a way that *in this suit it is final* The Court can never go back upon this decree so as to say that though the result of the account may be against the defendant still the defendant is not liable to pay anything That is finally determined against him and therefore in their Lord hips view the decree is a final one within the meaning of section 595 of the Code In a Calcutta ca e it was held that an order refusing to appoint a receiver in a suit is not a

( ) [illegible] (1913) 40 C [illegible] 64 [illegible] 43

(a) [illegible] (19 6) 49 Mad [illegible] 836 (6) A M 996

(b) [illegible] (19 7) 5 Ran 110 95 I C 59 ( ) A R 6

( ) [illegible] (19) 4 Ran [illegible] 934 ( ) A R 88

(d) [illegible] (190) 3 Cal 1

( ) [illegible] (19) 4 I A 103 111 113 49 C [illegible] 60 63 566 6 I C 1 4 ( ) A I C 3

(f) [illegible] (19 0) 4 I A 1 4 47 Cal 919 2 Bom L R 606 [illegible] I C 31 *Boy* [illegible] *Urban District Co* [1903] 1 K B 4 548

(g) *Rahimbhoy* v *Turner* (1891) 1 Bom 15 18 I A 6 *M* [illegible] v *Bodha* (189) 1 All 112 I A 1

(h) [illegible] (1901) 3 All 0 7 8 I A 28 34

( ) *M* [illegible] v *Bodha* (189) 17 All 11 11 I A 1

(j) (1891) 1 Bom 15 18 I A 6 [illegible] (19) 49 I A 109 111 113 43 C [illegible] 60 63 566 6 I C 1 4 ( ) A PC 237

final order and no appeal lies from it to the Privy Council (k) In a recent Calcutta case however where the High Court had discharged an order made by the District Court appointing a receiver the High Court granted leave to appeal to the Privy Council The Privy Council affirmed the order of the High Court but observed that as a general rule and in the absence of special circumstances or some unusual occasion for it exercise the power of making interlocutory orders was one which was not a suitable subject for review by the Judicial Committee (l) An order made in revision under s 115 of the Code granting (m) or refusing (n) leave to sue in forma pauperis is not a final order An order of the High Court directing the lower Court to proceed with the execution of a decree which the lower Court has refused to execute on the ground that it had no jurisdiction is not a final order (o) An order refusing an application to be brought on the record as the legal representative of a deceased party to a pending appeal is not a final but an interlocutory order (p) But where after a preliminary decree had been passed in a suit for partition declaring that the plaintiff was entitled to a one fourth share in the joint properties the lower Court dismissed the suit on the ground that the plaintiff had failed to prosecute the suit and the High Court on revision reversed the order it was held that the order of the High Court was a final order as the effect of the order was to restore the preliminary decree whereby the plaintiff was declared to be entitled to a one fourth share and the order was to that extent a decision upon a *cardinal* point in the case (q)

An order made on appeal setting aside or confirming a sale under O 21 rr 90 and 92 is appealable to His Majesty in Council Such an order is clearly one which deals *finally* with the rights of parties It is true that no second appeal lies from such an order having regard to the provisions of s 104 (2) read with O 43 r 1 (j) But s 104 (2) cannot restrict the provision of the present section which allows an appeal to the King in Council from final orders (r) Similarly though no second appeal lies from an order passed in appeal from an order filing an award [see s 104 (1) (f)] an appeal lies to the King in Council from such an order under this section the order being a final one (s) But an order refusing a stay under s 19 of the Arbitration Act 9 of 1899 is not a final order as such an order does not finally dispose of the rights of the parties but leaves them to be determined by the Court in the ordinary way (t) For the same reason an order made by a High Court reversing an order passed by the lower Court under O 23 r 3 recording a compromise [see O 43 (1) (m)] and directing the lower Court to proceed with the suit in the ordinary course is not a final order (u)

An order of remand is not ordinarily capable of being the subject of an appeal to His Majesty in Council being ordinarily interlocutory and not final within the meaning of this section but it would be a final order and therefore appealable if it has the effect of deciding finally the *cardinal* point in the suit (v) Thus where the cardinal issue in a suit was as to the validity of a will and the lower Court held that there was no valid will

(k) *Cl i d D lt v I u l i d* (189) Cal 3 8

(l) *Be j I n l a v Satish Cl a dra* (19-8) 55 I A 131 Cal 0 103 I C 349 (-8) A I C 49

(m) *I I t v M st F lp t* (19) 6 I t 67 100 I C 8 6 ( ) A I 1

(n) *B ib i Sal S j l v Gopal* (1904) 8 Cal W N 36

(o) *Raj k a v Rame uar* (1919) 4 Pat L J 401 I C 461

(p) *G ppa v Ca g pp* (1914) 38 Bo 4 1 3 I C 3 3

(q) *La l t v Bal k l* (19 1) 6 I t L J 116 60 I C 4 (1) A P 37

(r) *K h a I er lal v Mot Cl t l* (1913) 40 Cal 635 64 648 40 I A 140 148 149 19 I C 36

(s) *I l t v K sha ha id* (19 4) 1 I A 1 11 C 1 361 83 I C 31 (4) A I C 9

(t) *I a cha d v (rd l* (19 0) 47 I A 1 4 4 Cal 918 B m L R I C 30 ppro in *S l man v H* [1921] 1 Q B 34 *J n v* *Urban D t ic* (*l* [1903] 1 K a *S b n v S lbst n* (1916) K L

(u) *Sha k r v Nar n* (19 31 4 61 I C 80 ( ) A R *Nath v S Tamb I* (19) 83 83 I C 94 ( ) A *I rdo v B I* (19 4) 46 Mad J I C 938 (4) A M *D j I v Dh K* (1 4 I C 10 (6) A *Sacuri* (1) 6 Lal

(v) *I ha k n v (I* 3 All 0 3 I A *Botha* (18) 1 All 11

and dismissed the suit but the High Court held on appeal that the will was valid and remanded the case under O 41 r 23 for the decision of subordinate points it was held that the order of the High Court was a final order as the order comprised a decision upon the cardinal issue in the suit and it was one that could never while the decision stood be questioned again in the same suit (w) Similarly where the cardinal point in a suit was whether notice under s 167 of the Bengal Tenancy Act 8 of 1885 to annul certain encumbrances was properly served or not and the High Court reversing the decision of the lower Court held that it was properly served and remanded the case to be tried on the other issues it was held that the order of the High Court was a final order (x) Where the lower Court held that the matter in issue in a suit was res judicata and the High Court held that it was not and remanded the case for trial on the merits it was held by the Calcutta High Court on an application for leave to the Privy Council that the order was final (y) The contrary has been held by the High Court of Allahabad (z) But where the lower Court refused to set aside an ex parte decree on the ground that O 9 r 13 did not apply and the High Court remanded the case *for an inquiry on the merits* it was held that the order of the High Court was not a final order but a *purely interlocutory order directing procedure* (a) Where the lower Court refused to set aside an abatement on the ground that the application was barred by limitation and the High Court reversed the order and directed the lower Court *to rehear the application* for permission to implead the heirs it was held that there was no adjudication on the merits and that the order of the High Court was interlocutory and not final (b) It has also been held that where the lower Court dismisses a suit on the ground that the suit is barred under O 2 r 2 (c) or that the suit as framed is not maintainable (d) or that the plaintiff has no locus standi to maintain the suit (e) and the High Court reversing the decision of the lower Court remands the case for trial to that Court the order of the High Court is not final But there is a conflict of opinion whether where the lower Court dismisses a suit on the ground that it is barred by limitation and the High Court reversing the decision of the lower Court remands the case for trial to that Court the order of the High Court is final some cases holding that the order is interlocutory (f) and others that it is final (g)

In an Allahabad case an application was made by a company under sch II cl 17 to file an agreement to submit to arbitration The application was opposed (1) on the ground that the agreement not being under the seal of the company was invalid and (2) on the ground of misrepresentation and fraud The Court of first instance dismissed the application on the sole ground that the agreement not being under the seal of the company was invalid On appeal the High Court reversed the decree holding that the agreement did not require to be under the seal of the company and remanded the case for trial of the other issues i e issues as to fraud and misrepresentation From this order of remand the respondent applied for leave to appeal to His Majesty in Council It was held by a Full Bench that the order was not a final order within the meaning of cl (a) of this section there being other *important* issues to dispose of namely the

(w) — I A 1 17 All 11 *s pr*

(x) *4 a da Gop l v N f Cl and a* (1903) 3 Cal 618

(y) *Klag ndra v S 1a i m* (19 1) C 1 W N 836 61 I C 7 6 (1) A C 177

(z) *Saj 1 v Ishaq* (19 0) 18 All L J 83 4 I C 504

( ) (1901) 3 I A 3 34 23 All 2 0 *s pra*

(b) *Mumt ud D la v Jame Sk e* (19) 47 All 33 86 I C 161 ( ) A A 63

(c) *M ad H s in v Gob 1 Krishna* (1911) 33 All 391 9 I C 93 *I e Katara ga v Naras mha* (191) 38 Mad 09 1 I C 84

(d) *Meh Ch n l v Labh u Ram* (19 1) Lah 106 60 I C (1) A L 203

(e) *Sult S gh v M l Dh r* (19 4) 5 Lah 3 9 80 I C 366 (4) A L 6 1 [F B]

(f) *Mata t v Ca las na* (1894) 8 Bom 49 *H un N sa v M u r un Nissa* (1903 All 6 9 *Ba j Nath v Soha I bi* (1909) 31 All 54 3 I C 96

(g) *Sattappa v S brama a* (19) 43 Mad L J 8 1 I C 334 ( ) A M 510 *Sant Lal v Raj Nara n* (19 3) 4 All 4 9 I C 87 (4) A A 119 [whether application for decree under O 34 r 6 was barred]

issues of mi repre entation and fraud and leave to appeal was refused (*h*) Section 105 sub s (2) does not apply to appeals to His Majesty in Council (*i*)

An order of the High Court refusing to enrol a particular person as a legal practitioner under the Legal Practitioners Act 18 of 1879 is not one from which the High Court has juri diction to grant leave to appeal to the Privy Council Such an order is one pas ed in the exercise of the admini trative powers of the Court (*j*) An order refusing an application under s 45 of the Specific Relief Act 1 of 1877 is a final order (*k*)

Order passed on appeal —An order passed by a High Court rejecting an application to amend a decree is not an order passed on appeal within the meaning of cl (a) of thi section and is therefore not appealable to His Majesty in Council Moreover it is doubtful whether such an order is a *final order* (*l*) Similarly it has been held that an order made by a High Court refusing to admit an appeal presented after the expiration of the pre cribed period is not an order passed on appeal within the meaning of this section (*m*) An order passed in revision does not fall under clau e (b) (*n*)

Any other Court of final appellate jurisdiction —An appeal lies to the *Privy Council from a final order of a District Judge* (*o*) *or of the Judicial Commissioner s* Court (*p*) made under s 104 See notes to s 104 Privy Council appeal

Limitation —The application for leave to appeal to the Privy Council must be made within 90 days from the date of the decree sought to be appealed from [Limitation Act 1908 Sch I art 179]

Under the Limitation Act of 1877 it was held that in computing the aforesaid period the time requisite for obtaining a copy of the decree appealed from could not be excluded as s 12 of that Act did not apply to such applications (*q*) It was also held that the application could not be admitted after the expiration of the aforesaid period, though there was sufficient cause for not presenting the application within the prescribed period as s 5 of the Act did not apply to such applications (*r*) Both these sections have now been amended in the Limitation Act of 1908 and they have been made applicable to applications for leave to appeal The aforesaid decisions are therefore no longer law and it has now been expressly held that under s 12 of the Limitation Act of 1908 the t me requisite to obtain a copy of the decree appealed from is to be excluded (*s*)

Interlocutory Orders —See cl 40 of the Letters Patent

Prerogative of the Crown —The Code does not limit the prerogative of the Crown to admit an appeal Hence special leave may be granted by the King in Council to appeal where leave has been refu ed by the High Court (*t*) But no special leave will as a rule be granted unless there is some substantial question of law or general interest involved (*u*) Sec s 112

(*h*) *Nunmiah* v *The Ga ges Sugar Works Ld* (1916) 38 All 150 3 I C 360 [I B]

(*i*) *Ahmad Husain* v *Gobind Krishna* (1911) 33 All 391 9 I C 93 *Venk t rangi* v *N rasimha* (1915) 38 Mad 50) 1 I C 84 *Br to* v *B u* (19 4) 46 Mad L J 357 8 I C 938 (4) A M 01

(*j*) *S dhansu In re* (19) 1 Pat 590 70 I C 1 2 (2) A P 603

(*k*) *Alcock Ashdown & Co* v *Cl f Revenue A thority* (19 1) 23 Bom L R 113 64 I C 9 9 (21) A B 378

(*l*) *Su der Koer* v *Cha d shw r* (1903) 30 Cal 679

(*m*) *Karsondas* v *Gang ba* (1908) 3 Bom 108

(*n*) *S raj S gh* v *Ph l Kumari* (19 6) 48 All - 6 90 I C 904 (26) A A 20

(*o*) *S adatma d* v *Ph l Kuar* (1898) 0 All 41 5 I A 146

(*p*) *Raml l* v *Kishanchand* (19 4) 51 I A 7 51 Cal 361 83 I C 1 (4) A PC 9

(*q*) *Moroba* v *Ghanasham* (189) 19 Bom 301 *Ande son* v *Periasam* (189) 15 Mad 163 *Shib S gh* v *Ga dharp S ngh* (1906) 28 All 391

(*r*) *Shib Singh* v *Gandharp Singh* (1906) 8 All 391

(*s*) *Abd llah* v *Adm Genl of Be gal* (1915) 4 Cal 3 4 I C 273 *Ram Sarup* v *Jasna t Lai* (1915) 38 All 8 31 I C 906

(*t*) *Rahimbhoy* v *Turner* (1891) 15 Bom 155 18 I A 6 *Ikra nul Huq* v *Wilkie* (1906) 33 Cal 893

(*u*) *Moti Chand* v *Ganga Prasad* (190) 24 All 174 9 I A 40 See also *Sadagopa* v *Krishnamoorthy Rao* (1907) 0 Mad 185 at p 185 34 I A 93 99

and dismissed the suit but the High Court held on app remanded the case under O 41 r 23 for the decision that the order of the High Court was a final ord upon the cardinal issue in the suit and it w stood be questioned again in the same suit (suit was whether notice under s 167 of t certain encumbrances was properly r decision of the lower Court held th be tried on the other issue it order (x) Where the low r C and the High Court h ld th it was held by the Calcutta H that the order was final Allahabad (z) But where on the ground that O 9 r 13 *inquiry on the merits* it was h but a *purely interlocutory order* to set aside an abatement on th and the High Court reversed the *tion* for permission to implead the h the merits and that the orde of the It has also been held that where th low suit is barred under O 2 r 2 (c) or that t that the plaintiff has no locus standi to maint the decision of the lower Court remands the High Court is not final But there is a confli Court dismisses a suit on the ground that it is reversing the deci ion of the lower Court reman order of the High Court is final some cases holdin and others that it is final (g)

In an Allahabad case an application was mad file an agreement to submit to arbitration The app ground that the agreement not being und r the seal of th on the ground of misrepresentation and fraud The Court the application on the sole ground that the agreement not company was invalid On appeal the High Court reversed th agreement did not require to be und r the seal of the company for trial of the other issues issues as to fraud and misrep order of remand the respondent applied for leave to appeal to H It was held by a Full Bench that the order was not a final order of cl (a) of this section there being other *important* issues to d

(w) I A 1 17 All 11 *pr*

(x) *Ina d C pal v Nafar Chandra* (1903) 3 C I 618

(y) *Thag d Saha am* (19 1) 15 Cal W N 836 61 I C 6 (1) A C 1 7

(z) *S jal v Ishaq* (1910) 18 All L J 83 I C 04

(a) (1901) 8 I A 9 34 23 All 20 *supra*

(b) *Mumt d D la v J me Sk ner* (19) 47 All 33 86 I C 161 ( ) A 263

(c) *Ahmad H s v Gob nd Krish a* (1911) 33 All 391 9 I C 93 I *katara ga v as mha* (191) 33 Mad 0 21 I C 84

(d) *Mel Cl l v J* 1 100 60 I C 5 (1)

(e) *S h S gh v M l D* 8 9 80 I C 300 ( ) [I B]

(f) *M l v C d a* (1) 8 I *H ib a v M* (1903 All 6 9 *Ba j* (1903) 41 All 54 I C

(g) *S thappa v S bramanian* (1) L J 9 1 I C 334 ( ) M *n Lal j a a n* (10) 4 9 I C 87 (4) A A 119 [a] application for decree under O 34 r was barred]

issues of misrepresentation and fraud and leave to appeal was refused (*h*) Section 10, sub s (2) does not apply to appeals to His Majesty in Council (*i*)

An order of the High Court refusing to enrol a particular person as a legal practitioner under the Legal Practitioners Act 18 of 1879 is not one from which the High Court has jurisdiction to grant leave to appeal to the Privy Council Such an order is one passed in the exercise of the administrative powers of the Court (*j*) An order refusing an application under s 45 of the Specific Relief Act 1 of 1877 is a final order (*k*)

Order passed on appeal —An order passed by a High Court rejecting an application to amend a decree is not an order passed on appeal within the meaning of cl (a) of this section and is therefore not appealable to His Majesty in Council More over it is doubtful whether such an order is a *final order* (*l*) Similarly it has been held that an order made by a High Court refusing to admit an appeal presented after the expiration of the prescribed period is not an order passed on appeal within the meaning of this section (*m*) An order passed in revision does not fall under clause (b) (*n*)

Any other Court of final appellate jurisdiction —An appeal lies to the Privy Council from a final order of a District Judge (*o*) or of the Judicial Commissioner s Court (*p*) made under s 104 See notes to s 104 Privy Council appeal

Limitation.—The application for leave to appeal to the Privy Council must be made within 90 days from the date of the decree sought to be appealed from [Limitation Act 1908 Sch I art 179]

Under the Limitation Act of 1877 it was held that in computing the aforesaid period the time requisite for obtaining a copy of the decree appealed from could not be excluded as s 12 of that Act did not apply to such applications (*q*) It was also held that the application could not be admitted after the expiration of the aforesaid period, though there was sufficient cause for not presenting the application within the prescribed period as s 5 of the Act did not apply to such applications (*r*) Both these sections have now been amended in the Limitation Act of 1908 and they have been made applicable to applications for leave to appeal The aforesaid decisions are therefore no longer law and it has now been expressly held that under s 12 of the Limitation Act of 1908 the time requisite to obtain a copy of the decree appealed from is to be excluded (*s*)

Interlocutory Orders —See cl 40 of the Letters Patent

Prerogative of the Crown —The Code does not limit the prerogative of the Crown to admit an appeal Hence special leave may be granted by the King in Council to appeal where leave has been refused by the High Court (*t*) But no special leave will as a rule be granted unless there is some substantial question of law or general interest involved (*u*) See s 112

(*h*) *Nurim ah* v *The Ga ges Sugar Works Ld* (1916) 38 All 150 3 I C 360 [F B]
(*i*) *Ahmad Husain* v *Gobind Krishna* (1911) 33 All 391 9 I C 93 *Venkatarangi* v *Varanmha* (1915) 38 Mad 509 1 I C 84 *Brito* v *Brito* (19 4) 46 Mad L J 357 78 I C 938 (4) A M 01
(*j*) *Sudhansu In re* (19) 1 Pat 590 70 I C 17 (2) A 1 603
(*k*) *Alcock Ashdown & Co* v *Chief Revenue Authority* (19 1) 23 Bom L R 113 64 I C 9 9 (21) A B 378
(*l*) *Su de Koer* v *Cl lishwar* (1903) 30 Cal 679
(*m*) *K rsondas* v *Ga g ba* (1908) 3 Bom 108
(*n*) *Suraj Si gh* v *J h l Kumari* (19 6) 48 All 6 90 I C 904 (6) A A 20
(*o*) *Saadatma d* v *Ph l Ku r* (1898) 0 All 41 5 I A 146
(*p*) *Ramlal* v *Kishancha d* (19 4) 51 I A 7 51 C 1 361 83 I C 1 (4) A PC 95
(*q*) *Mor ba* v *Ghanasham* (189) 19 Bom 301 *Anderson* v *Peria m* (189) 1 Mad 163 *Shib S ngh* v *Ga dha p S gh* (1906) 8 All 391
(*r*) *Shib Singh* v *Gandharp Singh* (1906) 8 All 391
(*s*) *Abdullah* v *Admr Genl of Bengal* (1915) 4 Cal 35 4 I C 2 3 *Ram Sar p* v *Jaswa t Ra* (1915) 38 All 8 31 I C 906
(*t*) *R Jimbhoy* v *Turner* (1891) 15 Bom 155 18 I A 6 *Ikram l Huq* v *Wilkie* (1906) 33 Cal 893
(*u*) *Moti Chand* v *G nga Prasad* (190) 24 All 174 29 I A 40 See also *Sadagopa* v *Krishnamoorthy Rao* (1907) 30 Mad 185 at p 188 34 I A 93 99

Clause (c) Certificate as to fitness—Leave to appeal to the Privy Council may be granted (1) when a case fulfils the requirements of s 110 or (2) when it is *otherwise* a fit case for appeal to the Privy Council In either case a certificate has to be granted by the High Court in the first case a certificate to the effect that the case fulfils the requirements of s 110 and is therefore a fit case for appeal to the Privy Council and in the second case that *for other reasons* it is a fit case for appeal to the Privy Council [see O 45 rr 2 3] Clause (c) of the present section refers to the second class of cases In this class of cases it is not necessary that the order should be a *final* one Nor is it necessary that the value of the subject matter of the suit should be Rs 10 000 or upwards (v) The only condition necessary is that the case should be a fit one for appeal to the Privy Council Referring to this clause Lord Hobhouse said That is clearly intended to meet special cases—such for example as those in which the point in dispute is not measurable by money though it may be of great public or private importance (w) This was amplified in a later case before the Judicial Committee where it was said that clause (c) contemplated cases in which it is impossible to define in money value the exact character of the dispute there are questions as for example those relating to religious rites and ceremonies to caste and family rights or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject matter in dispute cannot be reduced into actual terms of money" (x) Thus where a petition was made by a company for a certificate to appeal to the Privy Council on the ground that the financial and commercial position of the company might be seriously affected by the questions at issue and that those questions were of importance to Indian companies generally the High Court of Bombay granted the requisite certificate The order sought to be appealed from in that case was an order dismissing a petition presented by the company for a confirmation of a special resolution altering the memorandum of association of the company (y) Similarly when a case involved a substantial question of law and the point in dispute though not measurable by money was of considerable importance namely the *extent* of the control acquired by one who had built a fire temple for Parsis at Udwada the High Court of Bombay granted leave to appeal to the Privy Council (z) Similarly the question as to what is the legal position of a person who has collected the debts of a deceased person by virtue of his being a holder of a succession certificate under the Succession Certificate Act 1889 was held to be a substantial question of law of general public importance and leave to appeal was granted under cl (c) of this section (a) Leave to appeal was similarly granted where the question was whether a fraud practised by a mortgagor alone upon a Sub Registrar would vitiate registration and disentitle the innocent mortgagee from enforcing the mortgage (b) so also in a case involving the question whether it is necessary to register documents giving an option of repurchase (c) The mere existence of a substantial question of law is not sufficient to give the High Court jurisdiction to give leave to appeal under *clause (c) of this section* the question must also be of great public or private importance (d) As to questions of private importance referred to in the judgment of Lord Hobhouse it has been held that by private importance is meant private importance to both parties to the litigation and not only to one

(v) *I hm bloj v T ner* (1890) 14 B m 4 8 *Sl v I a I ra iag* (19) 49 Cal 96 0 I C 519 ( ) A C 4 9

(w) *B rs Par h t v Ka h Kristna* (1901) 3 I A 11 13 28 All ? 7

(x) *Radh k hna v Swam tha* (19 1) 48 I A 31 43 44 M 1 93 0 C 0 1 C 8 (1) A I C 5 *H jvl v J ed)* (1913) 1 B m L R 10 1 1033 1 I C 83 *Al j ppa Nach appa* (19) 43 Mad L J 8 63 I C 38 (3) A M 1

(y) *B b y B m h T d g Corporat n v Dorabj* (1903) 2 B m 41

(z) *Nar j v Ftard lj* (1904) 6 Bom L R 86 in appeal from (1904) 8 Bom 0

(a) *Naj Nusa v Im na* (1916) 38 All 188 33 I C 34

(b) *D gpal v Pahlad lal* (19 0) 18 All L J 13 54 I C 8

(c) *J g v (j* (19) 0 B m 3 100 I C 143 ( ) A B 19

(d) *Mrit j js B l k d* (19 1) 6 P t L J 1 3 61 I C 663 (1) A I 33 *Mau g Ba Th n v District Co cil I gu* (1923) 6 Rang 43 100 I C 697 (8) A R 14 *Barl h v I n rani* (19 9) 50 All 640 109 I C 34 (9) A A 0

of them (e) The right of appeal to the Privy Council from a decision of the High Court upon a case stated under sec 66 of the Indian Income Tax Act 19 2 is given by sec 66A ( ) only in a case which the High Court certifies to be a fit one for such an appeal The High Court is justified in refusing a certificate in a case which in its view does not raise any question of such importance a would warrant a certificate under this clause It is not sufficient that the requirements of sec 110 of the Code are satisfied (f)

The High Court has under this clause to certify that the case *is a fit one* for appeal to His Majesty in Council To certify that a case is of that kind though it is left entirely in the discretion of the Court is a judicial process which could not be performed without special exercise of that discretion evinced by the fitting certificate (g) The certificate must make plain upon its face that the discretion conferred upon the High Court was invoked and was exercised (h) It is the certificate and not the order for the certificate which the Judicial Committee has to consider and act upon and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave it cannot be held that the leave was properly given (i)

As to certificate of fitness in the case of decrees passed by the High Court in cross appeals from the *same* decree see the undermentioned case (j) See also notes to O 45 r 3

110 [S 596] In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject matter of the suit in the Court of first instance must be ten thousand rupees or upwards and the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

Value of subject matter

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law

O 45 rr 4 5—Read O 45 rr 4 5 with this section

This section corresponds with s 596 of the Code of 1882 except that the words or final order have been added in paragraphs 2 and 3 after the word decree See note to s 109 above Difference between the old and the new section

(e) *I) R) sw ra v T ri elaka lam* (19 3) 44 Mad L J 17 I C 0 (3) A M 3 [leave refused] *Jesaia v Go inda chari* (19 3) 45 Mad L J 14 76 I C 811 (4) A M 31 [dispute between two temples of considerable antiquity and considerable importance—leave granted]

(f) *Delhi Cloth and General Mills Co v Income Tax Commission Delhi* (1927) 4 I A 4 1 9 Lah 81 106 I C 156 (27) A PC 4

(g) *I a Parsh d v Kash Krishna* (1901) 3 I A 11 13 23 All

(h) *Ra thal I a Swa lla* (19 1) 48 I A 31 44 Mad 93 60 I C 8 (21) A PC 95 *M ha j B h I r S gh L lch I* (19 0) Cal W N 0 6 I C 3 0 [I C]

( ) *Radha K ishn Das v Rai K ul Chand* (1901) 3 I A 18 1 3 3 All 41 418

(j) *M ha mad Wal Khan v M hammad Moh d D n* (191) 3 All 1 4 7 I C 1 3

Construction of the section—In a recent case the Judicial Committee said It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the section because such cases if worthy of being tried by a higher tribunal can always be dealt with under sub sec (c) of s 109 (k)

Date of valuation—As regards the amount or value of the subject matter of the suit *in the Court of first instance* the material date is the date of the institution of the suit But there is a difference of opinion whether if interest or mesne profits are claimed in a suit and awarded by the decree the interest or mesne profits are to be calculated up to the date of the institution of the suit or up to the date of the decree See notes below Amount or value of the subject matter of the suit in the Court of first instance

As regards the amount or value of the subject matter in dispute *on appeal to His Majesty in Council* the material date is the date of the decree from which the appeal to His Majesty in Council is to be made (l)

As regards the value of property referred to in the second paragraph of this section the material date is the date of the decree from which the appeal to His Majesty in Council is to be made (m)

Value of subject matter of suit

The amount or value of the subject matter of the suit in the Court of first instance—In some cases the value of the subject matter in the suit in the Court of first instance may be over Rs 10 000 and the value of the subject matter in dispute on appeal to His Majesty in Council may be less than Rs 10 000 In some cases again the value of the subject matter in the suit in the Court of first instance may be less than Rs. 10 000 and the value of the subject matter in dispute on appeal to His Majesty in Council may be over Rs 10 000 What the section requires is that the value of the subject matter of the suit in the Court of first instance must be over Rs. 10 000 or upwards and the value also of the subject matter in dispute on appeal to His Majesty in Council must be Rs 10 000 or upwards The word and in the first paragraph of this section means and and not or (n)

Mesne profits and interest—The only class of cases under the head amount or value of the subject matter of the suit in the Court of first instance that present any difficulty are those which include a claim for interest or for mesne profits Prior to 1874 appeals to the Privy Council were governed by the Order in Council of April 10 1838 By that Order it was prescribed that the amount or value of the subject matter in dispute in appeal to His Majesty in Council must be Rs 10 000 or upwards It was accordingly held by the Privy Council in cases that interest on money claims and mesne profits of immovable property *subsequent to the date of the institution of the suit* actually awarded by the decree appealed from may be added in calculating the value of the matter in dispute on appeal to His Majesty in Council but not interest or mesne profits *accruing subsequent to the decree* and if that amount was Rs 10 000 or upwards a party was entitled to appeal though the value of the subject matter of the suit in the Court of first instance was less than Rs 10 000 (o) It was also held that in no case can the costs of the suit be added to the principal in calculating the appealable value (p) The condition

(k) *Udoycha d v P E G dar* (19_5) 5? I A 207 211 5 Cal 6 0 655 88 I C 445 (5) A PC 1 9

(l) *Gooroopersad v Juggutchu der* (1860) 8 M I A 166 *Ram Kumar v Muhammad* (19 0) 4_ All 445 _5 I C 9 6

(m) *Surendra Nath v Dwark Nath* (1917) 44 Cal 119 35 I C. 60_ *Raoj v Laxmiba* (19 0) 44 Bom 101 55 I C. 97_ *S hgiri v M jayya* (1926) 50 Bom 160 94 I C 55 (6) A B 6

(n) *Mot Chand v G nga Prasad* (190?) 24 All 174 9 I A 40

(o) *Gooroopersad v Juggut hunder* (1860) 8 M I A 166 168, *Doorga v Rama Nauth* (1860) 8 M I A 6 264 *Coorodoss Roy v Gohlam Mowlah* (186) Marshall s Rep 4

(p) *Doorga Doss v Rama Nauth* (1860) 8 M I A 6_

that the amount or value of the subject matter *of the suit in the Court of first instance* also should be Rs 10 000 or upwards was first prescribed by the Privy Council Appeals Act 6 of 1874 and it was subsequently introduced into s 596 of the Code of Civil Procedure 1877 The first authoritative decision on the meaning of the words amount or value of the subject matter of the suit in the Court of first instance is that of the Judicial Committee in *Moti Chand* v *Ganga Prasad* (q) In that case the Court of first instance passed a decree for the plaintiff for principal and interest up to the date of the decree amounting to Rs 9 496 with further interest up to the date of realization From this decree the defendant appealed to the High Court and that Court reversed the decree and dismissed the suit with costs The plaintiff then applied to the High Court for leave to appeal to His Majesty in Council On behalf of the plaintiff it was contended that interest *subsequent to the decree* should be added to the sum of Rs 9 496 and that if that was done the value of the subject matter of the suit would exceed Rs 10 000 But this contention was overruled and the application was refused on the ground that the claim and decree in the original Court were for less than Rs 10 000 The plaintiff then applied to the King in Council for special leave to appeal but the application was refused In delivering the judgment of the Board Lord Davey said In the present case the amount or value of the subject matter of the suit in the Court of first instance *construing that in the manner most favourable to the proposed appellant* was at the outside the amount for which he recovered his decree which was below Rs 10 000 amounting in round numbers I think to about Rs 9 500 It is conceived that the words construing that in the manner most favourable to the proposed appellant mean even by including interest subsequent to the suit and up to the decree This decision is an authority for the proposition that interest *subsequent to the decree* cannot be included in calculating the amount of the subject matter of the suit (r) The High Court of Rangoon has held that interest from the date of the suit *up to the date of the decree* can be included in determining the amount of the subject matter of the suit (s)

As to suits for sale in the case of a mortgage there is a conflict of opinion whether interest subsequent to the decree of the Court of first instance can be included in calculating the amount of the subject matter of the suit It has been held by the High Court of Allahabad that in calculating such amount the Court should include interest from the date of the decree [that is the preliminary decree] up to the expiry of the period of six months provided in O 34 r 4 (t) According to the Calcutta (u) and Patna (v) High Courts such interest should not be included in determining the appealable value

It has been held by the High Court of Calcutta in two cases that in a suit for recovery of possession of immovable property with mesne profits the value of the subject matter of the suit consists of the value of the property plus mesne profits up to the date of the suit plus mesne profits from the date of the suit until delivery of possession or until the expiration of three years from the date of the decree with interest (w) The decision in the first Calcutta case (x) proceeded on the authority of *Mohideen* v *Pitchey* (y) a case under the Ceylon Ordinance No I of 1889 which does not impose any condition as to the amount or value of the subject matter *of the suit in the Court of first instance* The decision in the later Calcutta case however was based on the terms of s 211 of the Code of 1882

(q) (190) 24 All 174 29 I A 40 [suit to recover damages for fraud]

(r) *Maharajah Kesho Prasad* v *Sh ra* (1918) 3 Pat L J 317 3 0 44 I C 475

(s) *Thams ndaseen* v *Chetty* (19) 3 Rang 405 91 I C 647 (26) A R 45

(t) *G jadhar* v *Ambika* (19 3) 45 All 133 69 I C 64 (23) A A 78 In *Raghunatha s m* v *G paul* (19) 43 Mad L J 6 2 74 I C 696 (3) A M 135 the claim was *for Rs 9 94 and interest. It was held* th t interest from date of suit up to th date of the preliminary decree should be added No question arose as to subsequent interest

(u) *Nand Kishore* v *Ram G lam* (191) 39 Cal 1037 1040 17 I C 2 1

(v) *Ra vad* v *Rambilas* (19 1) 6 Pat. L J 596 6 I C 959 (1) A P 2 9

(w) *Dalgleish* v *Damodar* (1906) 33 Cal 1 36 *Kumar Basanta* v *The Secretary of State* (1910) 14 Cal W N 87 6 I C 79

(x) (1906) 33 Cal 1 36

(y) [1893] A C. 193

now O 20 r 12 ( ) The Calcutta decisions were dissented from by the High Court of Madras in *Subramania Iyyar* v *Sellammal* (*a*) where it was held that in calculating the amount of the subject matter of the suit in the Court of first instance mesne profits *only up to the date of the institution of the suit* can be added to the value of the property of which possession is claimed The correctness of the Calcutta decisions was also doubted by the Patna High Court in *Maharajah Kesho Prasad* v *Shiva* (*b*) but in later cases (*c*) the same High Court followed the Calcutta decisions having regard to the practice of that Court in matters of settled practice to follow the Calcutta High Court The Bombay High Court follows the Madras ruling (*d*)

Costs —Costs cannot be included in determining the amount of the subject matter of the suit (*e*)

The sum of money actually at stake may not represent the true value—In *Radha Krishna* v *Sundarasuamier* (*f*) their Lordships of the Privy Council said The sum of money actually at stake may not represent the true value The proceeding may in many cases such as a suit for an instalment of rent or under a contract raise the entire question of the contract relations between the parties and that question may settled one way or the other affect a much greater value and its determination may *govern rights and liabilities of a value beyond the limit* *It has thus been held that* where the subject matter in dispute relates to a *recurring liability* and is in respect of a property above the appealable value the case is within the first paragraph of this section Hence if the rent claimed in a suit is less than Rs 10 000 but the liability is of a recurring nature and the property is above that value the value of the subject matter must be deemed to be over Rs 10 000 (*g*) It cannot however be said where the suit is to enforce payment of an annuity of Rs 125 per annum that the value of the subject matter of the suit is Rs 10 000 or upwards for such an annuity cannot by any reasonable method of valuation be worth Rs 10 000 (*h*) Where the sole question was as to the destination of the *income* of the residue until the residuary attained twenty five and the aggregate amount of the income was less than Rs 10 000 it was held that the value of the subject matter (namely income) was less than R 10 000 though the value of the residue was over Rs 10 000 (*i*)

Value as laid in plaint—In suits relating to immovable property the value of the subject matter of the suit is the selling or market value and not the value as deduced from the amount of the stamp upon the plaint Hence if in a suit for possession of immovable property the value of the property as laid in the plaint is under R 10 000 for the purpose of Court fee it is open to the applicant to show when applying for a certificate for leave to appeal to the Privy Council that the market value of the property was Rs 10 000 or upwards (*j*) But a defendant who had previously adopted the value given in the

(*z*) (1910) 14 Cal W N 8 6 I C 9
( ) (1916) 9 Mad 843 31 I C 96
(*b*) (1918) 3 Pat L J 317 3 0 44 I C 475
( ) *Mahabi Prasad* v *Anup Na n* (1918) 3 Pat L J 377 46 I C 137 *Madra* v *Kishnude* (19 1) 6 Pat L J 16 63 I C 49 (1) N 1 1
(*d*) *Se hagiri* v *Ma j rya* (19 6) 50 Bom 160 94 I C 7 5 (6) A B 6
(*e*) *Fa t Ind a R lway* v *B dri Narain* (19) 6 Pat 441 104 I C 67 (7) A P 3 8
(*f*) (19) 4 I A 11 216 4 Mad 475 491 74 I C 591 (3) A I C 37
(*g*) *S rapat* v *Ram N ajan* (19 3) 50 I A 155 50 Cal 680 73 I C 193 (3) A PC 88 *Radhakrishna* v *Sundarasuamier* (19) 49 I A 11 45 M d 475 74 I C 381 (3) A I C 7 See also *S mo mov e* v *Mahar jah Sutte s h der* (1860) 8 M I A 16 168 s also *Kast rbhai* v *Hiralal* (19) 4 Bom L R 3 0 67 I C 938 (3) A B 3 The decision in *Dha a Mal* v *Mot* (19 4) 6 Lah L J 78 I C 6 4 (3) A L 236 seems to be of doubtful authority
(*h*) *Mirza Ab d* v *Ahmad Hu ain* (1923) 45 Mad L J 3 5 I C 50 (3) A PC 10 (P C) It would require 80 years purchase to make it Rs 10 000
(*i*) *Hu enbhoy* v *Ahmedbhoy* (190) 6 Bom 319
(*j*) *Moh n Lall* v *B bee Doss* (1860) 7 M I A 428 *Lek j Roy* v *Kanhya Singh* (1874) 1 I A 317 *Gourm ny* v *Abd ll* (1860) 8 M I A 268 *Pach ya* v *S rajami* (189) 1 Mad 237 *Hari Moh* v *N end a Na ain* (1904) 31 Cal 301 *Su endra Nath* v *D rarka Nath* (1917) 44 Cal 119 35 I C 60 *Nawa Ali* v *Allu* (19 3) 4 Lah 185 7 I C 5 0 (1) A L 8

plaint for the purpose of an appeal preferred by him to the High Court should not be allowed to contest that valuation on a petition by the plaintiff for leave to appeal to His Majesty in Council on the principle that a party cannot both approbate and reprobate (*k*)

It has been held by the High Court of Bombay that where in a suit for accounts the plaintiff values his claim for less than Rs 5 000 and institutes his suit in a Court of the Second Class Subordinate Judge whose pecuniary jurisdiction is limited to Rs 5 000 he cannot be heard to say that the amount of the subject matter is Rs 10 000 or upwards (*l*) In the course of the judgment Beaman J said The amount or value of the subject matter of a suit can in no case exceed the limits of the pecuniary jurisdiction of the Court in which it is instituted It follows that the amount or value of the subject matter of a suit for the purposes of s 109 clause (a) and (b) and s 110 of the Civil Procedure Code if that suit is instituted in a Court the pecuniary limits of whose jurisdiction is Rs 5 000 can never be greater than Rs 5 000 It is different however where a suit is for an injunction and a declaration relating to immovable property for such a suit according to the Bombay decisions may be brought in the Court of a Second Class Subordinate Judge though the value of the property may exceed Rs 5 000 In such a case it has been held that the case does not fall under the first paragraph of this section but that it falls under the second paragraph and that the plaintiff is not precluded from showing that the decree involved some claim or question to property of the value of Rs 10 000 or upwards within the meaning of the second paragraph (*m*)

In a suit for a general account against a trustee which charges him also with specific items of malversation each item of malversation does not constitute a distinct subject matter (*n*)

Value of subject matter in dispute on appeal to Privy Council

The amount or value of the subject matter in dispute on appeal to His Majesty in Council —Not only the amount or value of the subject matter of the suit in the Court of first instance but the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be Rs 10 000 or upwards The word and in the first paragraph of the section cannot be read as or (*o*) The words amount or value of the subject matter in dispute on appeal to His Majesty in Council mean the amount or value at the date of the High Court decree under appeal (*p*) *A* sues *B* to recover Rs 10 800 The trial Judge passes a decree for *A* for Rs 8 280 with interest at the rate of 6 per cent per annum from the date of suit till the date of realization *B* appeals from the decree to the High Court and *A* s suit is dismissed *A* appeals for leave to appeal to His Majesty in Council If interest were to be added to the decretal amount Rs 8 280 the valuation of the proposed appeal to the Privy Council would be over Rs 10 000 Is *A* entitled to add the interest ? The Allahabad Court has held that he is not (*q*)

A mortgages his property to *B* *C* claims that a portion of the property of the value of about Rs 6 000 belongs to him and that it did not belong to *A* *B* then sues *A* on the mortgage the mortgage debt being Rs 38 000 and joins *C* as a defendant A decree is passed in favour of *B* on the mortgage *C* s claim is allowed in part by the Court of first instance but it is disallowed altogether by the High Court Is *C* entitled to appeal to the King in Council ? No because though the amount of the decree passed in favour

(*k*) *Kristo Indro* v *Hurromonee* (1874) 1 I A 84 *Moolla & Sons* v *Leong Sham Sw y* (19 6) 4 Rang 9? 96 I C 107 (‑6) A R 138

(*l*) *Hirjibhai* v *Jamshedji* (1913) 15 Bom L R 10 1 21 I C 783 See notes to s 6 Pecuniary limits for passing decrees

(*m*) *Mohanlal* v *Ba Kash* (1916) 40 Bom 477 37 I C 371

(*n*) *S nda a* v *hat a elu* (19?9) 5 M... (9) A M 4 9

(*o*) *Mot Chand* v *Ganga Prasad* (19??) ... 174 23 I A 40

(*p*) *Gooroopersad* v *Juggutchunder* (18..) ... A 166

(*q*) *Ram Kumar* v *Muhammad* (19..) ... 445 55 I C 9 6

of *A* exceeds Rs 10 000 the value of *C*'s claim is less than Rs. 10 000 (*r*) Note that *C* ought not to have been joined as a party to the suit at all [see notes to O 34 r 1 Persons having an interest etc]

Single decree in several appeals —*A* claiming to be the next reversioner on the death of a Hindu widow sues *B* *C* and *D* being alienees of separate items of the estate of the last male holder and obtains a decree against them *B* *C* and *D* prefer *separate appeals* which are all disposed of by one decree *A* applies for leave to appeal to His Majesty in Council from the decision as to the items in possession of *B* and *D* The claims against the several alienees being based on really different causes of action the fact that only one appellate decree was drawn up does not affect the requirements of this section and consequently no leave can be granted in such of the appeals in which the value of the subject matter was below Rs 10 000 (*s*)

Abandonment of appeal in part after grant of certificate —*A* obtains a decree against *B* for Rs 11 000 *B* applies for leave to appeal from the decree to the Privy Council and a certificate is granted Afterwards in the printed case and at the hearing *B* withdraws part of his appeal reducing by so doing the amount in dispute to Rs 9 000 Does this render the appeal incompetent ? No if *B* had a *bona fide* intention when he applied for a certificate to appeal in respect of the whole amount of the decree (*t*)

Claim to property of value of Rs 10 000 or upwards

Or the decree or final order must involve directly or indirectly some claim or question to property of the value of Rs 10 000 or upwards —The decree or final order referred to in the second paragraph of the section is the decree or final order from which the appeal is to be preferred to the Privy Council The material date for determining the value of the property under this paragraph is the date of that decree or order (*u*)

Note that the expression used in the second paragraph of this section is property" while that used in the first paragraph is subject matter of the suit and subject matter in dispute on appeal to His Majesty in Council. It has been held by the High Court of Madras (*v*) that the second paragraph of this section applies only to cases which involve some claim or question to or respecting property additional to the actual subject matter in dispute in the appeal and to be taken into account therewith in making up the appealable value or it may possibly also apply to cases involving claims incapable of a money valuation such as claims to easements and the like but apart from this if nothing beyond the actual subject matter in dispute is involved the first paragraph of the section alone applies. This decision is at variance with the view expressed by Maclean C J at the end of his judgment in *Dalgleish* v *Damodar* (*w*) but that part of the judgment of the learned Chief Justice was an obiter dictum not supported by reasons. In a recent Patna case (*x*) Miller C J expressed his preference for the view taken by the Madras High Court The Madras view has also been adopted by the Rangoon High Court (*y*) In *Udoychand* v *P L Gudar* ( ) the plaintiff brought a suit to set aside an award in favour of the defendant for Rs 3 900 The trial Judge set aside the award, but the appellate Court reversed the decree and dismissed the suit The plaintiff applied for leave to appeal to His Majesty in Council alleging that if the appeal succeeded he could proceed with a suit which had been stayed in which he had claimed Rs 81 000 as

(*r*) *Falla Ku wa* v *Prot Singh* (1916) 38 All 4 S 43 I A 187 35 I C 939

( ) *Vaidhi ga* v *Somasu da m* (1919) 4 Mad 8 40 I C 434

(*t*) *K lka Si gh* v *I at I am* (1895) 22 Cal 434 I A 68

( ) *S end a Nath* v *Dwa ka Nath* (1917) 44 Cal 119 35 I C 60 *P* *oji* v *Laxmibai* (1900) 44 Bom 301 5 I C 9

( ) *Sub am a Ayyar* v *Sellammal* (1916) 39 Mad 843 846 849 31 I C 96

(*w*) (1906) 33 Cal 1286

( ) *M ha j Ke lo l ra ad* v *Sh a* (1918) 3 Pat [illegible] J 31 3 0 44 I C 4 5

(*y*) *Mouli d S* v *Le Sh Swa* (1926) 4 Ran [illegible] 96 I C 10 (6) A R 139

(*z*) (10) I A 0 10 (I 6 0 6 I 83 I C 44 ( ) A I R 1 9

damages against the defendant for breach of the contract which had led to the reference to arbitration The High Court refused leave and the plaintiff applied for special leave to appeal from the decree of the High Court The Judicial Committee held that the plaintiff's claim upon the contract was too remote to be considered as being property indirectly involved within the meaning of this section and the petition was dismissed Their Lordships said Their Lordships are not inclined to attempt any precise definition of the word property The Civil Procedure Code has not done so and any definition might not be found in the future precisely to fit the circumstances which the kaleidoscope of actual experience may produce But they think that the present is not a case *where the issue of this suit can be said directly or indirectly to involve other property* Let the situation be considered If this appeal were allowed and were successful what would be the position ? Their Lordships think that this is *not really consequential on the present decree* and too remote to be entitled to the description of being property indirectly involved in the issue of this suit

Where the plaintiff a tenant in common obtained a decree against the defendant another tenant in common for a mandatory injunction directing the defendant to demolish buildings erected by the defendant on a plot of common land the buildings being worth more than Rs 10 000 the High Court granted leave to the defendant to appeal to the Privy Council though the subject matter of the suit was valued for purposes of court fees at Rs 1 500 *(a)* Similarly where the plaintiff obtained a decree for possession of a piece of land worth Rs 2 000 and the result of the decree was to oblige the defendant to remove buildings worth more than Rs 10 000 which the defendant had built on the land leave was granted to appeal to the Privy Council *(b)* Where the value of the subject matter of the suit was below Rs 10 000 but the effect of a deed of gift with regard to the construction of which there was a dispute would govern the ownership of property worth five lac a certificate of appeal was granted *(c)* Similarly where the value of the subject matter in dispute on appeal to His Majesty in Council was below Rs 10 000 but the proposed appeal to His Majesty in Council involved a decision as to the validity of an award which dealt with property worth over Rs 10 000 a certificate of appeal was granted *(d)*

A sues *B* for a declaration that he is entitled to a one third share in the property in suit and for a decree for partition and for delivery of his share to him The property exceeds Rs 10 000 in value but the share claimed by *A* is of a value less than Rs 10 000 A decree is passed for *A* as prayed *B* then applies for leave to appeal to His Majesty in Council Does the decree involve a claim or question to property of a value exceeding Rs 10 000 ? Yes according to the Calcutta High Court *(e)* No according to the Bombay High Court unless there be other property outside the subject matter in dispute which can be affected by the decision *(f)* In one of the Bombay cases *(g)* Jenkins C J held that in order to determine the value prescribed by this section the decree has to be looked at as it affects the interests of the parties prejudiced by it and where the detriment to the party seeking relief is estimated at less than Rs 10 000 then the value of the matter in dispute in appeal is not of the prescribed value and the decree itself does not involve any claim or question to or respecting property of the prescribed value and the case does not fulfil the requirements of the section The Patna High Court has followed the Bombay decisions *(h)*

(a) *Am Chandra v Sh shi Bhushan* (1904) 31 Cal 30 [I C]

(b) *Sr emuth v I alaniappa* (1911) 34 Mad 53 9 I C 81

(c) *Al ma v Hasiba* (1896) 1 Cal W N lxxxiii See also *B p nd a v p t* (19) C I W N 04 84 I C 581 (23) A C 4 1 *Il gjappa v Nach app n* (19) 43 Mad L J 3 63 I C 395 (23) A M 1 5

(d) *S Kish n v Ka hmiro* (1913) 3 All 445 21 I C 617 See als *Khw ja M ham mad n the m tt r of* (1896) 18 All 196

(e) *Lala Bhugwat v I ai Pashupat* (1906) 10 C W N 564

(f) *De Silva v De S l a* (1904) 6 Bom L R 403 *Raoj v Laxmib* (19 0) 44 Bom 104 55 I C 9

(g) (1904) 6 Bom L R 403 *s pra*

(h) *Gosa n Bha nath v Bihari Lal* (1919) 4 Pat L J 41 5 I C 3

The High Court of Bombay has also held that in a suit by a partner for accounts and for recovery of his share it is the value of the plaintiff's share that must be looked to and not the value of the whole of the partnership assets (i) It appears however from a judgment of the same High Court in the undermentioned case (j) that if *A* sues *B* claiming the exclusive user of a well and compound valued at Rs 10 000 odd and the High Court holds that *A* and *B* are equally entitled to the user the decree must be deemed to involve property of the value of Rs 10 000 odd so as to entitle *A* to a certificate for leave to appeal to His Majesty in Council

In a suit for an easement of light and air claimed by the owner of property *A* against the owner of property *B* it is the value of the easement and not the value of property *A* that determines the appealable value (k) In a recent Bombay case *A* sued *B* for possession under the Bombay Rent Act 2 of 1918 The rent of the portion occupied by *B* was Rs 275 per month The High Court on appeal decreed *A*'s suit It was held that as the rent capitalized at 20 years purchase amounted to upwards of Rs 10 000 the decree involved indirectly a claim respecting property of the value of over Rs 10 000 and that *B* was entitled to leave to appeal to His Majesty in Council (l) In a Lahore case however where *A* sued to eject *B* alleging that *B* was a tenant at will and *B* contended that he was a permanent tenant paying an annual rent of Rs 1 200 the Court held that the issue in the suit namely whether *B* was a permanent tenant or a tenant at will did not involve any question respecting property of the value of Rs 10 000 or upwards (m)

Where subject matter of suit not capable of valuation

Where the matter is under the appealable value or is not capable of valuation—In such a case a party desirous of appealing to the Privy Council may apply for a certificate that the case is a fit one for appeal to His Majesty in Council under s 109 cl (c) (n) See notes to s 109 Certificate as to fitness

Decree of affirmance

Where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree—In this case it is not enough that the appeal involves some substantial question of law It is also necessary that the amount of the subject matter of the suit and of the subject matter in dispute on appeal must be Rs 10 000 or upwards or that the decree must involve some claim to property of like amount The existence of a question of law of itself does not give a right of appeal in the ordinary course of procedure under this section (o) This is clear from the word and with which the last paragraph of this section begins

Privy Council have held that the word decision in this clause means merely the decision of the suit and cannot like the word judgment be defined as meaning the statement of the *grounds* on which the Court proceeds to pass the decree It follows from this that in order to affirm the decision of the Court below it is sufficient if the appellate Court affirms the *decree* of the Court below it need not also affirm the *grounds of fact* on which the judgment was passed Thus where the decree of the appellate Court was that the appeal be dismissed but the reasons given were not the same as

(i) *Nar* [illegible] *Hisham* (1 [illegible]) 49 Bom 149 [illegible] I C 191 [illegible] A [illegible]
(j) *App* [illegible] (1[illegible]3) [illegible] I [illegible] A [illegible] 6
(k) [illegible] (1[illegible]) 3[illegible] L [illegible] 3 [illegible] 63 [illegible] *Lall* [illegible] *Lal* [illegible] (1[illegible]3 Bom [illegible] [illegible] 3[illegible] [illegible]
(l) [illegible] (1[illegible]) [illegible] Bom L R [illegible] 3 [illegible] (3) [illegible]
(m) [illegible] (1[illegible]4) 6 Lah [illegible]

I C 6[illegible] (3) [illegible] L 86
(n) *Mot* [illegible] (190[illegible]) [illegible] All [illegible] 40 [illegible] (1903) [illegible] 41 [illegible] (1901) 3 All [illegible] (1904) [illegible] 6 [illegible] (1[illegible]1) [illegible]
(o) [illegible] (1901) [illegible] All [illegible] (1901) 23 All 41 [illegible]

tho e of the lower Court in respect of some matters of fact it was held that the decision of the Court below was affirmed within the meaning of this section and that no certificate should be granted unless the appeal involved a sub tantial que tion of law (p) Nor is it nec ssary in order to affirm the d cision of the Court below that the finding of the appellate Court should coincide in terms with that of the Court below it is suffi ient if the findings of fact of the two Courts are in effect the ame (q) And it has been held that a decree of the High Court dismi sing an appeal for want of pro ecution the appellants not having supplied their coun el with materials upon which to argue the appeal when it was called for hearing is a decree affirming th d i ion of the Court below (r) Where the appellate Court agrees with the finding of the Court below upon the merits but varies the order as to costs (s) or awards simple interest from a c rtain date instead of compound interest (t) or allows a cro appeal modifying the decree to the extent of P 300 (u) it amount to an affirmation of the deci ion of the lower Court

In a Calcutta ca e (v) under the Land Acqui ition Act the applicant claimed Rs 7" 000 and odd as comp n ation but the Col ector awarded him Ps 28 287 The Judge on reference to him upheld the Collector s award The applicant then appealed to the High Court valuing the appeal at Ps 43 000 and odd being the diff rence between the two ums The High Court increa ed the amount of compensation by about Ps 7 000 It wa held that the decree of the High Court was an affi ming decree and leave to appeal to the Privy Council wa refu ed The High Court of Allahabad has held that where the decree appealed from varies the deci ion of the Court below to the prejudice of the applicant the decree is not a decree of affirmance (w) but it is a decree of affirmance if the variation is in favour of the applicant (x) In *Annapurnabai* v *Ruprao* (y) *A* alle ing that he wa adopted by the enior widow of one Shanker sued the junior widow and another for po e ion of property of over Rs 10 000 in value The junior widow denied the adoption and further she claimed to be entitled to P 3 000 per annum for her maintenance The fir t Court held that the plaintiff s adoption was proved but decreed to the widow Rs 800 per annum as maintenance The Appellate Court increa ed the maintenance to Ps 1 00 per annum but in all other respects affirmed the deci ion of the first Court The defendant applied for leave to appeal to the Privy Council but the application wa rejected The defendants then applied to the Privy Council for special leave to appeal It was argued on behalf of the defendants that the value of the subject matter of the suit excee led Ps 10 000 as al o did the subject matter of the proposed appeal and that even if the maintenance alone was regarded as in di pute its value having regard to the widow s prospects of life exceeded Rs 10 000 This contention was upheld and special leave to appeal was granted but the appeal was limited to the que tion as to the maintenance allowance

In a suit by *A* against *B* a decree is passed in *A* s favour *B* appeals from the decree but the appeal is di missed by the lower appellate Court *B* then appeals to the High Court The appeal is heard by a single Judge of the High Court who reverses the d cree of the lower appellate Court From this judgment *A* appeals to the High Court under clause 15 of the Letters Patent with the result that the judgment of the single Judge is reversed by a Bench of two Judges *B* applies for leave to His Majesty in Council Here the decree appealed from is the decree passed by the Bench of two Judges of the High

(p) *Tar d q s I h Pa n* (1903) All 103 30 I A 3 *Ishqlar I t Hyde F* (1883) 16 Cal 87 would seem to be no l r law

(q) *Tl p s Calc tta Tra r t ys Co* (1894) 1 C 1 3

( ) *L n I i s Ia J Jh* (1898) 0 All 36

(s) *Ch t / s M I mel* (19 1) 34 Cal L J 33 63 I C 40 ( ) A C 316

(t) *Ih j t S 7h J i I a* (191) 1 R no 1 1 61 C 40

( ) *I a th i s S br man* (1 8) 1 Mad I J 9 97 I C) (9) A M 10 4

(v) *Raja S ee Nath I y v Secret ry of St te* (1904) 8 C W N 294

(w) *Bhag i S ll s The All at t Pa k* (19 1) 43 All 0 64 I C 3 (1) A A 0

(x) *F m l th Fut al Das* (19) 44 All 00 64 I C 916 (2?) A A 8)

(y) (19 4) 51 I A 313 51 Cal 969 ( ) A 1C 60

Court The Court immediately below the Court constituted by the two Judges is the lower appellate Court and not the Court constituted by the single Judge of the High Court This therefore is a case in which the decree appealed from *affirms* the decision of the Court immediately below and no leave to appeal can therefore be granted unless the appeal involves some substantial question of law The above result follows from the fact that the *Code* makes no provision for an appeal within the High Court that is to say from a single Judge of the High Court the right of appeal from the judgment of a single Judge of the High Court is conferred by cl 15 of the Letters Patent (z)

Judicial Committee and concurrent findings of facts

Rule of Judicial Committee in cases of concurrent findings of fact when the appeal before the committee fails on the question of law on which leave to appeal was granted —The Judicial Committee has undoubtedly power as a Court of review to review the concurrent findings of *facts* of the lower Court though the appeal before it may fail on the question of law on which leave to appeal was granted But *as a general rule* the Committee will not interfere with the e findings on the ground that where the question in one of *fact* it is a question of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance (a) In *Umrao Begum* v *Irshad Usain* (b) Lord Hobhouse in delivering the judgment of the Board said The question is not only a question of fact but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs Their Lordships would be specially unwilling in such a ca e to depart from *the general rule* which forbids a fresh examination of facts for the purpo e of disturbing concurrent findings by the lower Court The mere fact that the lower Courts do not agree on all the steps which lead to one and the same conclusion is no reason for disregarding the said rule (c) It cannot detract from the weight of concurrent findings of fact that different Courts in arriving at the same re ult upon the same evidence have not been influenced by precisely the same considerations A difference of opinion to that extent is only calculated to suggest that the evidence whatever view be taken of it must necessarily lead to one and the same inference (d) The circumstance that the trial Judge based his findings on oral evidence while the finding of the Appellate Court was ba ed on documents is not a ground for interference (e) Sometimes the nature of the question may be such (as where the question is whether a deed of gift was executed by a Mahomedan under apprehension of death) that the Judicial Committee will not interfere with concurrent findings of the lower Courts on that question even where the evidence is such a to justify either view (f) The rule [above referred to] however is not an absolute rule it presses upon the appellant with more or less weight according to the circumstances of the ca e and no doubt the fact that the Courts have differed on some important but subordinate questions is a matter to be taken into consideration in determining whether the evidence b fore the lower Courts should be reviewed in detail (g) Thus concurrent findings of facts have been allowed to be disputed where the question of fact appeared to be a good deal mixed up with law (h) They have al o been allowed to be disputed where the decisions though ultimately one of fact turned upon the admissibility or value of many subordinate

(z) *D be dra N th* v *B bi dhend a* (1916) 43 Cal 90 3 I C 4

(a) *F t a B b* v *Ahmed Ial h* (1908) 3 Cal 1 35 I A 6 *Mahomed Ali* *Will m* *St ngh* (19 9) 33 C W N 6 215 I C 2 (9) A PC 63

(b) (1894) 1 Cal 09 21 I A 163 *M t g Tha Mo g I a* (1901) 8 Cal 1 2 I A 166 *Sri t* v *Kh g d a Naraj n* (1904) 31 C 1 8 1 31 I A 1 *S da al ja* v *I mas mi* (1 99) M 1 51 6 I A 55

(c) *Sa wal S gh* v *S truja* (1900) 9 All 1 *C I tp l S gh* v *Ria r B k h* (1906) 28 All 19

(d) *Nilmo S ngh* v *K rt Chu d Chowd* (1903) 30 C 1 84 8 0 I A 9

(e) *Bhagwan S ngh* v *Allahabad B k* (19 6) 53 I A 68 43 All 63 98 I C 901 (6) A I C 1 5

(f) *F t ma Bi* v *M d Bakhsh* (1908) 3 Cal 1 3 I A 6

(g) *Ch tpal S ngh* v *Bh Bakh h* (1906) 3 All 19

(h) *I luem* v *I a l e* (18) 4 I A 109 1 Mad

facts and involved the con truction of documents and other questions of law (i) In a recent ca e their Lordships of the Privy Council said If it appears that underlying findings of fact there are questions of law on which the finding proceeded or that there is a case that the judges mi directed themselves then the rule as to concurrent findings not being the subject of appeal doe not apply to the exclusion of such grounds of law as are alluded to (j)

Where a trial Judge bases hi judgment upon a finding of fact and two of three Judges constituting the appellate Court agree with the finding and conclusion the third Judge arriving at the same result upon a different finding of fact there are concurrent finding to which the rule of practice of the Board referred to above applies (k)

The principle of concurrent findings of fact does not apply where the case is one of no evidence The reason is that a decision that there is no evidence to support a finding is a *decision of law* (l) Nor does it apply to a finding as to the existence of a custom since that is a matter of mixed law and fact (m) Nor does it apply where the question is one of inference from documents for that is a question of law (n) But if the documents are not documents of title or statements intended to have effect as claims compromi es or surrenders of legal rights but merely records of payments the construc tion of documents however ob cure is a question of fact and Privy Council will not interfere if the findings are con urrent (o)

Substantial que tion of law

The appeal must involve some substantial question of law—No appeal lies to the Privy Council from an appellate decree when there are concurrent findings of the appellate Court and of the Court below upon questions of fact unless the appeal involves some sub tantial question of law (p) To grant leave to appeal on the ground that there *seems* to be a point of law which however has not been argued here is not a compliance with the provisions of this section (q)

The question of law contemplated by this section must be one in respect of which there may be a difference of opinion (r) A question of law definitely settled by a ruling of the Privy Council is not such a question (s)

Involve—Suppose that there are concurrent findings of fact so that the Privy Council having regard to the rule stated above would decline to disturb them in appeal and that no substantial question of law could arise before the Privy Council *unless* those findings were set aside by the Privy Council Can the proposed appeal be said to *involve* a que tion of law so as to entitle a party to leave to appeal to the Privy Council? No

(i) I *late u* v *Shekari* (1881) 8 I A 143 3 M 1 384

(j) *T l Adla* v *Fe o* (19) 41 Cal L J 386 88 I C 103 ( ) A I C 1

(k) *Habibur R man* v *Altaf* *Al* (19 1) 48 I A 114 48 Cal 856 60 I C 837 ( ) A PC 153

(l) *Ha dra Lal* v *Harid si* (1914) 41 C 1 9 998 41 I A 110 11 3 I C 637

(m) *Pala iappa* v *De vas kam* (191) 44 I A 14 40 Mad 0 3 I C

(n) *Cl idh* v *S ig* *Pr h* v *I store L l* (1919) 46 I A 197 4 All 1 57 I C 486

(o) *N c l* v *Al h l H kui* (19 8) I A 380 111 I C 98 (8) A I C 43

(p) *N bla D s* v *Pa* *F a* (1894) 16 All 4 *I l I* *al* v *Be j k* (I 06) 3 C 1 914 3 I A 10 *S* *I* *tt* *I b l* (1901) 8 C 1 130 *l e* *bh r* *n re* (1 06) 0 B m 633 *Ie to j* v *Q* *I* *e Co* (1901) 1 om 33 [s it for ma s for m li io s prosecuti n] *Pu h tta* v *Hargu* (19 1) 43 All 51 63 I C 83 (1) A A 14 [stay of] *Bu* *Khan* v *S j* (19 3) 45 All 667 I C 100 (4) A A 66 *B shambhar* v *Muhammad* (19 4) 46 All 7 79 I C 13 (24) A A 5 [construction of a docu nt] *Ana tal* v *S rj m ll* (19 4) 40 Mad L J 33 8 I C 185 (4) A M 618 [acknowl dgment within the me ning of the Stamp Act Sch I art 1] *G kal Ch* v *Sa* *l Das* (19 4) 5 Lah 60 78 I C 41 (4) AL 4 3 [custom of pre-emption]

(q) *F* *pp an* v *Srin vasan* (190) Mad 15 I A 39

(r) *Gokal Cha d* *Sanwal Das* (19 4) 5 Lah 60 *P shottam* v *H rgu Lal* (19 1) 43 All 513

(s) *Fero* v *N* *b Khan* (19 8) 9 Lah 581 110 I C 2 8 (3) A L 55 *M sam mat Sartaj* v *Mahad o* (19 6) 1 Luck 6 9 I C 193 (6) A O 381

according to the Allahabad High Court (t) Yes according to the Calcutta High Court (u) In a Bombay case Ranade J accepted the view of the Calcutta High Court Jardine J did not express any opinion (v)

Substantial question of law —These words do not mean a question of general importance but a substantial question of law as between the parties in the case involved (w) The application of well defined legal principles to a particular set of facts does not raise a substantial question of law (x) The rejection of an application under O 41 r 27 for the reception of additional evidence does not involve a substantial question of law (y) nor the omission to state reasons in an appellate judgment as required by O 41 r 31 (z) nor the dismissal of an appeal for default in furnishing security for costs under O 41 r 10 (a) The question whether a tenancy is one at will or permanent is a substantial question of law (b) and so is the question whether the rules of the Mahomedan law as to pre emption apply to an estate which comprises in part movable property (c) and so is a question of limitation especially where it affects the period of limitation for appeals to a Bench from judgments of the original side of the Rangoon High Court (d) But awarding the mortgage rate of interest at 9 per cent per annum from the date of the suit is not such an arbitrary and unwarrantable exercise of discretion under section 34 as to constitute a substantial question of law (e)

Review

Review —An order granting leave to appeal to the Privy Council is open to review (f)

Appeal

Appeal —See notes to O 45 r 3 Appeal

Judicial Committee and appeals from India

Rules of the Judicial Committee in appeals from India —

(1) A point not raised in the plaint before the District Judge or before the High Court cannot be raised before the Judicial Committee (g)

(2) The Judicial Committee will not disturb the findings of the Court below upon mere issues of fact unless it is clearly satisfied that there has been some miscarriage in the reception or in the appreciation of evidence (h)

(3) In appeal from second appeals the findings of fact by the first Court are binding on the Judicial Committee unless special leave to appeal from the decision of the first Court has been given (i)

(4) The Judicial Committee will not criticise with any strictness opinions as to the credibility of witnesses which is eminently a question for the Courts in India (j)

(t) *B ke Lal* v *Jag t Nara n* (1901) 23 All 94 I Si gh v Tir th I an (1916) 1 R no 64 p 19 3 I C 543

(u) *Mor* v *Mitt* (18) Cal 8 *Cop Nath* v *Gol k Ch nder* (1889) 16 Cal not

(v) *I ukhramlh r* v *re* (1906) 0 Bom 699

(w) *Ragh ath* v *D p ty Commissio er* (19) 54 I A 1 6 2 Luck 93 10 I C 849 (7) A I C 110

(x) *M th a* v *J gleo* (1928) 0 All 08 107 I C 33 (8) A A 61

(y) *F mrh d* in th goods of (1894) 21 Cal 486

(z) *S d r Bib* v *Bukesh* (188) 9 All 03

(a) *M hammad* v *Secretary of State* (1914) 36 All 225 23 I C 23

(b) *Sar d Nath* v *Dwa ka Nath* (1917) 44 Cal 119 35 I C 60

(c) *Syed Khan* v *Syed Ebrahim* (19 8) 6 Rang 169 110 I C 386 (28) A R 13

(d) *Surty* v *Chetty r Firm* (19 6) 4 Rang 265 98 I C 417 (27) A R 20

(e) *Bh g t Si gh* v *Jai I n* (1915) P R no p 1 28 I C 40

(f) *C pinath* v *Gol ck Ch nder* (1889) 16 Cal note

(g) *S mbhu Nath* v *S rj mont* (1899) C I 147 4 I A 131

(h) *I chard n* v *Go ernme t* (1864) 1 W R P C 4 *Cheyt Ram* v *Ch wdhr Nowb t I am* (1858) 7 M I A 20

(i) *A a gama jari* v *Trip a* (1887) 14 C I 40 14 I A 101 *L hmon S gh* v *P a* (1888) 16 Cal 1 16 I A 1

(j) *Sh fiq n sa* v *Sh ba li* (1904) 2 All 581

(5) As to the circumstances in which the Judicial Committee will allow a rehearing see the undermentioned cases (k)

(6) In appeals involving questions of valuation the decree complained of will not be interfered with by the Privy Council unless some erroneous principle has been invoked or some important piece of evidence has been overlooked or misapplied (l)

111 [S 597] Notwithstanding anything contained in section 109 no appeal shall lie to His Majesty in Council—

Bar of certain appeals

(a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861 or the Government of India Act, 1915, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being, or

(b) from any decree from which under section 102 no second appeal lies

Amendment—The word and figure or the Government of India Act 1915 were inserted in the section by the Amending Act 13 of 1916

Decree or order—In cl (a) the words decree or order have been substituted for the word judgment which occurred in the corresponding s 597 of the Code of 1882 See notes to s 109 under the head Difference between the old and the new section

Appeal from a decree of a single Judge—Clauses 15 and 36 of the Letters Patent of the Presidency High Courts and the corresponding clauses of the Letters Patent of the other High Courts were amended by the Orders in Council dated the 3rd November 1927 The effect of these amendments was considered by Rankin C J in a recent Calcutta case (m) In the course of the judgment the learned Judge said — Section 111 of the Code however definitely prohibits an appeal to the Privy Council from a single Judge and to this extent overrides clause 39 of the Letters Patent The section is not a mere provision that nothing in the previous section shall be deemed to give a right of appeal from the decision of a single Judge The provisions of clause (a) of section 111 may have been motived originally by the existence of the right of Letters Patent appeal [cf *Sabhapathi Chetti* v *Narayanasami Chetti*] (n) or by the opinion that it is not reasonable in Indian cases that the Privy Council should be called upon to decide cases until a Bench has dealt with them But in any case the effect of section 111 upon

(k) *Raj ... dern a ... Ran v B ja G r ... S g* (1838) 1 Moo I C 11 ... *Venkata ... Narasimha* ... *C ... rt of Ward* (1886) 11 App Cas 660 ... *Narayan Singh* v ... (1917) 44 I A 87 44 Cal 388 38 I C 93

(l) *Atmaram* v *Collector of Nagpore* (1929) 49 Cal L J 98 114 I C 587 ('29) A PC 9

(m) *Sardar Ali* v *Dalimuddi* (1929) 56 Cal 51 519-520 113 I C 49 ('28) A C 610

(n) (1901) 25 Mad 555 558

clause 39 of the Letters Patent cannot now be controlled by such considerations [*Sat
2 yanarayana Varaprasada v Venkata Bhasya Karla*] (o) It appears to me therefore
that the new clause in the Letters Patent takes away in all second appeals decided by
a single Judge (without his giving a certificate that the case is a fit one for appeal) the right
to go to the Privy Council under the ordinary law though the right of the judicial Com
mittee to give special leave is not of course affected That right was a limited and a
qualified right but such as it was it was open to the party prior to the 14th January
1928

112 [S 616] (1) Nothing contained in this Code shall be deemed—

Savings

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts

Clause (1) (a)—See notes to s 109 Prerogative of the Crown

(o) (19 3) 46 Mad 958 75 I C 604 (4) A M 399

PART VIII

Reference, Review and Revision

113 [S 617] Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit

Reference to High Court

Reference to High Court —See O 46 below

Benares State Court —The High Court of Allahabad has no power to entertain a reference on an application submitted to His Highness the Maharaja of Benares in a civil case from the Benares State Court (p)

114 [S 623] Subject as aforesaid, any person considering himself aggrieved—

Review

(a) by a decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit

See notes to O 47 r 1 below As to rules of procedure see O 47 below

115 [S 622] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

Revision.

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(p) *Sheobodh v Shira* (19) 4 All 3 86 I C 23 ( ) A A 93

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit

Code of 1882 s 622 —This section corresponds with s 622 of the Code of 1882 There is no material alteration in the section

Limits of revisional jurisdiction —The jurisdiction exercised by the High Court under this section is called Revisional Jurisdiction The powers of the High Court under this section can only be invoked *in cases in which no appeal lies* to the High Court provided the case has been decided by any Court subordinate to such High Court and such subordinate Court appears—

(1) to have *exercised* a jurisdiction not vested in it by law *or*

(2) to have *failed* to exercise a jurisdiction vested in it by law *or*

(3) to have acted in the exercise of its jurisdiction *illegally or with material irregularity*

The High Court has no power to interfere in revision under this section except in the three cases mentioned above Whether a particular order is *expedient* or not is not a ground on which the High Court can interfere under this section (*q*) Further in the exercise of revisional power it is not the province of the High Court to enter into the merits of the evidence it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order (*r*) If the High Court finds that the external conditions of jurisdiction of investigation and of command have been satisfied by the inferior Court it should not substitute its own appreciation of evidence or its own judgment thereon for the determination of the inferior Court in any matter committed by the Legislature to the discretion of the inferior Court (*s*)

High Courts powers of superintendence —A case may not fall under this section and yet it may fall under s 15 of the Charter Act 1861 now s 107 of the Government of India Act 1915

Certiorari —The provisions of this section are not exhaustive Cases may be imagined though rare ones which do not fall under this section For such cases it cannot be said that the powers of the High Courts which have inherited the ordinary or extraordinary jurisdiction of the Supreme Courts to issue writs of certiorari have been taken away by the provisions of this section (*t*)

Bombay Regulation 2 of 1827 —The High Court of Bombay has power independently of sec 115 of the Code to call for the proceedings of any subordinate civil Court and to issue orders thereon under Bombay Regulation 2 of 1827 Ch 1 s 5 (2) (*u*)

In which no appeal lies —The High Court cannot act under this section in any case in which an appeal lies to that Court The word appeal is not confined to first appeal it includes second appeal (*v*)

(*q*) *In the matter of the petition of* (191) 31 All 39 14 I C 66

(*r*) (1888) 10 All 46

(*s*) *Jo a* (1883) 7 Bom 341

(*t*) *Madras* (1919) 46 I A 176 190 43 M 146 153 1 C 09

(*u*) *Bombay Steam Navigation C Ltd v Vas d* (19 8) Bom 37 106 I C 4 0 (9) A B 5

(*v*) (1 9) 0 Mal I 5 1 C 1 W 6 6 631 (10 9) 49 C L J 81 115 I C 368 (9) A C 6

Memorandum of appeal may be treated as application for revision and vice versa—Where an appeal is preferred in a case in which no appeal lies the High Court may in a proper case treat the memorandum of appeal as an application for revision and deal with it on that footing (w) Similarly if an application for revision is made in a case in which an appeal lies the application may be converted into an appeal (x)

Interlocutory orders—To give the High Court jurisdiction to revise an interlocutory order it is necessary among other things that it must be a case decided within the meaning of this section and further that no appeal lies to the High Court from that order For the purposes of this section interlocutory orders fall into two classes namely—

A Those from which an appeal lies under s 104 (1) These are orders made by the Court of first instance

B Those from which no appeal lies These may be—

(a) orders made by the Court of first instance from which no appeal is allowed under s 104 (1) *or*

(b) orders passed in first appeal from which no second appeal lies having regard to the provisions of 104 (2)

As regard interlocutory orders falling under class A the High Court has no jurisdiction to revise them as they are appealable orders (y)

As regards interlocutory orders falling under class B there is a conflict of opinion whether they are subject to revision under this section The conflict turns mainly on the word case and the word may in the section Does the word case include an issue or part of a case? If it does not the passing of an interlocutory order is not deciding a case and it is not capable of revision It has been held by some Courts that the word case includes part of a case and by others that it does not

Assuming that the word case includes part of a case in other words includes interlocutory orders and assuming further that the other conditions laid down by the section are fulfilled there is no doubt that the High Court *can* interfere in revision with such orders There is also no doubt that though the High Court *can* revise such orders it is not bound to do so for the section says that the High Court *may* call for the record of any case it being discretionary with the Court to call for the record The matter being one of discretion the question has arisen (and on this point there is another divergence of opinion)—in what cases is it proper for the Court in the exercise of its discretion to revise interlocutory orders? To appreciate the different views on the subject it is necessary to bear in mind that though an interlocutory order may not be appealable under s 104 it may be challenged in the appeal from the final decree under s 105 provided the order is one affecting the decision of the case Again there are some interlocutory orders from which an injured party is given a right of suit to set aside th[illegible] stated in the note below Alternative remedy by way of suit or otherwise" It has been held in some cases that if a party aggrieved by an interlocutory order has the alternative remedy of challenging the order in an appeal from the final decree under s 105 [illegible]

(w) M[illegible] v *Sheriff* (191[illegible]) 36 Bom 10[illegible] 10 I C 68 [illegible] (1911) 38 Cal [illegible] I C 96 [illegible] (1918) 41 Mad 5[illegible] v [illegible] (1[illegible]3) [illegible] I C 10[illegible] A C 487 [illegible] *Bel*[illegible] v [illegible] (1[illegible]) 5 Cal [illegible] 19 103 I C 861 [illegible] A C 8[illegible] *ram* [illegible] (19[illegible]) 49 Mad [illegible] I C [illegible] ([illegible]6) A M 5[illegible]9 *Sal*[illegible] (19[illegible]6) 4 Rang [illegible] 97 I C [illegible] A R [illegible]

(x) [illegible] 78 I C 49 [illegible] A P [illegible] *Laland* (19[illegible]) 8 Lah 61 [illegible]

(y) See for [illegible] (19[illegible]) 41 Cal [illegible] 10 [illegible]

has the alternative remedy by way of suit the High Court should not in the exercise of its di cretion interfere in revision with such order the power to interfere being exercis able only where there is no other remedy For instance no appeal lies from an order of a District Court made on appeal granting a temporary injunction [s 104 (2)] further any error in such order cannot be objected to in an appeal from the final decree as it cannot possibly affect the decision of the case within the meaning of s 105 nor does a suit lie to set aside such an order the High Court may therefore interfere in revision with the order ( ) Similarly where a Court asks a plaintiff to pay additional Court fee before his suit can be entertained the High Court may interfere in revision with the order as the order in effect amounts to a denial of *jurisdiction* (a) But why it has been asked and asked pertinently in a large majority of cases should the discretion of the High Court be fettered with such a hard and fast rule ? Why should the High Court refuse to interfere *in every case* in which the injured party has another remedy open to him ? Why should not the High Court revise an order even if there is another remedy open to the injured party if its non interference might lead to failure of justice or irreparable injury ? This last consideration has weighed with many judges and it has accordingly been held in some cases that the High Court may in a proper case interfere in revision even if there is another remedy open to the aggrieved party With these prefatory remarks the views of the different High Courts on the subject may now be considered

Prior to a Full Bench decision of the Allahabad High Court to be presently noted it was held by that Court that interlocutory orders were not subject to revision first because an interlocutory order cannot be said to be a case within the meaning of this section and, secondly because a party aggrieved by such order though he cannot appeal from the order has another remedy open to him under s 105 namely to make the order a ground of appeal from the final decree in the suit (b) In *Buddhu Lal* v *Mewa Ram* (c) decided in 1921 a Full Bench of the Allahabad High Court held that the word case in this section does not include an issue or part of a case that it does not therefore include an interlocutory order and that the High Court therefore has no power to interfere in revision with interlocutory orders *in any case* According to this decision the word case means a suit where an application for revision is made in a suit and since the High Court under this section can only call for the record of any case which has been decided it has no power under this section to call for the record of a suit *until the suit has been decided* The same view of the section has been taken by a Full Bench of the Lahore High Court in *Lalchand* v *Behari Lal* (d) decided in 1924

(z) *Ba Atrani* v *Deeps g* (1916) 40 Bom 86 33 I C 3 8

(a) *P mrup Das* v *Mohunt* (1910) 14 C W N 93_ *M* *Lal* v *Durga Prasad* (19 4) 3 Pat 930 80 I C 667 (3) A P 673 *Kulandaivelu* v *Ramaswam* (1928) 51 Mad 664 108 I C 539 (28) A.M 416 But no revision lies from an order that the Court fee paid is correct [*Muhamad* v *I ah ma Bee* (19 9) 56 Mad L.J 30 114 I C 84 (29) A.M 191] unless the question is not only one of Court fee but of jurisdiction *K tt ua* v *Rama sw m a* (19 9) 56 Mad L J 394 (29) A M 336

(b) *Harsa an* v *Muhammad* (189) 4 All 91 *Chattar S gh* v *Lekhraj* (1883) 5 All 93 *Farid* v *D lari* (1884) 6 All 33 *Dh dei* v *Chotu Lal* (1917) 39 All _54 38 I C 8 9

(c) (19 1) 43 All 564 63 I C 15 (21) A A 1 [F B] overruling *Bhargava & Co* v *Jagannath* (1919) 41 All 60 55 I C 331 *Chhakkan Lal* v *Kanhaiya Lal* (19 3) 45 All _18 69 I C 9 1 (3) A A 118 *Equ table F u t Co* v *Hafiz Mah med* (1928) 50 All _76 108 I C 73 (28) A A 97

(d) (19 4) Lah 93 84 I C 59 (4) A L 4 [F B]

On the other hand it has been held by the Calcutta (e) Madras (f) Patna (g) and Rangoon (h) High Courts that the word case is wide enough to include an interlocutory order that the words record of any case include so much of the proceedings in any case as relate to an interlocutory order and that the High Court therefore has the power to interfere in revision with orders passed *at any stage of a suit* though there may be another remedy open to the injured party *e g* by making the order a ground of appeal from the final decree under s 105 subject however to this limitation that the High Court will not interfere unless its non interference might lead to failure of justice or irreparable injury Following this principle the High Court of Calcutta in one case set aside an order of the Subordinate Court framing additional issues which were unnecessary for the disposal of the suit when it appeared that the trial of those issues would entail an expenditure of time and money wholly out of proportion to the matter in dispute and cause irreparable injury to the plaintiff (i) Similarly where the lower Court refused the plaintiff s application for an amendment of the plaint the High Court of Madras set aside the order in revision and directed the plaint to be amended (j) In another case where the question was whether an election petition was maintainable at all, and the lower Court held that it was the Madras High Court set aside the order in revision and dismissed the petition. The Court observed that if the petition did not disclose any ground for an enquiry the lower Court would by holding the inquiry exercise a jurisdiction not vested in it by law and to hold it would simply lead to waste of time of the Court and of the parties (k) The High Court of Bombay also has held that the word case includes part of a case and that the High Court has the power to interfere in revision with interlocutory orders But there is a difference of opinion within that Court whether the High Court should in the exercise of its discretion interfere only in cases where there would otherwise be no remedy or whether it may interfere even if the injured party has another remedy open to him by an appeal from the final decree under s 105 or by way of suit On the one hand, it was laid down by a Full Bench in *Shiva Nathaji* v *Joma* (l) decided in 1883 that though the High Court will not ordinarily interfere in revision with interlocutory orders where the aggrieved party has another remedy open to him either by an appeal from the final decree under s 105 or by suit it will interfere if the appeal would manifestly be ineffectual and non interference would result in a defeat of law and a grave wrong to the aggrieved party On the other hand a Divisional Bench consisting of Sargent C J and Candy J held in *Motilal* v *Nana* (m) decided in 1894 that the High Court should not in the exercise of its discretion interfere in revision with interlocutory orders except in cases where the injured party had no other remedy open to him. No reference was made in the judgment to the Full Bench decision in

(e) *Dhapi* v *Ram Pershad* (1887) 14 Cal 768 *Gobinda* v *Ilanja* (1909) 14 Cal W N 147 4 I C 364 *Sajjad Ali* v *Ali Hussain* (1910) 15 C I W N 3 3 6 I C 74 *Jatindra Nath* v *Har* (1914) 20 Cal L J 4 6 433 26 I C 9 4 *Sarda prasad* v *T co ts* (1915) 4 Cal J 6 9 7 I C 91 *Smt Sarajubala* v *M h* (1924) 8 Cal W N 991 8 I C 1008 (1925) A C 04 *Raja* *Rajabala* (1924) Cal 1 8 136 85 I C 8 0 (1925) A C 3 0 but see *Salam Chand* v *Bhagwati Das* (1926) 53 Cal 6 98 I C 615 (1926) A C 1149

(f) *I a ya* v *Tir kka l* (1925) 48 Mad L J 343 87 I C 90 ( ) A M 58 *J dla a* v *Vergl e* (1) 48 Mad L J 451 87 I C 113 ( ) A M 0 *Sri Krishna Doss* v *Chatoorl Chand* (1903) 8 Mad 334 4 I C 503 *Sr Poo p th S I a j l* (191) 9 Mad L J 53 30 I C 41 *I N a of Hyderabad I r* (15 3) 9 Mad 6 Muttusami Ayyar J s that the section pre-supposes d cisi n or an order in the nature of a decree

(g) *Nar tan* v *Halford* (1919) 4 Pat L J 191 44 I C 831 *Ba key* v *Ram Bahad r* (1919) 4 Pat L J 19 50 I C 5 0 *M n Lal* v *Durga Pras d* (1924) 3 Pat 930 80 I C 667 (1924) A 1 673

(h) *Jupiter General Insurance Co Ltd* v *Abd l A iz* (1923) 1 Rang 231 6 I C 48 (1924) A 1

(i) *S Saroj bal* v *Moh n* (1924) 28 Cal W N 991 8 I C 1008 (1925) A C 04

(j) *K n* v *P kka el* (19) 48 Mad L J 343 8 I C 90 ( ) A M 58

(k) *Jana dl na* v *Varghese* (19) 48 Mad L J 4 1 8 I C 113 (1925) A 3 0

(l) (1883) 7 Bom 341 357 3 [F B] *Vithal* v *Balkrishna* (1886) 10 Bom 610, 616 [F B] *Somchand* v *Chhaganlal* (1911) 3 Bom 43 4 10 I C 803

(m) (1894) 18 Bom 3 *Irbasappa* v *Lasgowda* (1910) 44 Bom 9 I C 43 *Ja l* v *Jaja* (1920) 44 Bom 613 5 I C 5 6

Shiva Nathaji s case The decision in *Motilal v Nana* was disapproved by a Divisional Bench of the same High Court in *Secretary of State v Narsibhai* (n) decided in 1924 and the Court followed the principle laid down in the Full Bench ruling In the course of his judgment Koyajee J observed that the section did not make the absence of another remedy a necessary condition of its applicability

The distinction between the decisions of the High Courts of Allahabad and Lahore on the one hand and those of the other High Courts on the other hand as to the meaning of the term case is brought out by the following case *A* institutes a suit against *B* in Court *X* One of the issues in the suit is whether Court *X* has jurisdiction to try the suit The Court holds that it has and that the suit must proceed *B* applies to the High Court for a revision of the order of Court X Has the High Court power to interfere in revision with this order which is an interlocutory order? According to the Allahabad (o) and Lahore (p) decisions the High Court has no such power as the decision of an issue in a suit is not a decision of a case within the meaning of this section According to the High Courts of Bombay (q) and Madras (r) the High Court has the power to interfere with the order in revision as the word case includes part of a case and further the High Court would in the exercise of its discretion interfere with the order if it came to the conclusion that the order was wrong though the order may be challenged in an appeal from the final decree for if Court X had no jurisdiction to try the suit it would result in unnecessary waste of time and money

As regards orders made on an application for leave to sue in *forma pauperis* a distinction has been made by the Allahabad High Court between an order *granting* the application and an order *rejecting* the application An order rejecting the application it has been held amounts to a *decision of the case* and is therefore open to revision but an order granting the application is *not a decision* of the *case* but a mere interlocutory order and it is not therefore open to revision (s) In recent Allahabad cases (t) however Walsh J expressed the opinion that no revision lies even from an order rejecting the application the ground of the decision being that it is not a case decided within the meaning of this section no opinion was expressed by Piggott J But where the Court of first instance instead of trying the question of the petitioner s pauperism tries the question of his title to the property claimed by him and finding that the title was not established dismisses the application to sue in *forma pauperis* the High Court can interfere in revision for in not trying the question of pauperism the Court failed to exercise the jurisdiction vested in it by law and in trying the question of title it exercised a jurisdiction not vested in it by law (u) The High Court will also interfere in revision if the lower Court dismisses the application on the ground that the petitioner s claim is barred as res judicata as such an inquiry is not warranted by the provisions of O 33 r 5 (v)

Even if the section applies to interlocutory orders no High Court will interfere in revision with an order made by the lower Court deciding that certain evidence is inadmissible (w)

Alternative remedy by way of suit or otherwise—The powers conferred upon the High Court by this section are discretionary Hence though a party may not have

(n) (1924) 48 Bom 43 I C 41 (24) A B 6

(o) *Buddhu L l v Mewa Pam* (19 1) 43 All 564 63 I C 15 (1) A A 1 [F B]

(p) *Lalchand v B hari Lal* (1924) 5 Lah 38 84 I C 259 (24) A L 4 [F B]

(q) *Secret ry of St te v N rs bh i* (19 4) 48 Bom 43 77 I C 41 (24) A B 6

(r) *Janardhanan v Verghe e* (19 5) 48 Ma 1 L J 451 87 I C 113 (5) A M 07 See also *Iaya i v Rajab la* (19 4) 5 Cal 1 8 136 8 I C 8 0 ( ) A C 3 0

(s) *M h mmad Ayab v Muhammad Mahm d* (1910) 3 All 6 3 6 I C 831 See also *H rs ran v Muhammad* (1881) 4 All 91

(t) *Mal deo v The Secretary of Stat* (19) 44 All 248 6 I C 55 ( )A A 1 *Shanker Ban v Ram D o* (19 6) 48 All 493 94 I C 484 (6) A A 446

(u) *Sha ran v Abd s* (19 3) 45 All 549 73 I C 538 (3) A A 577

(v) *Lachmi v Ram Bahad r* (19 5) 23 All L J 00 86 I C 781 (5) A A 75

(w) *Isa Ad v Bai Mariam* (19 7) 29 Bom L R 04

a remedy by way of appeal the High Court may in the exercise of its discretion refuse to interfere under this section if there is *any other remedy* open to the party The especial and extraordinary remedy by invoking the revisional powers of this Court should not be exercised unless as a last resource for an aggrieved litigant (x) The recognised rule is that if a party to civil proceedings applies to us to exercise our powers under s [115] he must satisfy us that he has *no other remedy* open to him under the law to set right that which he says has been illegally irregularly or without jurisdiction done by a subordinate Court (y) The other remedy open to the applicant must be a *certain and conclusive* remedy allowed by law

Upon the principle stated above no application will be entertained to revise an order made under O 21 rr 60 61 or 62 (Code of 1882 ss 280 281 282) for though no appeal lies from such order the party against whom the order is made has a special remedy by way of suit under O 21 r 63 [Code of 1882 s 283] (z) Similarly no application will be entertained to revise a decree passed in a suit for possession instituted under s 9 of the Specific Relief Act 1877 for though no appeal lies from a decree passed in such suit the party against whom the decree is passed is not precluded from instituting a regular suit to establish his title to possession (a) But if the remedy is a *doubtful* one the High Court may interfere by way of revision under this section (b) And even if the remedy is certain and conclusive the High Court may in an exceptional case interfere by way of revision under this section (c) No doubt the ordinary rule is that where an aggrieved party has other remedy available this Court is unwilling to interfere but it is unquestionable that even if there be such remedy this Court may interfere in exceptional cases (d) Thus where the lower Court refused the application of a decree holder for rateable distribution under s 73 on the ground that there was another property of the judgment debtor available for the satisfaction of his claim the High Court of Madras interfered on revision under this section though the applicant had clearly a remedy by suit Miller J said I do not depart from the view that where a party has a remedy elsewhere than in the High Court the High Court should not except in special cases interfere under [this section] But here we have a case in which there is no doubt as to the rights of the parties and no remedy if I do not *interfere* except by a *suit to which there can be no defence* and which *therefore* would surely multiply proceedings In such a case the lesser evil at any rate is interference under [this section] (e) When the Court on an erroneous view of the law refused to proceed with the suit until Court fee was paid the Madras High Court interfered with the interlocutory order as this would give more complete and efficacious relief and avoid unnecessary hardship and multiplicity of proceedings (f) In a Patna case Manuk J said When the High Court can by interfering under section 115 in appropriate cases terminate the litigation the mere fact that another remedy *by suit only* lies should not *per se* be a reason for non interference (g) In a Calcutta case the High Court interfered in revision where the lower Court refused to entertain an application for review based on an allegation of fraud though the applicant had a remedy by way of suit (h)

(x) *Sheo Prasad* v *Kastura Kuar* (1888) 10 All 119 1
(y) *Gopal Das* v *Alaf Khan* (1889) 11 All 383 *Gu* v *Jasraj* (1893) 15 All 40
(z) *Sheo Prasad* v *Kastura Kuar* (1888) 10 All 119 *Ittiachan* v *Velappan* (1885) 8 Mad 484
(a) *Bhaindal* v *Pandal* (1888) 1 Bom 1 *V a Isaballi* v *D dbhai* (1890) 14 Bom 3 1 *Kash th* v *Nana* (18) 1 Bom 731 See also *Ahmad Din* v *Allas Trad g C* (191) P R 66 p 287 31 I C 80
(b) *Gh l m* v *Du rka Prasad* (1896) 18 All 163 168
(c) *D b D s* v *Eja H sain* (1906) 28 All *Emperor* v *Bihari Lal* (19 9) 51 All 338 (28) A A 588
(d) *Umat ul M hd* v *F l o m* (1903) 1 Cal W N 16 4 *F gi na d* v *I i Charan* (1919) 4 Pat L J 94 10 103 4 I C 150 *Sh a* v *Joma* (1883) L m 341 3
(e) *Sh e Fri h a Das* v *Ch n look Cl i* (1909) Mad 334 4 I C 03 *Admi st t r Ge e al* v *Clettyar* (19 8) 5 Rang 4 109 I C 444 (8) A I 83
(f) *I lan la* v *I d a* (19 8) 51 Mad 664 108 I C 533 (28) A M 416
(g) *Fajl inandan* v *Pa Cha an* (1919) 4 Pat L J 94 106 49 I C 1 0 *Musam nat H* v *Musa at Aysha* (19 0) 1 t L T 415 417 57 I C 4 1
(h) *Khitish Cha d a* v *Nagend a Nath* (19 9) 33 C W N 57 (29) A C 513

Whether High Court may of its own motion call for record—The powers of revision given by this section are very wide and the High Court may *of its own motion* call for any record under this section if it appears desirable so to do to that Court (i) It is not neces ary to the exercise of its powers under this section that it should be put into motion by the party aggrieved by the proceeding complained of It has been so held by the High Courts of Calcutta Allahabad and Madras (j) In a Bombay case however where a Collector applied to the High Court to revise a decision of a Mamlatdar the High Court declined to interfere stating that in so doing it was following the established practice of the Court and adding that the defendant if *he felt aggrieved could himself apply to that Court (k)*

Case—The word case is more comprehensive than the word suit In a case before the Judicial Committee (l) the question arose whether proceedings by petition to a Civil Court in a matter under s 10 of the Religious Endowments Act 20 of 1863 constituted a case within the meaning of this section Dealing with that question their Lordships said No definition is to be found in the Code of the word case It cannot in their Lordships view be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court It must they think include an ex parte application such as that made in this case praying that persons in the position of trustees or officials should perform their trust or discharge their official duties' The word case al o includes proceedings under the Guardians and Wards Act 1890 Probate and Administration Act 1881 Succession Certificate Act 1889 Provincial Insolvency Act 1J20 etc (m) The passing of an ex parte decree is deciding a case (n) but it is not ettled whether the making of an interlocutory order is so See note above Interlocutory ord rs

Subordinate Court—The High Court has no power of revision under this section unless the case is decided by a Court and further it has been decided by a Court subordinate to the High Court A Court subordinate to a High Court i one over which the High Court has appellate jurisdiction (o) A District Registrar is not a Court within the meaning of this section (p) Nor is the Rent Controller of Rangoon (q) Nor is a District Judge acting under s 4 of Bombay Act 12 of 18J0 (r) The Chief Judge of the Small Cause Court at Bombay acting under the powers granted to him by s 33 of the Bombay Municipal Act 1888 is not a Court subordinate to the High Court of Bombay (s) Nor is a District Judge acting under s 23 of the Bombay District Muni ipal Act 1873 a Court subordinate to the High Court of Bombay (t) nor a Chief Judge of the Small Cause Court at Rangoon acting under powers conferred by sec 14 of the Rangoon Municipal Act 1922 (u) The Chief Judge Small Cau e Court acting under the Madras City Municipal Act (v) or exercising powers under sec 15 of the Rangoon Pent Act 1920 (w) is a persona designata and not a Court subordinate to the

(i) *Visheshar* v *Hari Si gh* (1883) 5 All 4
(j) *I ra Mal* v *Ja ki Pershad* (1901) 28 Cal 680 *Golam Mahami ad* v *Saroda* (1900) 4 Cal W N 695 *Debi Das* v *Eja H sa n* (1906) 8 All 7 *Anth y* v *D pont* (188) 4 Ma [illegible] 17
(k) *Iandu* v *Bhaidu* (189) 21 Bom 806
(l) *Bal krishna* v *I as deva* (1917) 44 L A 61 40 Mad 93 40 I C 6 0
(m) *Pridhu Lal* v *Mewa I am* (19 1) 43 All 564 5 63 I C 15 (1) A A 1 *Lal Cha d* v *B hari Lal* (19 4) 5 Lab 38 9 84 I C 9 (4) A L 4 5 See *B ll* v *Ha d c r* (19 4) 6 Lah L J 219 9 1 (4 1 (4) A L 0 [Guardi ns and W ls Act 1890—revi ion]
(n) *Pi j Shah* v *Q rib Shah* (19 6) 7 Lah 161 9 I C 1 (26) A L 379
(o) *Balkrish a* v *C ll tor Bomb y* (19 3) 4 Bom 699 01 73 I C 3 4 (3) A B 90
(p) *Ma cala* v *I uma uppa* (1907) 30 Mad 3 6 *Vaj nna* v *Pattabhiramayya* (19 8) 51 Mad 45 103 I C 180 (8) A M 475
(q) *M hid en* v *Bul h Ram* (19 5) 3 Ran 410 91 I C 617 (26) A R 33 [F B]
( ) *Cooper In re* (1918) 4 Bom 119 43 I C 465
(s) *V vaikar* v *Sar jin* (19 3) Bom L R 463 73 I C 133 (3) A B 4 1
(t) *Balaj* v *Merwa j* (189) 21 Bom 9 *Ga gadh r* v *Hubl Municip lity* (19 6) 0 Bom 3 7 94 I C 660 (6) A B 344
(u) *Mun cip l Corpor tion* *Shakur* (19 6) 3 Ran 560 91 I C 550 (6) A R 5
( ) *L k h a n* v *Kannapp* (19 7) 50 Mad 1 1 99 I C 148 (26) A M 93
(w) *Aziz* v *Kaloboy* (19) 4 I ng 304 93 I C 90 ( ) A R 1

High Court A Full Bench of the Madras High Court has held that the High Court has no power to revi e orders passed under sec 20 of the Madras Estates Land Act 1 of 1908 by the Board of Revenue (x) The High Court of Kumaun is not a Court subordinate to the High Court of Allahabad (y) But a District Judge acting under s 57 of the Madras Local Boards Act 14 of 1920 is a Court within the meaning of this section (z)

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Decision of a single judge of a Chartered High Court.—A Judge of a chartered High Court sitting alone is not a Court subordinate to the High Court but performs a function directed to be performed by the High Court there is therefore no revision from his decision under this section (i)

Decision of a single Judge of Chief Court of Oudh —The Court of a single Judge of the Chief Court of Oudh sitting to hear and determine a suit of which the value is more than Rs five lacs as provided by sec 7 of the Oudh Courts Act 4 of 1925 is not a subordinate Court to the Chief Court which is the High Court referred to therein and therefore no revision lies against its order (j)

Jurisdiction —Jurisdiction has been explained in the notes to s 21 The ex pression jurisdiction is not confined to the jurisdiction to entertain a suit or appeal A Court may have jurisdiction to entertain a suit or appeal and yet it may have no jurisdiction to pass a particular *order* in the suit or appeal If it does so the case

(x) *I ghunada* v *G vin la* (19 8) 5 M L J 798 (8) A M 103 o err l ng *Na asimha Rao* v *Ryots of Y eddam* mud p ll (19 6) 49 Mad 499 94 I C 164 (6) A M 480 and in effect overruling *Ra a a Kali* (1919) 4 Mad 310 51 I C 634

(y) *Sad r Singh* v *Am r S ngh* (19) 45 All 393 1 I C 991 (3) A A 91

(z) *P maswami* v *Muthu* (19 3) 46 M d 36 71 I C 1039 (3) A M 19 *Alamal* v *Basa a* (19 3) 46 M d I 3 7 I C 90 (3) A B 4

(a) *Th mb i* v *Ma i n* (1910) 34 Bom 6 I C 867 *Syed* v *M homed* (19 9) 31 Bom L R 5 115 I C 407 (9) A B 190 dissenting from *Mo es* v *Meyer* (19 5) 50 Bom 3 9 I C 367 (6) A B 139

(b) *M l* v *Sher ff* (191) 36 Bom 105 1 I C 68

(c) *Ius t ll* v *Ma ad* (1913) 3 B 114 17 I C 6 6

(d) *B lakrish a* v *V asud va* (191) 44 I A 61 68 6) 40 M a 793 801 40 I C 650

(e) *Abd l S ttar* v *Spec il Deput Colle tor* (19 4) 47 Mad 3 84 I C 616 (4) A M 44 [F B] overr ling *P mesw a* I *l A quisit o Coll t P l jhat* (1919) 4 Mad 31 49 I C 659 See *Ad u t ato Ge eral of Bengal Tl La d Acqi tion Collector* (1 0) 1 C l W N 41 *Krishna Da C ll ctor f Pabna* (191) 16 C l L J 16 13 I C 4 0

(f) *Balk is a* v *The Collect r Bo ab* (19 3) 47 Bom 699 3 I C 3 4 (3) A B 90

(g) *S asvat* v *The La d Acq i n D p ty Collect r* (191) Pat L J 04 39 I C 650

(h) *B tish Ind a St am N gation Compa y* v *Secretar f State* (1911) 38 Cal 0 8 I C 107

(i) *Debe d a Nath* v *Bib dhe d a* (1916) 43 Cal 0 94 33 I C 745 See lso *Jamna Doss* v *S b pathy Chett* (1913) 36 Mad 135

(j) *Ran B s ni* v *Minor son of Madho S ngh* (19) Luck 1 99 I C 547 (7) A O 59

Whether High Court may of its own motion call for re powers of revision given by this section are very wide and the High Court *own motion* call for any record under this section if it appears desirable so t Court (i) It is not necessary to the exercise of its powers under this should be put into motion by the party aggrieved by the proceeding It has been so held by the High Courts of Calcutta Allahabad and M a Bombay case however where a Collector applied to the High Court f sion of a Mamlatdar the High Court declined to interfere stating th was following the established practice of the Court and adding that he felt aggrieved could himself apply to that Court (k)

Case —The word case is more comprehen ive than th a case before the Judicial Committee (l) the question ar ings by petition to a Civil Court in a matter under s 10 of the I Act 20 of 1863 constituted a case within the meaning of th that question their Lordships said No definition is to be the word case It cannot in their Lordships view be co which there is a plaintiff who seeks to obtain particular reli f against a defendant who is before the Court It must they t application such as that made in this case praying that p r tees or officials should perform their trust or discharge their case al o includes proceedings under the Guardians n and Administration Act 1881 Succession Certificate Act Act 1920 etc (m) The passing of an ex parte decree i is not settled whether the making of an interlocutory Interlocutory ord rs

Subordinate Court —The High Court has no j unless the case is decided by a Court and furth subordinate to the High Court A Court sub l which the High Court has appellate jurisdiction (Court within the meaning of this section (Rangoon (q) Nor is a District Judge acting u The Chief Judge of the Small Cause Court at B to him by s 33 of the Bombay Municipal Act I Court of Bombay (s) Nor is a District Jud Muni ipal Act 1873 a Court subordinate t Chief Judge of the Small Cause Court at I sec 14 of the Rangoon Municipal Act 19_ (acting under the Madras City Municipal Act (Rangoon Pent Act 1920 (w) is a person

(i) *Pisheshar v Hari S ngh* (1883) All
(j) *P an Mal v Ja ki Persl al* (1901) 680 *G lam Mal ami al v S r* (1 4 Cal W N 69 *Debi Das v Ej H* (1906) 28 All 7 *Anthony v D j* (1 4 Mal 17
(k) *Pandu v Bhardu* (1897) 21 Bom
(l) *Balakrishna v l as d va* (1) 44 I 261 40 M d 793 40 I C 0
(m) *Bi dlhu L l v Mewa R n* (19 1) 4 64 5 63 I C 15 (1) A A 1 *Cha d v Beh ri Lal* (19 4) 5 L h 84 I C (4) A I 4 *Ball v H r l ari* (19 4) 6 L h I J 19 9 I C 4 1 (4) A L 5 0 [Guardians and Wards Act 1890—revision]
(n) *Pir j Shah v Qorib Shah* (19 6) 7 Lah 161 9 I C 1 4 (26) A L 379
(o) *Balkrish a v C lle tor Bombay* (19 3) 47

(v) *I* 1
(w) *A* 90

High Court. A Full Bench of the Madras High Court has held that the High Court has no power to revise orders passed under sec. 205 of the Madras Estates Land Act I of 1908 by the Board of Revenue (x). The High Court of Kumaun is not a Court subordinate to the High Court of Allahabad (y). But a District Judge acting under s. 57 of the Madras Local Boards Act 14 of 1920 is a Court within the meaning of this section (z).

The Court of the Resident at Aden is subordinate to the High Court of Bombay in reference to cases to be stated by the Resident for the decision of the High Court under s. 8 of the Aden Court Act 2 of 1864 (a). His Britannic Majesty's Courts in Zanzibar are also subordinate to the High Court of Bombay (b). A Collector exercising *judicial* functions under the Bombay Mamlatdars Courts Act II of 1906 is a Court within the meaning of this section (c). And so is a Civil Court acting or purporting to act under the provisions of s. 10 of the Religious Endowments Act 20 of 1863 (d). It has been held by the High Court of Madras (e) and Bombay (f), that where an application is made to a Collector for a reference to the Civil Court under s. 18 of the Land Acquisition Act I of 1894 and the application is rejected the Collector in so doing does not act as a Court and his order is not subject to revision by the High Court. The High Court of Patna has held that a Collector acting under the second proviso to s. 49 of that Act is a Court and an order made by him refusing to refer to the Civil Court a question under that proviso is subject to revision by the High Court (g). The High Court of Calcutta has held that a Collector acting under s. 11 of that Act is not a Court within the meaning of this section (h).

Decision of a single judge of a Chartered High Court.—A Judge of a chartered High Court sitting alone is not a Court subordinate to the High Court but performs a function directed to be performed by the High Court; there is therefore no revision from his decision under this section (i).

Decision of a single Judge of Chief Court of Oudh.—The Court of a single Judge of the Chief Court of Oudh sitting to hear and determine a suit of which the value is more than Rs. five lacs as provided by sec. 7 of the Oudh Courts Act 4 of 1925 is not a subordinate Court to the Chief Court which is the High Court referred to therein and therefore no revision lies against its order (j).

Jurisdiction.—Jurisdiction has been explained in the notes to s. 21. The expression jurisdiction is not confined to the jurisdiction to entertain a suit or appeal. A Court may have jurisdiction to entertain a suit or appeal and yet it may have no jurisdiction to pass a particular *order* in the suit or appeal. If it does so the case

(x) *Pag unada G int* (1 8) 5 M L J 98 (28) A M 103 overruling *Na as ha I o v R ts of Peddamar pall* (19 6) 49 Mad 433 94 I C 164 (26) A M 480 and in effect overruling *Rama Kah* (1919) 4 Mad 10 1 I C 634

(y) *Sada S gh v Amar Si gh* (19 3) 4 All 83 71 I C 931 (23) A A 231

(z) *P masua v Mutt u* (19 3) 46 M 1 536 1 I C 1039 (23) A M 192 *Alamat v Bas a* (19 3) 46 Mad 1 3 I C 90 (23) A M 4

(a) *Ibi ba v Mari a* (1910) 34 Bom 6 5 I C 867 *Syed v Mahomed* (19 9) 31 Bom L R 115 I C 407 (29) A B 190 dissenting from *Mo es v Meyer* (19) 50 Bom 3 9 I C 67 (26) A B 133

(b) *M al v Sh r ff* (191) 6 Bom 105 1 I C 68

(c) *Fu l v M adu* (1913) 3 Bom 114 17 I C 676

(d) *Bal k ish na v Vasudeva* (191) 44 I A 61 68 69 40 Mad 793 801 40 I C 6 0

(e) *Abd l Sattar Speci l Dep ty Collecto* (19 4) 47 Mad 3 84 I C 616 (24) A M 44 [F B] overruling *P m w ra v Jan l Acqu s t o Collector P lghat* (1919) 4 Mad 31 49 I C 6 See *Ad u t l -Ge er l of Bengal v The Land Acq s t on Collector* (190) 12 C 1 W N 41 *Krish a Das v Coll ctor of Pab a* (191) 16 Cal L J 16 13 I C 4 0

(f) *Ball h a v The Collector B mba* (19 3) 47 Bom 639 3 I C 3 4 (23) A B 90

(g) *S a u l Th La d A q t n Deputy Collecto* (1917) Pat L J 04 39 I C 6 0

(h) *B u h India St am Na igation Compa y v Secretary of State* (1911) 38 Cal 0 8 I C 10

(i) *D be l a Nath v Bib the d a* (1916) 43 Cal 90 34 33 I C 745 See also *J mna Du s v Sabapathy Chetty* (1913) 36 Mad 138

(j) *Fa B san v Minor son of Madho S gh* (19 7) Luck 1 99 I C. 547 (27) A O. 59

Whether High Court may of its own motion call for record—The powers of revision given by this section are very wide and the High Court may *of its own motion* call for any record under this section if it appears desirable so to do to that Court (*i*) It is not necessary to the exercise of its powers under this section that it should be put into motion by the party aggrieved by the proceeding complained of It has been so held by the High Courts of Calcutta Allahabad and Madras (*j*) In a Bombay case however where a Collector applied to the High Court to revise a decision of a Mamlatdar the High Court declined to interfere stating that in so doing it was following the established practice of the Court and adding that the defendant if he felt aggrieved could himself apply to that Court (*k*)

Case—The word case is more comprehensive than the word suit In a case before the Judicial Committee (*l*) the question arose whether proceedings by petition to a Civil Court in a matter under s 10 of the Religious Endowments Act 20 of 1863 constituted a case within the meaning of this section Dealing with that question their Lordships said No definition is to be found in the Code of the word case It cannot in their Lordships view be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court It must they think include an ex parte application such as that made in this case praying that persons in the position of trustees or officials should perform their trust or discharge their official duties The word case also includes proceedings under the Guardians and Wards Act 1890 Probate and Administration Act 1881 Succession Certificate Act 1889 Provincial Insolvency Act 1920 etc (*m*) The passing of an ex parte decree is deciding a case (*n*) but it is not settled whether the making of an interlocutory order is so See note above Interlocutory orders

Subordinate Court—The High Court has no power of revision under this section unless the case is decided by a Court and further it has been decided by a Court subordinate to the High Court A Court subordinate to a High Court is one over which the High Court has appellate jurisdiction (*o*) A District Registrar is not a Court within the meaning of this section (*p*) Nor is the Rent Controller of Rangoon (*q*) Nor is a District Judge acting under s 4 of Bombay Act 12 of 1850 (*r*) The Chief Judge of the Small Cause Court at Bombay acting under the powers granted to him by s 33 of the Bombay Municipal Act 1888 is not a Court subordinate to the High Court of Bombay (*s*) Nor is a District Judge acting under s 23 of the Bombay District Municipal Act 1873 a Court subordinate to the High Court of Bombay (*t*) nor a Chief Judge of the Small Cause Court at Rangoon acting under powers conferred by sec 14 of the Rangoon Municipal Act 1922 (*u*) The Chief Judge Small Cause Court acting under the Madras City Municipal Act (*v*) or exercising powers under sec 15 of the Rangoon Rent Act 1920 (*w*) is a persona designata and not a Court subordinate to the

(*i*) *Bisheshar v Hari Singh* (1883) 5 All 4
(*j*) *I r n Mal v J nki Pershad* (1901) 28 Cal 680 *Golam Mahamad v S odi* (1900) 4 Cal W N 69 *Debi Das v Eja Husain* (1906) 8 All 7 *Anthony v Dupont* (188) 4 Mad 1
(*k*) *Ia du v Bhaudu* (189) 21 Bom 806
(*l*) *Bal krishna v Vasudeva* (1917) 44 I A 61 40 Mad 93 40 I C 650
(*m*) *P ithu Lal v Mei a Ram* (19 1) 43 All 64 63 I C 15 (1) A A 1 *Lal Ch nd v B ha L l* (19 4) 5 Lah 88 84 I C 9 (4) A L 4 See *B ll v H rdi n* (19 4) 6 Lah L J 19 9 I C 451 (4) A L 5 0 [Guardian and Ward Act 1890—revision]
(*n*) *P j Shah v Q ib Sh h* (19 6) 7 Lah 161 9 I C 1 4 (6) A L 379
(*o*) *B lkrish a v Coll tor Bombay* (19 3) 4 Bom 60 01 3 I C 3 4 (3) A B 90
(*p*) *Manavala v I ma appa* (190) 30 Mad 3 6 *Vagann v Patta h amayya* (19 8) 51 Mad 45 10 I C 180 (8) A M 4 5
(*q*) *Mohudee v B ksh Ram* (19) 3 Rang 410 91 I C 61 (6) A P 33 [F B]
(*r*) *Coop In re* (1918) 4 Bom 119 43 I C 46
(*s*) *Navalkar v S ojin* (19 3) 2 Bom L R 463 73 I C 133 ( ) A B 4 1
(*t*) *Balaji v Merwa ji* (1895) 21 Bom 279 *G gadh v Hubli Mu ic pality* (19 6) 50 Bom 3 7 94 I C 660 (6) A B 344
(*u*) *Mu cipal Corporation v Shakur* (19 6) 3 Rang 560 91 I C 550 (6) A R 5
(*v*) *Lak h ana v K ppar* (19 7) 50 Mad 1 1 99 I C 148 (26) A M 93
(*w*) *Aziz v Kh l boy* (19 7) 4 Rang 304 98 I C 90 ( ) A R 1

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(x) *Raghunada* v *Govinda* (19 3) M L T 38 (8) A M 10 overruling *Na as mha Rao* v *I jots of I ddamamid rall* (19 6) 49 Mad 433 94 I C 164 ( ) A M 480 and in effect overruling *I ma a* v *Kali* (1919) 4 Mad 10 51 I C 634

(y) *Sadar Singh* v *Ama Singh* (19 3) 4 All 383 71 I C 931 (3) A 4 1

(z) *Ramaswa* v *M thu* (19 3) 46 Mad 536 71 I C 1039 (3) A M 19 *Afam l* v *Basa a* (19 3) 46 Mad 1 3 I C 90 (3) A 3 4

(a) *Ilt ba* v *Ma ia* (1910) 34 Bom 6 I C 867 *Syed* v *Mahomed* (19 9) 31 Bom L R 2 115 I C 407 (9) A B 190 dissenting from *Moses* v *Meyer* (19) 50 Bom 3 9 I C 367 (26) A B 139

(b) *M* v *Sher ff* (1912) 36 Bom 10 1 I C 68

(c) *P lla* v *Maladu* (1913) 3 Bom 114 17 I C 676

(d) *Bal krishna* v *Vas deva* (191) 44 I A 61 68 63 40 M a 793 801 40 I C 650

( ) *Abd l Sattar* v *Speci l D puty Coll ct* (19 4) 47 Mad 3 84 I C 616 (4) A M 44 [F B] o e uli *P r meswa a* v *Ia d Acq i it n C ll t r P lghat* (1919) 4 M d 31 49 I C 653 See *Ad* *t tor-General of Be g l* v *Th La d* *t q sit Collector* (190) 1 C l W N 41 *I sl na Da* v *C ll t I la b a* (191) 16 C L J 16 13 I C 4 0

(f) *B krish a* v *The Colle t r B mbay* (19 3) 47 Bom 609 3 I C 3 4 (3) A B 30

(g) *S a wati* v *Th I d Acq ton D p ty C llector* (1917) Pat L J 04 39 I C 6 0

(h) *Brit sh India Steam N gation Company* v *Secret ry of State* (1911) 38 Cal 0 8 I C 10

(i) *Debe l a Nath* v *Bib dhe d a* (1916) 43 Cal 90 94 33 I C 745 See also *Jimna Doss* v *S bapathy Chetty* (1913) 36 M d 138

(j) *Pa Bas n* v *M nor son of Madho S gh* (19 7) Luck 1 99 I C 547 (7) A O. 59

is one under clause (a) of the section and the High Court is entitled to interfere in revision. This follow from the rulings of the Judicial Committee in *Lachmi Narain* v *Balmakund* (k) dealt with in the note below The same topic continued and in *Brij Mohun* v *Rai Uma Nath* (l)

Exercise by Court of jurisdiction not vested in it by law—If a Court assumes jurisdiction which by reason of the pecuniary or territorial limits of the jurisdiction of such Court or by reason of the subject matter of the suit or other proceedings instituted in it is not vested in it by law the High Court to which such Court is subordinate has power under clause (a) to interfere in revision under this section It will not however do so unless the facts from which absence of jurisdiction may be inferred are patent upon the face of the record (m) Similarly the High Court has power to interfere in revision under clause (a) if the lower appellate Court entertains an appeal from an order from which no appeal lies (n) or if a Testamentary Court appoints a receiver (o) or if the lower Court inquires into a question into which has no jurisdiction to inquire (p) or if the lower Court demands search fee on an application for copies of records in addit on to the stamps for copies (q)

For other cases under this head see notes below The same topic continued and Wrong decision of lower appellate Court as to jurisdiction of trial Court

Failure to exercise jurisdiction—Where a Court having jurisdiction to act in a matter declines jurisdiction clause (b) applies Thus where a Court has jurisdiction to accept a plaint (r) or to execute a decree (s) or to review its judgment (t) but refuses to accept the plaint or to execute the decree or to review its judgment on the ground that it has no jurisdiction the High Court will interfere under this section When a Subordinate Judge refused to allow an assignee to execute a decree the Allahabad High Court held that there was a failure to exercise jurisdiction because the Judge did not exercise his own judgment but followed a ruling which was not applicable (u) Again when the lower Court made an order on the petition that the petition will be recorded this was said to be no order at all and the Court was directed in revision to hear and dispose of it on the merits (v) Similarly where a Court refused to confirm a sale under s 312 of the Code of 1882 [now O 21 r 92] believing that it had no power to do so if the purchaser objected to the sale on the ground of misrepresentation it was held by their Lordships of the Privy Council that the case was one in which the Court had failed to exercise a jurisdiction vested in it by law and that the decision was therefore subject to revision under the present section (w) The rejection of an application for fixing a standard rent on the ground that the provisions of the Calcutta Rent Act 1920 were not applicable to the case is a refusal by the Rent Controller to exercise jurisdiction conferred upon him by the Act and is accordingly a proper case for interference under this section (x) An order returning a memorandum of appeal for presentation to another Court is also open to revision (y) Interference under this section is also appropriate where a Court has no discretionary power to refuse a relief but refuses the relief believing that it has a discretionary power to do so Thus where a Court refused the

(k) (19 1) 1 I A 3 1 4 Pat 61 81 I C 4 (4) A I 1 18
(l) (1893) 0 Cal 8 19 I A 154
(m) *Mih l* v *Muhammad H en* (1 9) 14 All 413
(n) *B Ma* v *Panchollal* (19 3) 5 Bom L R 14 I C 6 (3) A R 214 (order under O 1 r 101)
(o) *K h ya K nha ya* (19 4) 46 All 3 9 I C 383 (4) A A 376
(p) *Ma j fun L* v *M g I* (19) 1 Ra 3 6 I C 04 (3) A I 193
(q) *Raja S h b* v *Sub Coll ctor* (19 3) 51 Mad 599 108 I C 6 6 (3) A M 370
(r) *Zam n* v *F le* 41 (19) 3 C l 146 *Bala I ar* v *D Ra* (1869) 8 All 111
(s) *Sham ao* v *N l ji* (1886) 10 Bom 00 See al o *Is rudd* v *I a Sakhi* (191) 41 I L J 166 86 I C 7 5 ( ) A 6 9
(t) *Akba I h n* v *Muha n nad* (1909) 31 All 610 4 I C 3
(u) *Ra S l Mal n Lal* (19 6) 48 All 43 93 I C 3 6 (6) A A 346
(v) *M M d l* v *Mee lahi* (19 8) 51 Mad 44 106 I C 660 ( ) A M 15
(w) *B j Moh* v *R Uma Nath* (1893) (1 8 19 I A 1 4
(x) *Ba a l* v *I i* (19) 49 Cal 0 8 83 I C 368 ( ) A C 514
(y) *Cl la* v *Ch l* (19) Lah L J 8 90 I C 603 ( ) A L J

application of a decree holder for a rateable distribution under s 73 though according to its own finding he was clearly entitled to such distribution on the ground that there was other property of the judgment debtor available for the satisfaction of his claim the High Court of Madras interfered under this section ( ) But where a Court has a discretion in a matter a wrong exercise of such discretion is not a proper ground for interference under this section (a)

For other cases under this head see notes below The same topic continued and Wrong decision of lower appellate Court as to jurisdiction of trial Court

Where a Court in the exercise of its jurisdiction has acted illegally or with material irregularity—Cl (c) of the section contemplates cases other than those referred to in cls (a, and (b) This clause clearly excludes clause (b) for a Court cannot refuse to exercise its jurisdiction and act in the exercise of it with material irregularity (b) The clause refers to cases where the Court *having jurisdiction and exercising it* has acted illegally or with material irregularity in the exercise of such jurisdiction (c) The words acted in the exercise of its jurisdiction illegally or with material irregularity have given rise to a conflict of decisions It is therefore best first to state how much is settled law and then to deal with the various interpretations put on the words illegally and with material irregularity by the various High Court

What is not illegality or material irregularity—*It is settled even if it be on a point of law that where a Court has jurisdiction to determine a question and it determines that question it cannot be said that it has acted illegally or with material irregularity because it has come to an erroneous decision on a question of fact or even of law* —The leading case on the subject is *Amir Hassan Khan* v *Sheo Baksh Singh* (d) decided by their Lordships of the Privy Council in 1884 In that case it was laid down by their Lordships that where a Court *has* jurisdiction to decide the question before it and in fact decides the question it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity *merely because its decision is erroneous* The mere fact that the decision of the Court is wrong affords no ground for the interference of the High Court under this section In the course of the judgment their Lordships said The question then is did the Judges of the lower Courts in this case in the exercise of their jurisdiction act illegally or with material irregularity? It appears that they *had* perfect jurisdiction to decide the question which was before them [namely whether the suit was barred as *res judicata*] and they did decide it *Whether they decided it rightly or wrongly* they had jurisdiction to decide the case and even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity Following this decision it has been held that the High Court will not interfere under this section merely because the lower Court allowed an application which was barred by limitation (e) or wrongly decided that a suit was barred by limitation (f) or that it was barred as *res judicata* (g) or because the lower Court proceeded upon an erroneous construction of the sections of an Act (h) or

( ) *Sr I nsl ia D* v *Cl d)k Cl l* (1903) 3 M d 34 4 I C 503
(a) *Jh l l l* v *B h slar D s* (1918) 40 All 61 46 I C 1 4l *el H s i* v *Ha d al* (19 6) 48 All 193 90 I C 243 (6) A 4 14 ( )
(b) *B sa tulla* v *I a dd n* (19 6) 3 Cal 679 96 I C 0 (6) A C 7
(c) *Ristam m* v *Chapa* (1 94) 1 Mad 410 4 1
(d) (188) 11 Cal 6 11 I A 37 *Mula ial Iu uf Khan* v *Abd l Rahm n Kl* (1889) 16 C 1 4) 16 I A 104 *Paras r ia* v *S sl i* (1904) 7 Mad 504
( ) *Labu Ia i* v *Mu a Ial* (1917) 40 All 454 100 I C 6 8 ( ) A A 3 8
(f) *S nd Si gh* v *Doru Sh k r* (1898) 0 All 8 *Iamgop l* v *Joh n ll* (191) 33 Cal 4 3 1 I C 4 *Jl t L l Ga o n* (1918) 3 P t L J 6 46 I C 1 6 It s oth rw e here a Co rt nt tai s a appl at on wh ch on the f of it i b rred by limitation nd *f ils to al j d ate upon the q e t f l tat* [Limitation Act s 3] *T* v *B i dd n* in (1915) 19 Cal W N 970 3 I C 4 6 *S tish Chandra* v *Rakhal* (19 8) 47 Cal L J 6 107 I C 733 (8) A C 189
(g) *A ir* v *Ialkr sl a* (18) 11 Bom 4 8
(h) *I ubbaba* v *Noorj a* (1886) 13 C l 90 *Kri hna* v *A darnath* (18 9) 15 Cal 446 *Kal Charan Sarat Chu der* (1903) 30 Cal 39 *Ga ga Cl a an Shoshi Bl I* (190) 3 C l 5 *R i Singh* v *Sal j I n* (1906) 8 All 84 *Malk rj n Na h ri* (1901) Bom 33 34 I A 16

misunderstood the effect of a document in evidence (i) or excluded evidence which it *ought to have admitted (j) except where such admission was in direct contravention of a* statutory provision (k) or held, though incorrectly that there was no relation of landlord and tenant between the parties to a suit or proceeding (l) or that it was not necessary to give notice to a railway company under s 77 of the Railways Act (m) or that an application to set aside a sale was not timed barred (n) or that it wrongly applied secs 130 and 131 of the Transfer of Property Act (o) Similarly no revision lies from an order passed in appeal remanding a case under O 41 r 23 below (p) though such order may be erroneous in law The cases cited above were all cases in which the Court *had* jurisdiction to decide the question before it and decided it in fact but the decision was impeached as being erroneous in law and was sought to be revised under the present section In all those cases the High Court held that though there was an error in law the decision was not open to revision on the ground that a mere error in law is not an illegality within the meaning of this section In all these cases the High Court might well have said in the words of their Lordships of the Privy Council in another case (q) It [the lower Court] made a sad mistake it is true but a Court *has jurisdiction* to decide wrong as well as right The point was further emphasized by their Lordships of the Privy Council in *Balakrishna* v *Vasudeva* (r) Referring to this section their Lordships said —

It will be observed that the section applies to jurisdiction alone the irregular exercise of it or the illegal assumption of it The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved (s)

The rule laid down in *Balakrishna s case* has been interpreted or rather applied differently by different High Courts. This may be explained by an illustration *A* applies under O 21 r 89 to set aside a sale in execution of a decree The lower Court places a wrong interpretation on r 89 and holds that *A* is not a person entitled to apply under that rule and the application is dismissed *A* then applies to the High Court for a revision of the order of the lower Court Can the High Court interfere in revision? It has been held by the Patna High Court (t) that it can the reason given being that the case is one of a *refusal to exercise a jurisdiction* vested by law in the lower Court and therefore within this section In the course of his judgment Mullick J said The Court s decision upon the point whether the applicant has the necessary legal character is clearly a question involving jurisdiction An erroneous decision on a question of law or fact *after* jurisdiction has once been legally assumed would not be a ground for interference under section 115 of the Code of Civil Procedure but if the decision is *the very basis and foundation of jurisdiction* in its limited sense as distinguished from powers it at once comes within the purview of the section The judgment of their Lordships of the Privy Council in *Balakrishna* v *Vasudeva* is in my opinion authority for this view The same view has been taken by a Full Bench of the Madras High Court (u) These decisions have *been dissented from by a Full Bench of the Allahabad High Court (v) In the*

(i) *Da ratl I ai* v *Sle din* (1 94) 16 All 3)

(j) *Malharra* v *Gulabbhai* (1899) 23 Bom 1 7 *Enat Mo d l* v *Baloram* (189J) 3 Cal W N 581 But see *Bhusan* v *Profulla* (19 1) 48 Cal 119 60 I C 801 (1) A C 251 [shuttin out evidence]

(k) *East Ind an Ry Co* v *Ka ai L l* (19 3) 28 Cal W N 9 34 80 I C 05 (24) A C 493

(l) *Shew P osad* v *Ra nchunder* (1914) 41 Cal 3 3 3 I C 9 7

(m) *E t I t n I j C K i Lal* (19 3) 9 C I W N 80 I C 0 (5) A C 493

(n) *M mmat B i* v *Pa Nath* (19 3) 2 Pat 600 7 I C 430 (24) A P 37

(o) *S nt S gh* v *Mubarak* (1928) 9 Lab 8 106 I C 901 (28) A. L 140

(p) *Chhubu M an* v *Ha charan Das* (1912) 1 R no 119 p 406 18 I C 5 9

(q) *Malkarjun* v *Na hari* (1901) 5 Bom 337 27 I A 16 *Rajwant Prasad* v *Ram Ia tan* (1915) 4 I A 171 176 37 All 485 494 49 30 I C 849

(r) (1917) 44 I A 61 40 Mad 93 40 I C 6 0

(s) (1917) 44 I A 61 67 40 Mad 793 99 40 I C 650 *Ashiq Al* v *Imtiaz Begam* (1917) 39 All 3 4 I C 8J1 [ult valu tion] *Jh ku Lal* v *B shesha D s* (1918) 10 All 61 46 I C 71 [O 23 r 1]

(t) *M amm t Dha u t* v *Sheo Sh nk r* (1919) 4 Pat L J 340 51 I C 873

(u) *S nd ram* v *Ma* (19 1) 44 M d 5 4 63 I C 93 (1) A M 157 [F B]

(v) *Iad Ram* v *S nda Si gh* (19 3) 45 All 4 5 4 I C 8 (3) A A 39 [F B]

Allahabad case Banerji J after referring to *Balakrishna s case* said In the present case the Court was competent to determine whether [A] was entitled to make an application under O 21 r 89 and it had jurisdiction to decide that question and it decided it adversely to [A] The Court may have been wrong in its decision but it cannot be said that in the exercise of its jurisdiction it acted illegally or with material irregularity in the ense in which those words have been interpreted by their Lordships of the Privy Council in the case to which I have referred and in earlier cases decided by their Lordships The substantial point of difference between the e two divergent views is that the Patna and Madras High Courts treat the refusal by the lower Court to entertain the application as a *refusal to exercise* a jurisdiction vested it by law while the High Court of Allahabad regards the refusal as no more than a decision though erroneous on a point of law *in the exercise* of the lower Court s jurisdiction There is no difference of opinion between these Courts on the point tha where the lower Court assumes jurisdiction or refuses jurisdiction on an erroneous construction of a statute the High Court can interfere in revision The difference arises on the question—is it a case of a refusal to exercise jurisdiction or a case merely of a wrong decision on a point of law in the exercise of the Court s juri diction ? According to the Patna and Madras High Court it is the former according to the Allahabad High Court it is the latter

Following its Full Lench ruling the Madras High Court has held that though an erroneous deci ion on a point of limitation is not a ground for interference under this section the High Court can and will interfere if the Small Cause Court refuses to entertain an application for retrial of a uit tried by a single judge of that Court where such refusal proceeds on a wrong view of a question of limitation (u) It has similarly been held by that Court that where a District Judge on an erroneous construction of a statutory rule assumes juri diction to declare whether a person elected as a Pre ident of a Local Board is duly elected or not and assuming such juri diction declares his election to be void the High Court has the power to interfere under this section (x) The same High Court interfered in revision where a Subordinate Judge misconstrued the legal position in the case and refused to release the property under *attachment* as he should have done (y) also where the result of an erroneous decision was likely to perpetuate the error and to give rise to a multiplicity of suits not for one year but for all time (z)

The High Court of Calcutta has held that where a Judge has mi directed himself as to the meaning and effect of a section or of a rule under the Code the High Court can interfere in revision Thus where a plaintiff was allowed to withdraw his suit under O 23 r 1 with liberty to bring a fresh suit on the same cause of action on the ground of a formal defect in the frame of the suit *after* the suit had been heard and decided against him on the merits the High Court interfered in revision (a) In another case the High Court interfered in revision on the ground that the Munsif had not directed his attention properly to the provisions of O 21 r 60 (b) The Oudh Court interfered in revision where the lower Court allowed the plaintiff to withdraw the suit with liberty to institute a fresh suit the object of the withdrawal being to produce evidence in the new uit which he had omitted to produce at the right time (c) The High Court of Pangoon has held that if the lower Court fails to take into account some proposition of law or some material fact in evidence it acts illegally and its decision may be revised by the High Court but

(w) *British I d a St n \ g t o Co Sha fall* (19 3) 46 Mad 938 0 I C 888 (3) A M 435

( ) *F m u mi v M dhu* (19 3) 46 Mad 536 1 I C 1033 (3) A M 19 *Ahamad v F sa a* (19 3) 46 M d 1 3 I C 90 (3) A M 54

(y) *G ng y v Venkat am yya* (19 3) 43 Mad L J 80

(z) *Sury a jana v Sree Raja Venkata* (19 9) 56 Mad L J 73

(a) *F m S ran v Radha* (19 3) 5 Cal. 106 113 I C 847 (9) A. C. 88

(b) *Rajkisho e v Bhabatosh* (19 9) 43 Cal L J 51 115 I C 36 (9) A C

( ) *Til v Firm Sheo Dayal* (19 8) 3 Luck 403 107 I C 887 (8) A O 48

that if the lower Court has applied its mind to the case and duly considered the facts and the law applicable then although its decision may be erroneous the High Court cannot interfere in revision (d)

The same topic continued—The decision in *Amir Hassan Khan's case* presupposes jurisdiction in the Court whose decision is sought to be revised on the ground that it is erroneous Hence the principle of that decision does not apply where a Court erroneously assumes a jurisdiction which is not vested in it by law (e) Thus if a Court proceeding upon an erroneous construction of a section of an Act assumes a jurisdiction which is not vested in it by law the High Court will interfere in revision and set aside the decree of the lower Court as one passed without jurisdiction (f) Similarly if a Court wrongly decide that a suit i of a civil nature and entertains the suit on that basis the decision is open to revision under clause (a) of this section for no civil Court is competent to entertain a suit which is not of a civil nature (g) ee s 9 above Likewise if a Court proceeding upon an erroneous construction of a statute or upon a misapprehension of the law declines to exercise a jurisdiction vested in it by law the High Court has the power to interfere under clause (b) of this section (h) These really are cases under clauses (a) and (b) of the present section They are not cases under clause (c) which is the clause now under consideration The reason why these cases are mentioned here is *that it was contended in those cases that as the assumption of jurisdiction or the refusal* to exercise it had proceeded upon an *error of law* the High Court had no power to interfere under this section and the decision in *Amir Hassan Khan's* case was invoked in support of that contention But the High Courts held that if the case came under either clause (a) or clause (b) it was immaterial that the assumption of jurisdiction or the refusa to exercise it proceeded upon an *error of law* The High Court also pointed out that the basis of the decision in *Amir Hassan Khan's* case was that the lower Court *had* jurisdiction to determine the question before it and that it *had* determined it and all that that case decided was that an *erroneous decision* of a case *in the exercise of the Court's jurisdiction* was no ground for interference under this section

A Court has no power to dismiss a suit after the decree is passed in the suit If it does so the question arises whether the case is one of exercise of jurisdiction not vested in the Court or one of illegality or material irregularity In *Lachmi Narain* v *Balmakund* (i) the Judicial Committee held that the case was one of exercise of jurisdiction not vested in the Court In that case the High Court on appeal passed a decree by consent for a partition upon certain terms and remitted the suit to the Subordinate Judge for disposal under the decree The plaintiff failed to appear on the day appointed by the Subordinate Judge to proceed with the matter and the Judge dismissed the suit under O 17 r 2 and O 9 r 8 The plaintiff applied to the High Court for revision The High Court decided that the case came both under clause (a) and clause (c) of this section and set aside the order of the Subordinate Judge and ordered the case to be restored to his file The defendants appealed from this order to the Privy Council on the ground that the High Court had no power to interfere in revision Their Lordships affirmed the decision of the High Court and said Their Lordships do not think it necessary to determine that the case came under para (c) of s 115 But they think that the order which the Subordinate Judge made was one which he *had not jurisdiction* to make The order of the Subordinate Judge was not merely wrong in law it was an order which he had no jurisdiction to make

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(d) *Fut Chong* v *Maung Po Cho* (19 9) 7 Rang 3 9 (9) A R 145

( ) *M* *la* v *S j h* (1888) 11 Mad 0

(f) *... h n bh r ... la der* (189) 16 Bom 08 *Bl j* v *B B & C I Ry* (19 6) 50 Bom 15 94 I C 74 (6) A B 66 See also *J j Moh n* v *I ... Ima Nath* (1893) 0 Cal 8 19 I A 1 4

(g) *Foss* v *I tamb r* (1903) 25 All 09 see the judgment of Blair J on p 5 of the report

(h) *Jug bandhu* v *Jad ...* (1888) 15 Cal 47 *Maharajah of I d n* v *Ap rba* (1911) 1 C W N 8 10 I C 5 7 *Raja* v *R jabala* (19 4) C l 129 8 I C 8 0 (5) A C 8 0

(i) (19 4) 51 I A 3 1 4 Lat 61 81 I C 747 (4) A I C 1 8

Besides the cases mentioned above there are cases in which the action of the lower Court has been held *not* to amount to illegality or material irregularity *e g* failure to give notice where no notice is required to be given under the Code though it might have been given as a matter of equity (*j*) deciding a case without taking into consideration a point of law where such point was never raised before the Court (*k*) omitting to state in the order granting a review that the new matter discovered by the applicant was important (*l*)

What is illegality or material irregularity —*Amir Hassan Khan s* case decides what *is not* an illegality or material irregularity What is it then which *does* constitute an illegality or material irregularity within the meaning of this section ? The Courts have taken *Amir Hasan Khan s case* as the key to the solution of this question but as different Judges have put different interpretations upon the case there are many conflicting decisions as to the meaning of the words of which the following are the leading examples —

1 The words acted in the exercise of its jurisdiction illegally or with material irregularity refer only to an *error of jurisdiction* and apply only to cases of the kind contemplated by cls (a) and (b) of this section (*m*) As against this view it has been said that the words in question did not occur in the Code of 1877 that they were first introduced by the amending Act of 1879 that errors of jurisdiction had already been provided for by the first two clauses of the section and that the words in question must refer therefore to something other than errors of jurisdiction (*n*)

2 The words refer to *errors of procedure* only as distinguished from errors of *law* (*o*) This view proceeds mainly on the word acted In a Calcutta case Jenkins C J said It appears to me that section 115 can only be called in aid when the failure of justice (if any) has been due to one or other of the *faults of procedure* indicated in that section If there was an error committed [by the Small Cause Court Judge] it was an error of *law* and not of *procedure* and in my opinion Mr Justice Fletcher had no power to interfere (*p*) This view is supported by the recent decision of the Privy Council that it is a material irregularity to decide a case in the absence of a necessary party (*q*)

3 The words apply to cases where there is a *wilful disregard or conscious violation* by a judge of a rule of *law* or *procedure* (*r*) As against this view it has been said that it engrafts upon the Privy Council ruling a qualification to the effect that the High Court can interfere under the present section if the erroneous decision is the result of *conscious violation* by the lower Court of a rule of law or procedure and that the distinction is in no way warranted by the language of the section (*s*) To this it is replied that if the section did not apply to cases where a Judge consciously violated a rule of law or procedure a lower Court might with impunity wilfully disregard the decisions of the High Court or even of the Privy Council (*t*)

4 The words apply to cases where the decision complained of is vitiated by a *gross and palpable* error (*u*) According to this view a mistake though of law would if

(*j*) *I n P a n t l* (19 1) 4 Bom 360 59 I C 713 (1) A B 19

(*k*) *H d r P l e r* (19) 46 Bom 56 6 I C 9 ( ) A B 149

(*l*) *S in a v Offi l Ass gn e* (19 7) 50 Mad 891 103 I C 3 7 (7) A M 641

(*m*) *M g i I v J L l* (188) All 336 *L l m I a v D I* (1886) 8 All 111

(*n*) *Kr t m C pa* (1894) 1 M d 410 414 41

(*o*) *K istam a C j* (1 94) 1 M 1 410 414 41

(*p*) *Shew Prosad* v *Pa nch nder* (1914) 41 Cal 3 3 338 _3 I C 977

(*q*) *Umed M l* v *Chand Mal* (19 6) 3 I A 71 99 I C 749 (6) A PC 14_

(*r*) *Sh a v Jom* (1883) Bom 341 3 8 3 9 *Krista ma* v *Chapa* (1894) 17 Mad 410

(*s*) *K ist mm v Ch pa* (1894) 17 Mad 410 4 0

(*t*) *I ss* v *P t mba* (1903) _5 All 509 5 4 per Stanl v C J

(*u*) *M h nt* v *Khet.er M Dass* (1896) 1 Cal W N 617 *Enat Mond l* v *B loram* (1899) 3 Cal W N 581 58 *Venkusa* v *Lakshman* (1888) 1 Bom 61

gross and palpable give jurisdiction to the Court under this se tion But this view runs counter to the Privy Council decision (i)

5 The words acted illegally do not merely imply the committing of an error of procedure such as the expression acted with material irregularity does Those words have relation to gross and palpable errors of Subordinate Courts resul ing in grave injustice (w)

It will not serve any useful purpose to discuss these conflicting views Suffice to say as ob erved by the Judicial Committee in *Balakrishna* v *Vasudeva* (x) that the section applies to jurisdiction alone *the irregular exercise of it* or the illegal assumption of it The section is not directed against conclusions of law or fact *in which the question of jurisdiction is not involved* See note above Jurisdiction

Having noted the different interpretations put upon the words in qu stion we proceed to note some of the decisions reported on the subject

It is an illegality to frame an issue on a point of fact expressly *admitted* by the defendant and to di miss the suit on the ground that the fact is not proved (y) Similar v it is an illegality if a Court passes a decree on an unstamped hundi. The Stamp Act expressly provides that an un tamped hundi *shall* not be acted upon (z) [see Stamp Act II of 1899 s 35] It is an illegality if the appellate Court calls in question the admissibility of a document not duly stamped after the same has been admitted in evi dence in the Court of first instance such a course is manifestly against the provisions of the Stamp Act by which it is enacted that when an instrument has been admitted in evidence such admission *shall* not be called in question at any stage of the same suit (a) [see Stamp Act II of 1899 s 35] It is also an illegality to pass a decree where there is no evidence at all to support it (b) or where the evidence is obviously value less (c) or to decide a case on personal inspection of the subject matter of the suit ignoring the evidence on record (d) It is an illegality to attach in execution of a decree the tools of an artisan contrary to s 60 of the Code (e) or to attach money in a provi dent fund regulated by the Provident Funds Act (f) It is al o an illegality where a Court acts upon a rule invented by itself and not warranted by the law (g)

It is a material irregularity if a decree is passed in a suit in the absence of a party in whose absence it could not possibly be made (h) It is also a material irregularity if a Court taking a mistaken view of the que tion at issue proceeds to determine an issue which does not really arise in the case and bases its decision of the ca e on a determina tion of that issue (i) It is also a material irregularity to treat the delivery of a summons by post to a person who was not shown to be the defendant as good service and to pass a decree ex parte against the defendant on that footing (j) or to attach in execution of a *personal* decree against a defendant property which he holds as *trustee* for another (k) or to make an order against a person without hearing him (l) It is also a material irregularity

( ) *Shew Prosad* v *R m Ch nder* (1913) 41 Cal 3_3 340 23 I C 977
(w) *Jog essa* v *Satish Chand a* (19 4) 51 Cal 690 83 I C 438 (_4) A C 633
(x) (1917) 44 I A 61 267 40 M d 93 799 40 I C 6_0
(y) *Corakh* v *I ith l* (1887) 11 Bom 435
(z) *Chenbasapa* v *Lak hman* (1894) 18 Bom 369
(a) *Shiddapa* v *I aca* (1894) 18 Bom 737
(b) *Shields* v *Wilkinson* (1887) 9 All 398 409
( ) *Bhai ab* v *Kalidhan* (19_3) 33 C W N 569 (29) A C 36
d) *Sak a Bibi* v *Steph ns* (19 6) 4 Rang 2_1 9 I C 10 5, (_6) A R. _05
(e) *B d mi* v *D u* (1886) 8 All 111 115 *Dhan S ngh* v *Basant S ngh* (1886) 8 All 519 5?9 *Sew Bux* v *Shibchunder* (1886) 13 Cal 2_5 231
(f) *Hindley* v *Joynarain* (1919) 46 Cal 96_, 970 973 54 I C 439
(g) *Dip Ch d* v *Sheo Prasad* (19 9) 7 All L J 69 (9) A A 593
(h) *Um d Mal* v *Chand Mal* (19 7) 53 I A 71 5 Mad L J 368 99 I C 749 (6) A I C 14
(i) *Ve k b i* v *Lak hma* (1888) 1 Bom 617 *S pra a l* v *Tricomdas* (1915) 4 Cal 9 6 931 7 I C 917
(j) *Jagan th* v *S oon* (1894) 18 Bom 606 *Ab h m* v *Donald* (1906) 20 Mad 3 4
(k) *Sha d* In the matter of (1901) _8 Cal 574
(l) *Salo Koer* v *G pal S h* (1907) 34 Cal 9 9 933 *Braja Bh s* v *Sris Chand a* (1919) 4 Pat L J ?0 47 I C 719 *Bach bai* v *Ibrahim* (19_3) 47 Bom 11 14 15 69 I C 169 ( ) A B 207 But see *Mulchand* v *Tarni Prasad* (1919) 4 Pat L J 61? 54 I C 222

for a Court to decline to go into evidence when required to do so and to proceed to dispose of the suit upon the pleadings or upon allegations made in a petition (m) or to refuse to draw up its own decree whether it be preliminary or final (n) or to refu e to grant a certificate for a refund of court fees paid on a memorandum of appeal when a case is remanded under O 41 r 23 (o) [Court Fees Act 7 of 1870 s 13] It is also a material irregularity to apply to a case a section of an Act which is not applicable to it (p) or to disregard the provisions of the Evidence Act and to place the burden of proof on a wrong party (q) or to decide a case on a point of fact not raised in the pleadings (r) Where an application is made to set aside a sale under O 21 r 80 and it is followed by another application which does no more than give additional particulars of irregularity in conducting the sale it is material irregularity to refuse to consider the second application (s)

Wrong decision of lower appellate Court as to jurisdiction of trial Court — The question to be considered under this head is whether the High Court has jurisdiction to interfere under this ection where the lower appellate Court erroneously decides in the exercise of its admitted jurisdiction as an appellate Court that the Court of first instance had or had not jurisdiction to entertain a suit Ca es of this kind arise when a Court of first instance returns a plaint on the ground that it has no jurisdiction to entertain the suit and the lower appellate Court *affirms* the order of the Court of first instance or *sets aside* the order Has the High Court jurisdiction in such a case to revise the order of the *lower appellate Court?* It has been held by the High Court of Allahabad (t) that it has not the reason given being that if the lower appellate Court committed an error it did so *in the exercise of its jurisdiction* in entertaining an appeal which it was bound to entertain On the other hand it has been held by a Full Bench of the Madras High Court (u) that the High Court has jurisdiction to interfere in revision with the order of the lower appellate Court the reason given being that the case comes either under cl. (b) or cl (c) of this section In an earlier Calcutta case (v) the High Court took the same view as that taken by the Allahabad High Court but in a later case (w) where the lower appellate Court had confirmed the order of the first Court the High Court entertained an application to revise the order of the lower appellate Court In a Bombay case (x) where the lower appellate Court had confirmed the order of the first Court and the application was for the revision of the orders of both the lower Courts the application was entertained But though the Allahabad High Court holds that the order of the lower appellate Court cannot be revi ed yet it holds that its jurisdiction to revise the order of the Court of first instance is not excluded by the fact that it wa appealable to a subordinate Court It has therefore jurisdiction to et aside that order in revision and the order of the lower appellate Court falls with it (y)

Ex parte decree — A Full Bench of the Allahabad High Court has held that the High Court has power to interfere in revision with an appellate order directing the setting aside of an ex parte decree when the Appellate Court had no power under O 9

(m) *B aj Bhusan* v *Sris Chandra* (1918) 4 Pat L J 20 47 I C 719
(n) *Sidhanath* v *Ganesh* (1913) 37 Bom 60 17 I C 6 7
(o) *Bha sing* v *Chaganiram* (1918) 42 Bom 363 4 I C 55
(p) *Sew Bux* v *Shib Chunder* (1886) 13 Cal. *Jugobundho* v *Jai* (1887) 15 C l 47 *S aprasad* v *Trico idas* (1915) 4 Cal 9 6 931 7 I C 9 7 *Ami a Bibi* v *K M Moideen* (19 5) 3 Rang 11 89 I C 6 0 (5) A R 00
(q) *Rasu* v *Kalla a* (19 4) Rang 0 8 I C 658 (4) A R 349
(r) *Ma ng Pa* v *Abdul G* (19 6) 4 Rang 20 97 I C 10 (6) A R 14
(s) *Ram Sar n* v *Girdha Lal* (19 6) 48 All 36 9 I C 567 (6) A A 30
(t) *Badami Ku* v *Dini Rai* (1886) 8 All 111 [F B] *Jw la Prasad* v *East India Railway* (1918) 16 All L J 53 48 I C 99 *Chandu Lal* v *Kola Mal* (19 1) 43 All 331 61 I C 36 (1) A A 6
(u) *Atchayya* v *Sri Seetha an hand a* (1916) 39 Mad 19 18 I C 55 (F B] *Meenat h* v *Ananthanarayana* (1903) 6 Mad 4 *Kattiya* v *I ma samiya* (19 9) 56 M L J 304 (9) A M 336
(v) *Math ra Nath* v *Ume h Chand a* (1896) 1 Cal W N 6 6
(w) *Zam an Fateh Ali* (190) 3 Cal 146
(x) *Vishtanath* v *Rambhat* (1891) 15 Bom 148 *Nandlal* v *Kisanlal* (1928) 30 Bom L R 1391 11 I C 34 ('28) A B 348
(y) *Bisheshar Prasad* v *Raghubir* (19 6) 48 All 168 90 I C 353 (6) A A 58

r 13 to direct the case to be reheard (z) In one case the Lahore High Court interfered in revision when the lower Court set aside an ex parte decree even though the application to set it aside was barred by limitation (a)

Order refusing review—Where the lower Court refuses to entertain an application for review based on an allegation of fraud the High Court has power to interfere under this section (b) The section however does not apply to an order refusing to grant a review (c) When the lower Court has rightly refused to restore an execution application under O 9 the High Court has no power under this section to direct it to treat the application as one in review (d)

Order granting review—An order granting a review may be set aside in revision (e)

Award—See notes to Schedule II paras 1 5 15 and 16 under the heading Revision

Lunacy—As to the power of the High Court to interfere in lunacy proceedings see the undermentioned case (f)

No revision from discretionary orders—The High Court will not interfere in revision with an order which it is in the discretion of the lower Court to make (g)

Court fee—See note above Interlocutory order

Gross miscarriage of justice—The interference of the High Court under this section in cases where the lower Court has acted illegally or with material irregularity should be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice (h) Hence the judgment of a lower Court should not be set aside upon a mere technicality (i)

Sanction to prosecute—If a Civil or a Revenue Court acting under s 476 of the Criminal Procedure Code grants or refuses an application to prosecute a party to the suit or witnesses before it its order is a *decision* of a *case* within the meaning of the *present section* The High Court therefore has no jurisdiction to interfere under s 439 of the *Criminal Procedure Code* and to call for the proceedings of the lower Court under that section But it has power under s 115 of *this Code* as also under section 15 of the High Courts Act 1861 [now s 107 of the Government of India Act 1915] to call for the proceedings and to pass such order as it may deem expedient In other words the application in such cases lies on the *civil* revisional side of the High Court and not on the *criminal* revisional side But the Bench exercising criminal jurisdiction may deal with the matter if authorized to do so by the Chief Justice under section 14 of the High Courts Act 1861 [now s 108 of the Government of India Act 1915] (j) The rule is

(z) *Ram Sarup v Gaya Prasad* (19 6) 48 All 175 90 I C 180 (5) A A 610

(a) *P roj Shah v Qarib Shah* (19 6) 7 Lah 161 9 I C 124 (6) A L 379

(b) *Khit h Chand a v Nagendra Nath* (19 9) 33 C W N 57 (29) A C 513

(c) *Lakshman v Maruti* (19 4) 26 Bom L R 84 80 I C 67 (4) A B 344

(d) *Safiannessa v Megh Lal* (19 6) 43 Cal L J 83 94 I C 17 (26) A C 735

(e) *Nath Lal v Raghub Si gh* (19 6) 48 All 160 89 I C 946 (6) A A 50

(f) *S oj v Mahe dra* (19 7) 54 Cal 836 103 I C 7 5 (7) A C 636

(g) *Pha ind a v Pramatha Nath* (19 8) 5 Cal 748 106 I C 880 (8) A C 4 1 *Jh ku Lal v Bisheshar Das* (1918) 40 All 61 *Hasan Ali v Lachhman* (19 8) 50 All 143

(h) *Per* Davies J in *Kristamma v Chapa* (1891) 17 Mad 410 at p 4 1 *Ismailj v Marlcod* (1907) 31 Bom 139

(i) *Asharfi Lal v D puty Commissioner of B ra Ba ki* (1895) Cal 729 I A 90 *Ram Gol n v Chintamon* (19 6) 5 Pat 361 93 I C 939 (6) A P 18

(j) *Bhup Ku war in the matter of the petition of* (1904) 6 All 49 57 [F B], *Emperor v Ha Prasad* (1913) 40 Cal 7 7 10 I C 197 [F B] *Emperor v Kashi* (1918) 3 All 695 36 I C 836 But see *Uttu pura v Emperor* (1910) 33 Mad 48 3 I C 934 [F B] *Abd l H q v Sheo Ram* (19 7) 49 All 536 100 I C 376 (7) A A 334 *Bism ll h v Shak Ali* (19 9) 4 Luck 1 (9) A O 494

the same where action has been taken by a Subordinate Civil Court under s 19ɔ of the Criminal Procedure Code (k) See also the undermentioned cases (l)

Appeal —By cl. 15 of the Letters Patent as amended in March 1919 it is provided that no appeal lies from an order made in the exercise of revisional jurisdiction. Prior to the amendment there was a conflict of decisions as to whether an appeal lay to the High Court under cl 15 of the Letters Patent from the judgment of a single Judge delivered in the exercise of revisional jurisdiction under this section. The matter stood thus it was enacted by cl 15 of the Letters Patent as it stood before the amendment that an appeal shall lie to the High Court from the judgment of one Judge of the High Court or one Judge of any Division Court *pursuant* to *s 13 of the Charter Act* Now s 13 of the Charter Act provides for the exercise by the Judges of the High Court of the *original* and *appellate* jurisdiction vested in the High Court This gave rise to the question whether the division of jurisdiction into (1) original and (2) appellate was exhaustive or not If the division was exhaustive revisional jurisdiction must be treated as comprised in appellate jurisdiction so that an appeal would lie under cl. 15 from the judgment of a single Judge exercising revisional jurisdiction If the division was not exhaustive so that revisional jurisdiction was something outside the original and appellate jurisdiction the case would not fall within s 13 of the Charter Act and no appeal could therefore lie under cl. 15 of the Letters Patent It was held by the High Courts of Madras (m) and Calcutta (n) that the division of the juris diction of High Courts into original and appellate was exhaustive and that revisional jurisdiction was included in appellate jurisdiction and that an appeal therefore lay under cl 15 of the Letters Patent from an order of a single Judge made under the present section, provided such order amounted to a judgment within the meaning of that clause. The contrary was held by the High Court of Bombay (o) it does not however appear that there was any judgment in the Bombay case (p)

Laches —An application for revision will not be entertained unless it is made without unreasonable delay (q)

(k) *Salig Ram* v *Ramji Lal* (1906) 8 All 5 4 *Chennanagoud in re* (190) 26 Mad 139

(l) *Ram Prasad Mala in re* (1910) 37 Cal 13 4 I C 6 *Beni Prasad* v *Sarju Prasad* (1911) 33 All 51 9 I C 98 *Budhu Lal* v *Chattu* (1916) 43 Cal 597 36 I C 472 s c in appeal (1917) 44 Cal 804 39 I C [order made by a judge of the Presidency Small Cause Court] *Paramaswami* v *Alamel* (1919) 4 Mad 6 49 I C 11 [Madras Estates Land Act] *Emperor* v *Chote Lal* (1917) 9 All 367 39 I C 848 [non specification of statements on which charge is brought]

(m) *Chappan* v *Moidin* (1899) 2 Mad 68 *Tuljaram* v *Alagappa* (191) 35 Mad 1 8 I C 340 *Srinivasa* v *Ramaswami* (1916) 39 Mad 35 3 I C 846

(n) *Shib Prosad* v *Ram Chunder* (1914) 41 Cal 3 3 3 I C 977 *Debendranath* v *Bibudhendra* (1916) 43 Cal. 90 33 I C 745

(o) *Hiralal* v *Bai Asi* (1898) Bom 891 See also *Nisar Ali* v *Ali Ali* (1906) 8 All 133

(p) See (1914) 41 Cal 3 3 33 3 I C 977 *supra*

(q) *Durga Prasad* v *Sheo Charan* (188) 4 All 154 *Balmakund* v *Sheo Jatan* (1884) 6 All 1

PART IX

Special Provisions relating to the Chartered High Courts

116 [S 631] This Part applies only to High Courts which are or may hereafter be established under the Indian High Courts Act, 1861, or the Government of India Act, 1915

Part to apply only to certain High Courts

The words and figures or the Government of India Act 1915 were inserted in the section by the Amending Act 13 of 1916

117 [S 632] Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts

Application of Code to High Courts

Save as provided in this Part —See s 120

Save as provided in Part X —See s 129

Rules — Rules means rules contained in the First Schedule or made under s 122 or s 125 see s 2 (18) see also O 49 r 3

118 [S 634] Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs,

Execution of decree before ascertainment of costs

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation

119 [S 635] Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys

Unauthorised persons not to address Court

See Letters Patent cls. 9 and 10

Provisions not applicable to High Courts in original civil or insolvent jurisdiction

120 [Ss 638, 639] The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20

As to *Rules* not applicable to Chartered High Courts see O 49 r 3

Sub-section (2) of this section by which it was provided that nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an insolvent Court has been repealed by the Presidency Towns Insolvency Act III of 1909 s 127

PART X

Rules

121 [*New*] The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part

Effect of rules in First Schedule

The whole of this Part is new except ss 129 130 and 131 which correspond to s 652 paras 2 3 and 4 of the Code of 1882

As to annulment and alterations of rules see s 124

122 [*New* *Cf* s 652, first para] High Courts established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the Chief Court of Oudh, may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule

Power of certain High Courts to make rules

The words and figures or the Government of India Act 1915 were inserted in the section by the Amending Act 13 of 1916 The words and the Chief Court of Oudh were added by the Oudh Courts Act 4 of 1925

Rules made under this section by the High Courts are set out in Appendices at the end of this work.

Sections 122 to 128 excepting s 125 provide for rules to be made by Chartered High Courts for regulating their own procedure and the procedure of the Civil Courts subject to their superintendence that is Courts subject to their appellate jurisdiction see High Courts Act 1861 s 15 and the Government of India Act 1915 s 107 These rules must not be inconsistent with the provisions in the body of the Code (see s 128) Further they are subject to the previous approval of the authorities mentioned in s 126 Sec 129 provides for rules to be made by Chartered High Courts as to their *original* civil procedure These rules may be inconsistent with the provisions in the body of the Code but they must not be inconsistent with the Letters Patent establishing those Courts

Rules and limitation —None of the Courts empowered under this section to frame rules has power by any rule which it may make to alter the period of limitation prescribed by the Indian Limitation Act (r)

An appellant is entitled as of right under sec 12 of the Indian Limitation Act 1908 to exclude the time requisite for obtaining copies of the decree or order appealed from and of the judgment on which such decree may be or is founded This right is not affected by any rules made by any High Court that such copies need not accompany the memorandum of appeal (s)

( ) \ n gh v Sh Prasad (1918) 40 All 1 7 4_ I C 855 [F.B].

( ) Jit bloy v Chetty r (10_8) 55 I A 161 6 I g 30" 100 I C 1 (_8) A P C 103

123 [*New*] (1) A Committee, to be called the Rule Committee, shall be constituted at the town which is the usual place of sitting of each of the High Courts and the Chief Court referred to in section 122

Constitution of Rule Committees in certain Provinces

(2) Each such Committee shall consist of the following persons, namely —

(a) three judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or a Divisional Judge for three years,

(b) a barrister practising in that Court,

(c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court, and

(e) in the towns of Calcutta, Madras and Bombay, an attorney

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge who shall also nominate one of their number to be president

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf, and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor General in Council or by the Local Government, as the case may be

The words "the town which is the usual place of sitting of each of the High Courts referred to in section 122" in sub sec (1) were substituted for the words "each of the towns of Calcutta Madras Bombay Allahabad, Lahore and Rangoon" by the Amending Act 13 of 1916 The words "and the Chief Court" after the words "High Courts" were added by the Oudh Courts Act 4 of 1925

124 [*New*] Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration

Committee to report to High Court

The provisions as to Rule Committees apply to rules to be made under s 122 Rules under that section can only be made after the Chartered High Courts have taken the opinion of the Rule Committee attached to them

125 [*New*] High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such condition as, in the case of the Court of the Judicial Commissioner of Coorg, the Governor General in Council, and, in other cases, the Local Government, may determine

Power of other High Courts to make rules

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court

Rules under this section should not be inconsistent with the provisions in the body of this Code See s 128 and contrast s. 129 As to sanction see s 126

126 [*New*] Rules made under the foregoing provisions shall be subject to the previous approval of the following authorities, namely —

Rules subject to sanction

(a) if the rule is made by a High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, to the approval of the authority prescribed by the proviso to section 107 of the latter Act for rules made under that section,

(b) if the rule is made by any other High Court, to the approval of the Local Government

The word "approval" in the section was substituted for the word "sanction" by the Amending Act 13 of 1916

The words and figures "or the Government of India Act 1915" were inserted in the section by the Amending Act 13 of 1916 The words and figures "the proviso to

section 107 of the latter Act were substituted for the words and figures section 15 of that Act also by that Act

Approval —This section requires in the case of rules to be made by Chartered High Courts the same sanction as is required by s 107 of the Government of India Act 1915 the object being that the rule making power should correspond with the power conferred under section 107 of that Act That section empowers the Chartered High Courts to make and issue general rules for regulating the practice and proceedings of Courts subject to their appellate jurisdiction subject to the previous approval in the case of the High Court of Calcutta of the Governor General in Council and in other cases of the local Government

127 [*New*] Rules so made and approved shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule

Publication of rules

The word approved was substituted for the word sanctioned by the Repealing and Amending Act 24 of 1917 sch I

128 [*New*] (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matter relating to the procedure of Civil Courts

Matters for which rules may provide

(2) In particular, and without prejudice to the generality of the powers conferred by sub section (1), such rules may provide for all or any of the following matters, namely —

(a) the service of summonses, notices and other process by post or in any other manner either generally or in any specified areas, and the proof of such service,

(b) the maintenance and custody, while under attachment, of live stock and other movable property, the fees payable for such maintenance and custody the sale of such live stock and property and the proceeds of such sale,

(c) procedure in suits by way of counter claim, and the valuation of such suits for the purposes of jurisdiction,

(d) procedure in garnishee and charging orders either in addition to, or in substitution for the attachment and sale of debts,

(e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not (*t*),

(f) summary procedure—

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—

on a contract, express or implied, or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only, or

on a trust or

(ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non payment of rent, or against persons claiming under such tenant,

(g) procedure by way of originating summons,

(h) consolidation of suits, appeals and other proceedings,

(i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi judicial and non judicial duties, and

(j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts

Power of Chartered High Courts to make rules as to their original civil procedure

129 [S 52, **third para**] Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, may make such rules not inconsistent with the Letters

(*t*) See *Balm Fund v Busendoyal* (1919) 46 Cal 48 60 I C 51

Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code

The words and figures or the Government of India Act 1915 were inserted in the section by the Amending Act 13 of 1916

Rules as to original civil procedure of Chartered High Courts —Rules made under s 122 must not be inconsistent with the provisions in the body of this Code Under this section any Chartered High Court may make rules to regulate its own procedure in the exercise of its original civil jurisdiction Such rules may not be consistent with the provisions in the body of the Code but they must not be inconsistent with the Letters Patent establishing it The Letters Patent here referred to are the Letters Patent of 1865 those being the Letters Patent in force when the present Code was enacted, and not the Letters Patent of 1862 (u)

Power of other High Courts to make rule as to matters other than procedure

130 [S 652 second para] A High Court not established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, may, with the previous approval of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 or section 107 respectively of those Acts make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency town

The words and figures or the Government of India Act 1915 were inserted in the section by the Amending Act 13 of 1916 The words or section 107 respectively of those Acts were substituted for the words of that Act also by that Act

The word approval was substituted for the word sanction by the Repealing and Amending Act 24 of 1917 sch I

Publication of rules

131 [S 652, fourth para] Rules made in accordance with section 129 or section 130 shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the force of law

Date of publication —The rules referred to in this section have the force of law from the date of publication (v)

(u) *Udoy Chand v Khetsidas* (19 4) 51 Cal 905 906 911 81 I C 1048 (4) A C 10 5 | (v) *B j nath v Dulari* (19 8) 50 All 66 110 I C 19 (28) A A 08

PART XI

Miscellaneous

132 [S 640] (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court

Exemption of certain women from personal appearance

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code

Appearance in Court —This section provides for exemption of purdanashin ladies from personal appearance in Court but not from attendance in Court The word appearance means that a purdanashin lady shall not be compelled to come forth into view or to become visible to the public gaze The Court therefore has power to order a purdanashin lady to give evidence in Court provided she is not compelled to come forth into view or to become visible to the public gaze (w) See notes to O 26 r 1 Persons exempted from attending Court

133 [S 641] (1) The Local Government may, by notification in the local official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption

Exemption of other persons

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs

See O 26 r 1

(w) *Ia Bilarroy* (19 9) 56 Cal 86 ('29) A C 523

134 [*New*] The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code

Arrest other than in execution of decree

This section is new It supplies an omission

135 [S 642] (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court

Exemption from arrest under civil process

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents, and recognized agents, and their witnesses, acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal

(3) Nothing in sub section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment debtor attends to show cause why he should not be committed to prison in execution of a decree

Alterations in the section —

1 The words other than process issued by such tribunal for contempt of Court in sub s (2) have been added to give effect to a Calcutta decision (*x*)

2 Sub section (3) is new It has been substituted for the words except as provided in section 337A sub section (5) and sections 556 and 643 which occurred at the commencement of sub section (2) in the Code of 1882

Grounds of exemption from arrest —The exemption here conferred is not for the personal benefit of the individual but for the furthering of public interests and the better administration of justice In other words the exemption is not the privilege of the person attending the Court but that of the Court which he attends If therefore a witness does not believe *bona fide* that his attendance was required there is no privilege (*y*) For the same reason where a writ of attachment for *contempt* of Court has been issued against a party to a suit he cannot claim privilege from arrest while proceeding to Court for the purpose of attending the hearing of the suit ( )

While going to or attending and while returning from Court —A party to a suit is exempt from arrest under this section while going to or attending the Court before which the suit is pending and while returning from such Court The following are the leading cases bearing on this part of the section —

(1) Where a plaintiff who was a native of Patna and who had instituted a suit in the High Court of Madras left Patna on receiving a letter from his solicitors that

(*x*) *John v Carter* (1880) 4 B L R O C 90

(*y*) *Wooma Churn v T d* (1875) 14 B L R App 13 *Samaapuri v I rry & Co* (1890) 13 Mad 150 158 *Omritolall in the matter of* (1876) 1 Cal 8 91

(*z*) *John v Carter* (1880) 4 B L R O C 90

his presence was required and arrived at Madras on 24th October and the suit having come on for hearing on the 27th of October was adjourned till the 25th of December and he was arrested in execution of a decree against him on the 10th of November it was held by the High Court of Madras that he was privileged from arrest (*a*) This decision was disapproved by the Allahabad High Court (*b*) in the case cited in ill (2) below but it is in accordance with the decision of the House of Lords in the under mentioned case (*c*)

(2) *A* residing in Bombay goes to Benares to prosecute an application to set aside an ex parte decree passed against him by the Benares Court and puts up at a Dak bungalow in Benares On the date fixed for the hearing of the application *A* attends the Court when his application is heard and dismissed He then leaves the Court returns to the Dak bungalow and thence proceeds to the railway station where he is arrested in execution of the decree while actually seated in the train It is found on evidence that *A* had taken a ticket for Allahabad when arrested On the above facts the High Court of Allahabad held that *A* s arrest was legal The Court said In the present case [*A*] had left the Court and had returned to the place where [he] was staying in Benares he had then left that place and [was] actually on his way to Allahabad which is not his home In these circumstances we cannot hold that he at the time of arrest was *returning* from a tribunal within the meaning of section 135 (*d*)

(3) The exemption from arrest continues during such period as is reasonably occupied in going to attending at and returning from the place of trial (*e*) But if there is a deviation the privilege is forfeited It is not a deviation sufficient to forfeit the privilege if the shortest road home is deviated from and a less crowded and more convenient road adopted (*f*)

(4) A debtor who is released from jail under an order of the Court on the ground that the order under which he was committed was illegal *may* be arrested under civil process immediately after he is released He is not privileged from arrest as *returning from Court* It does not follow because imprisonment followed on an order which was illegal that he should be treated when released from jail as returning from Court (*g*)

(5) *A* is arrested in execution of a decree obtained against him by *B* and is brought before the Court While he is in the custody of the Court s officers he is arrested in execution of a decree obtained against him by *C* *A* is not exempt from arrest in execution of *C* s decree It cannot be said that *A* while he was under arrest in execution of *B* s decree was voluntarily in Court in connection with the execution of *B* s decree (*h*)

Parties —A defendant in a summary suit under O 37 [Code of 1882 chapter 39] is privileged from arrest though he has not obtained leave to defend the suit (*i*)

Civil process —This section applies only to witnesses and parties arrested under writs issued by Courts to which the Code applies It does not apply where a party *is arrested under a writ issued from a Small Cause Court As there is no provision* in the Small Cause Court Act corresponding to this section questions as to exemption from arrest in the case of persons arrested under writs issued from Small Cause Courts must be governed by the principles of the English law on the subject There are very much the same as those set forth in the present section (*j*)

(*a*) *Siva Bux in the matter of* (188) 4 Mad 317
(*b*) *Ardeshirji v Kalyandas* (1910) 33 All 3 6 3 I C 46
(*c*) *Persse v Persse* (1856) 5 H L C 671 Halsbury, Vol 25 p 818
(*d*) *Ardeshirji v Kalyandas* (1910) 32 All 3 3 I C 46
(*e*) *Appasamy v Govinen* (1868) 4 Mad H C 145
(*f*) *Soorendro Nath in the matter of* (1880) 5 C 1 106 *Emperor v Bihari* (1924) 46 All 663 84 I C 64 (24) A A 6 6
(*g*) *Samarapuri v Parry & Co* (1890) 13 Mad 150
(*h*) *Govindasamy v The Union Bank Ltd* (1924) 47 Mad L J 6 8 84 I C 513 (24) A M 900
(*i*) *Soorendro Nath in the matter of* (1880) 5 Cal. 106
(*j*) *Soorendra Nath in the matter of* (1880) 5 Cal. 106

Appeal —Where a judgment debtor arrested in execution of a decree claims exemption from arrest under this section but the exemption is not allowed the order is one under s 47 and is appealable (*k*)

Exemption of members of legislative bodies from arrest and detention under civil process

135A (1) No person shall be liable to arrest or detention in prison under civil process—

(a) If he is a member of either Chamber of the Indian Legislature or of a Legislative Council constituted under the Government of India Act during the continuance of any meeting of such Chamber or Council,

(b) If he is a member of any committee of such Chamber or Council, during the continuance of any meeting of such committee,

(c) If he is a member of either Chamber of the Indian Legislature, during the continuance of a joint sitting of the Chambers, or of a meeting of a conference or joint committee of the Chambers of which he is a member,

and during the fourteen days before and after such meeting or sitting

(2) A person released from detention under sub section (1) shall, subject to the provisions of the said sub section, be liable to re arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub section (1)

This section was added by s 3 of Act 23 of 1925

Procedure where person to be arrested or property to be attached is outside district

136 [S 648] (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order together with the probable amount of the costs of the arrest or attachment

(*k*) (19 4) 47 Mad L J 678 84 I C 513 (4) A M 900 *supra*.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him

(4) Where a person to be arrested or movable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, or of the Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court

Arrest and attachment otherwise than in execution of decree—This section prescribes the procedure to be followed where a person is to be arrested or where property is to be attached otherwise than in execution of a decree

Order of arrest for contempt of Court—It has been held in Calcutta that a Judge of the Calcutta High Court sitting on its original side has no power to direct a mofussil Court to execute a warrant of arrest for contempt of Court But if he grants an injunction and the order is disobeyed he may direct the arrest and detention of the offender under O 39 r 2 in which case the present section will apply (*l*)

The Madras High Court has held that when an injunction issued by a Division Bench of the High Court on the Appellate Side is disobeyed by a party residing in the mofussil the Bench has the power to send to the appropriate mofussil Court the warrant of arrest for execution whether this section applies in terms or not and the mofussil Court on receipt of the warrant must proceed as provided in this section (*m*) In the Madras case the Court treated the disobedience of the injunction as contempt of Court It is difficult to understand why when *an injunction had actually been granted the Court did not* proceed under O 39 r 2 in which case there could have been no doubt as to the applicability of the present section to the case

(*l*) *Salamchand* v *Joogul Kissore* (19–3) 55 Cal 7 10 I C 65 (–3) A C 16–

(*m*) *Adaikala* v *Imperial Bank* (19 0) 50 Mad L J 401 ? I C 196 (–0) A M 574

Language of subordinate Courts

137 [S 645] (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the Local Government otherwise directs

(2) The Local Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Court shall be written

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court such writing may be in English, but if any party or his pleader is unacquainted with English, a translation into the language of the Court shall, at his request, be supplied to him, and the Court shall make such order as it thinks fit in respect of the payments of the costs of such translation

Sub section (3) is new

Power for Local Government to require evidence to be recorded in English

138 [S 185A] (1) The Local Government may, by notification in the local official Gazette direct with respect to any Judge specified in the notification or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed

(2) Where a judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court

Oath on affidavit by whom to be administered

139 [S 197] In the case of any affidavit under this Code—

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf or

(c) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath to the deponent

The words or other person in cl (b) are new

140 [S 645A] (1) In any Admiralty or Vice Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall, upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors, and such assessors shall attend and assist accordingly

Assessors in causes of salvage etc

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed

141 [S 647] The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction

Miscellaneous proceedings

This section does not apply to proceedings in execution —S 647 of the Code of 1882 as it stood when that Code was first enacted ran as follows —

The procedure herein prescribed shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction *other than suits and appeals*

The question arose under that section whether the words proceedings other than suits and appeals included proceedings in execution in other words whether that section had the effect of rendering the provisions of the Code relating to suits applicable to proceedings in execution of a decree On the one hand by the High Courts of Allahabad (n) and Bombay (o) held that that section applied to applications for execution of decrees so that the procedure relating to suits was applicable to applications for execution On the other hand the High Court of Calcutta held that that section did not apply to proceedings in execution (p) In this state of authorities the Legislature intervened and an Explanation was added into the section by the Civil Procedure Code Amendment Act 6 of 1892 which ran as follows —

Explanation —This section does not apply to applications for the execution of decrees which are proceedings in suits

The effect of the above Explanation was to supersede the Allahabad and Bombay rulings above referred to and to give legislative sanction to the Calcutta decision

In the meantime one of the Allahabad cases referred to above namely the case of *Fakir ullah* v *Thakur Prasad* (q) was taken up to the Privy Council and that tribunal held in the year 1894 that independently of the Explanation s 647 did not apply to applications for execution but only to original matters in the nature of suits such as proceedings in probates guardianships and so forth thus overruling the Allahabad and Bombay cases (r) This decision if it had come three years earlier would have rendered the Explanation unnecessary The Privy Council decision and the recognition of the rule that sec 647 does not apply to execution proceedings render the

(n) *Kifayat Ali* v *Ram Singh* (188) 7 All 359 *Sarju Prasad* v *Sita Ram* (1888) 10 All 71 *Fakir-ullah* v *Thakur Prasad* (1890) 1 All 179 *Radha Charan* v *Man Singh* (1890) 1 All 39?

(o) *Parjade* v *Parjade* (188) 6 Bom 681

(p) *Bunko Behary* v *Nil Madhub* (1891) 18 Cal 635

(q) (1890) 1 All 179

(r) *Thakur Prasad* v *Fakir ullah* (1895) 17 All 106 1 A 44

explanation unnecessary, and it has accordingly been omitted in the present section (s) At the same time two alterations have been made in the section namely (1) the words in regard to suits have been added and (2) the words other than suits and appeals have been omitted In so doing the Legislature has now done what it could have done as well in 1892

The reason why the words other than suits and appeals which occurred at the end of s 647 have been omitted in the present section is this S 647 applied to proceedings other than suits and appeals The High Court of Allahabad held that applications for the execution of decrees were proceedings other than suits and appeals and that s 647 applied therefore to such applications (t) On the other hand the High Court of Calcutta held that applications for the execution of decrees were not proceedings other than suits and appeals *they being proceedings in suits* and that s 647 did not therefore apply to such applications (u) The Legislature adopted the view of the Calcutta High Court and enacted by way of Explanation to the section that the section does not apply to applications for the execution of decrees *which are proceedings in suits* It would have been a shorter cut if the Legislature had amended s 647 by deleting the words other than suits and appeals as those were the words that gave rise to the conflict instead of adding into the section an Explanation which certainly was not happily worded What the Legislature omitted to do in 1892 it did in 1908

This section we have said does not apply to proceedings in execution (r) Hence the procedure provided in the Code in regard to *suits* does not apply to *applications for execution of decrees* The following are the leading decisions on the subject —

1 The provisions of s 11 relating to *res judicata* in regard to suits do not apply to applications for the execution of decrees But though these provisions do not in terms apply to applications for execution they are governed by principles analogous to those of *res judicata* See note to s 11 Orders in execution proceedings on p 77 above

2 The provisions of O 2 r 2 [Code of 1882 s 43] do not apply to applications for execution Hence where a decree awards two distinct reliefs an application to enforce one relief is no bar to a *subsequent application* to enforce the other relief though both reliefs are awarded by the same decree (w)

3 The provisions of O 9 [Code of 1882 ss 96 to 109] do not apply to applications for execution Hence if the applicant fails to *appear* at the hearing of the application the Court cannot dismiss the application under O 9 r 8 [Code of 1882 s 102] though it may do so under its inherent power (x) And where in the exercise of this power an application for execution is dismissed the Court has no power to *restore* it to the file under O 9 r 9 [Code of 1882 s 103] (y) as that rule does not apply to execution proceedings But though the Court has no power to *restore* to the file an application which has once been dismissed for default such dismissal is no bar to a *fresh* application for execution (z) See notes to O 9 r 9 and O 9 r 13 Execution proceedings

(s) *Hari Charan* v *Ma matha* (1914) 41 Cal 1 45 19 I C 683 *Balasubramania* v *Swarnammal* (1915) 38 Mad 199 21 I C 3

(t) *Radha Charan* v *Man Singh* (1890) 1 All. 39 at p 39

(u) *Bunko Behary* v *Nil Madhub* (1891) 18 Cal. 63 p 638

(v) *Hari Charan* v *M atha* (1914) 41 Cal 1 45 19 I C 653 *Balasubrama a* v *Swarn mmal* (1915) 38 Mad 19 1 I C 3 *B bus* v *Alakhdeo* (1918) 4 Pat L J 330 47 I C 154 *Bholu* v *Ram Lal* (19 1) 2 Lab 66 60 I C 0 (1) A L 67 *Bharat* v *Asghar* (19 3) 45 All 143 73 I C 453 (3) A A 460 *Na end a* v *R khaldas* (19 5) 41 Cal. L J 96 9 I C 3 1 ( ) A C 510 *Basa t lla* v *Re udd n* (19 6) 53 Cal. 679 96 I C 0 (6) A C 7 3

(w) *Radha* v *Radha* (1891) 18 Cal. 515 *Sadho* v *Hawat* (189) 19 All. 93

(x) *Dho kal* v *Phakka* (1894) 15 All 84

(y) *Haj at* v *Fal ul ussa* (1894) 18 Bom 4 9 *S at Kri h a* v *Bisweswar* (19) 54 Cal 405 103 I C 69 (2) A C 534

(z) *Th kur Pr d* v *Fakirullah* (1895) 17 All. 106 11 I A 44 *Bharat* v *Asghar* (19 3) 45 All 143 3 I C 455 (3) A A 460

4 The provisions of O 17 rr 2 3 [Code of 1882 ss 157 158] do not apply to applications for execution Hence an order dismissing an application for *default* is no bar to a fresh application for execution (*a*)

5 The provisions of O 23 r 1 [Code of 1882 s 373] do not apply to applications for execution Hence the *withdrawal* of an application though it be without the leave of the Court is no bar to a fresh application for execution (*b*) See now O 23 r 4

6 See note to s 144 Whether a proceeding under this section is a proceeding in execution

7 See O 22 r 12

Other cases under this section are considered in their proper place

Proceedings in any Court of civil jurisdiction —The proceedings spoken of in this section refer to *original* matters in the nature of suits such as proceedings in probate guardianship and so forth and do not include execution (*c*) An application under s 18 of the Religious Endowments Act 1863 is a proceeding of this nature Hence it must be verified as required by O 6 r 15 of the Code (*d*) But an application for settlement of rents made to a *Revenue Officer* under s 105 of the Bengal Tenancy Act 8 of 1885 is not a proceeding in a Court of civil jurisdiction Hence the petition need not be signed as required by O 6 r 14 (*e*) A petition by a company to the High Court under the Indian Companies Memorandum of Association Act 1895 for the confirmation of a special resolution altering the Memorandum of Association of the Company is a proceeding within the meaning of this section Therefore where the petition was dismissed and the Company applied for leave to appear to the Privy Council the case was dealt with by the Court under s 595 of the Code of 1882 [now s 109] (*f*) Similarly an application to set aside an ex parte payment order made under the Indian Companies Act 6 of 1882 is a proceeding in a Court of civil jurisdiction Hence the provisions of O 9 r 13 apply to the case (*g*) An application under s 12 of the Guardians and Wards Act 1890 is a proceeding in a Court of civil jurisdiction Hence a receiver may be appointed in such a proceeding under O 40 r 1 (*h*) But an application for a succession certificate under the Succession Certificate Act 1889 is not such a proceeding Hence a receiver cannot be appointed under O 40 in such a proceeding (*i*) An application for the appointment of a Common Manager under s 93 of the Bengal Tenancy Act 8 of 1885 is a proceeding of the kind contemplated by this section a receiver therefore may be appointed under O 40 r 1 pending the application (*j*) Disciplinary proceedings taken under s 14 of the Legal Practitioners Act 18 of 1879 are not proceedings in any Court of civil jurisdiction within the meaning of this section therefore the procedure provided by s 24 of the Code does not apply to those proceedings (*k*) An application under para 17 of Schedule II to file an agreement to refer to arbitration comes within this section hence where an application is made under that para the applicant may join several causes of action in the application as provided by O 2 r 3 below (*l*) An inquiry before a Commissioner appointed by a Court to ascertain the amount of mesne profits payable by one party to another is a proceeding within the meaning of this section Hence the provisions of O 18 r 1

(*a*) *Tirthasami* v *Annappayya* (1895) 18 Mad 131

(*b*) *Thakur Prasad* v *Fakirullah* (1895) 17 All 106 22 I.A 44 *Bu ko Behary* v *Nil Mahdh b* (1891) 18 Cal. 635

(*c*) *Thakur I asad* v *Fakirullah* (189) 1 All 106 111 22 I A 44

(*d*) *Amdoo Miyan* v *Muhammad* (1901) 24 Mad 685 689

(*e*) *Hazari L l* v *Ambica* (1924) 3 Pat. 6 79 I C 6 (24) A.P 104

(*f*) *Bombay Burmah Trad g Corporation* v *D alji* (1903) 27 Bom 415 418

(*g*) *Hindusta L k* v *Meh aj* (19 0) 1 Lah 187 55 I C 8 0

(*h*) *Bai Jamn bai* in re (191) 36 Bom 0 11 I C 554 *Chandrawati* v *Jagan Nath* (19 5) 7 Lah L.J 281 90 I C 611 (25) A L. 489

(*i*) *Kanhaiy* v *Kanha ya* (19 4) 46 All 3 9 I C 363 (24) A A 376

(*j*) *As dal* v *Mahomed* (1916) 43 Cal. 986 36 I C 17 But O 40 r 1 is no confined to suits

(*k*) *I the matter of Janak Kishore* (1916) 1 Pat. L. J 576 3 I C 484

(*l*) *Dreyfus & Co* v *Gurdita Mal* (1911) Punj Rec. No 35 p 1 3 9 I C 655

apply to the proceeding (m) See also notes to O 9 r 9 Dismissal for default of application to restore suit 1

The procedure provided in this Code —This section extends the procedure provided in this Code in regard to suits to proceedings in Civil Courts It does not confer any substantive right not expressly given elsewhere by the Code *e g* a right of appeal (n) Hence no appeal lies from an order passed on a proceeding of the kind contemplated by this section unless the order comes within the purview of O 43 (o) Nor does an appeal lie from an order returning a memorandum of appeal to the proper Court (p) Further the section does not confer upon any Court entertaining such proceedings a *power* not expressly given elsewhere by the Code *e g* the power to refer questions to the High Court [s 113] (q)

142 [S 94] All orders and notices served on or given to any person under the provisions of this Code shall be in writing

Orders and notices to be in writing

143 [S 95] Postage where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made

Postage

Provided that the Local Government may remit such postage, or fee or both, or may prescribe a scale of court fees to be levied in lieu thereof

144 [S 583] (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and, for this purpose the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal

Application for restitution

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub section (1)

(m) *Ramakka* v *Neg m* (19 4) 4 Mad 800 9_ I C 133 (5) A M 145

( ) *P a urama* v *Se h e* (1904) 7 Mad 504 *Damod ra* v *Kuttappa* (1913) 36 Mad 16 10 I C 879

(o) *Cha dar* v *Du g* (19 4) 46 All 538 9 I C 3 3 (4) A A 68 *Hara* v *Mur n* (19) 6 Cal L J 184 69 I C 1003 ( ) A C 5 *H b bar* v *Said ne sa* (19 3) 38 Cal L J 3 8 7 I C 907 (4) A C 3 *Cha dra* v *Jag Nath* (19) Lah L J 81 90 I C 611 ( ) A L 48)

(p) *Ca addy* v *So oj Kumar* (19 8) S C W N 6J3

(q) *D moda a* *Kutt ppa* (1913) 6 Mad 16 10 I C 819

The old section—S 583 of the Code of 1882 ran as follows —

When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same he shall apply to the Court which passed the decree against which the appeal was preferred and such Court shall proceed to execute the decree passed in appeal according to the rules hereinbefore prescribed for the execution of decrees in suits

The new section—Sub sec (1) of the present section is s 583 so recast as to give legislative recognition to the practice founded on that section

Sub sec (2) is new See notes below Sub section (2) bar of suit and Where a decree is varied or reversed

Restitution—The word restitution in this section means restoring to a party on the variation or reversal of a decree what has been lost to him in execution of the decree or directly in consequence of that decree The section does not apply unless the property was lost in execution of the decree or directly in consequence of that decree (r) The restitution moreover must be properly consequential on the variation or reversal of the decree (s) The granting of restitution however is *not discretionary* The principle of the doctrine of restitution is that on the reversal of a decree in appeal the law raises an obligation in the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost (t) The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree and the Court in making restitution *is bound* to restore the parties so far as they can be restored to the same position they were in at the time when the Court by its erroneous action had displaced them from it (u)

The doctrine of restitution contemplates the case where property has been received by a decree holder in execution of a decree and the decree or part thereof is subsequently varied or reversed on appeal by the judgment debtor In such a case the procedure to be adopted by the judgment debtor is to apply under this section to the Court of first instance for restitution of the property and for consequential relief On such application being made the Court *shall* cause restitution to be made to the judgment debtor (the successful appellant) The restitution to be made must be such as will so far as may be place the parties in the position which they would have occupied but for the decree appealed from or such part thereof as has been varied or reversed (v) This principle applies with equal force whether restitution has or has not been directed in the appellate decree (w) For the purpose of making such restitution as aforesaid the Court may make any orders including orders for the refund of costs (x) and for the payment of interest (y) damages (z) compensation and mesne profits (a) which are

(r) *Baikuntha Nath* v *Prosannamoyi* (1924) 51 Cal 3 4, 81 I C. 571 (24) A C 769 *Nadar Mal* v *Ratan Lal* (1927) 8 Lah 356 104 I C 817 (27) A L. 625

(s) *Jagachand* v *Champi* (1924) 46 All. 767 84 I C. 75 (24) A A 713

(t) *Dorasami* v *Annasami* (1900) 23 Mad 306 311

(u) *Hurro Chunder* v *Shoorodhonee* (1868) 9 W R 402

(v) (1868) 9 W R 402 *supra*

(w) *Balvantrav* v *Sadrud n* (1889) 13 Bom 485 *Raja Singh* v *Kooldip* (1894) 21 Cal 989, *Bhagwan* v *Ummat ul Hasnain* (1896) 18 All 6? 263 *Munshi Dinesh Proshad* v *Shanker* (1904) 9 Cal W N 391 *Parbhu Dayal* v *Ali Ahmad* (1910) 32 All 9 4 I C 3 6

(x) *Watkins* v *Mahomed* (189) 1 Cal. W.N. cxcvii.

(y) *Rodger* v *Comptoir d'Escompte de Paris* (1871) L. R 3 P C 465 *Forester* v *Secretary of State* (18 8) 3 Cal. 161 173 4 I A 137 *Phul Chand* v *Shanker* (1896) 20 All. 430 *Bhagwan* v *Ummat-ul-Hasnain* (1896) 18 All 6? *Ayyamyyar* v *Shastram* (1886) 9 Mad 506 *Collector of Ahmedabad* v *Larji* (1911) 35 Bom 255 10 I C 818 [Land Acquisition Act] *Hirabhai* v *Maneklal* (1925) 27 Bom L R 495 87 I C 713 (25) A B 313 [Money paid into Court] *Indra Chand* v *Forbes* (1917) 2 Pat L J 149 39 I C ? [rate of interest discretionary], *Gokul Prasad* v *Ram Devi* (1921) 19 All. L. J 71 63 I C 613 (21) A. A 241 [interest on costs] *Hanuman* v *National Bank of India* (1920) 7 Lah. 23 93 I C 954 (26) A L. 488

(z) *Balvantrav* v *Sadrud n* (1889) 13 Bom 485

(a) *Raja Singh* v *Kooldip* (1894) 21 Cal. 989 *Mookoond* v *Mahomed* (1887) 14 Cal. 484 *Kalyanasundram* v *Egnaredeswara* (1888) 11 Mad 61, *Vasudeva* v *Narayana* (1901) 24 Mad 341, *Hardat* v *Izzat un nissa* (1899) 21 All. 1 *Prag Narai* v *Kamakhia Singh* (1909) 36 I A 197, 31 All. 551 3 I C 798 *Parbhu Dayal* v *Ali Ahmad* (1910) 32 All. 79 4 I C 3 6 *Parbhu Dyal* v *Kalyan Das* (1916) 43 I A 43 38 All. 163 33 I.C 505

properly consequential on such variation or reversal In directing restitution it is to be noted that the parties must be placed in the same position as they were previously in irrespective of any other rights accruing to any of them during the litigation (b) Where an order is made against a party for restitution but restitution is not made the order may be enforced by sale of his property [s 36] (c)

Illustrations

(1) A obtains a decree against B for possession of immovable property [or a decree for the recovery of movable property say timber or a decree for a sum of money] and in execution of the decree obtains possession of the property [or obtains the timber or recovers the money] The decree is subsequently reversed in appeal B is entitled on an application under this section to restitution of the property [or of the timber or of the money] though there may be no direction for restitution in the decree of the appellate Court *Munshi Dinesh Proshad* v *Shanker* (1904) 9 Cal W N 381 *Balvantrao* v *Sadrudin* (1889) 13 Bom 45 *Bhagwan* v *Ummat ul Hasnain* (1896) 18 All 262

(2) A obtains a decree against B for Rs 5 000 and recovers the amount in execution The decree is subsequently reversed in appeal B is entitled on an application under this section to a refund of the money together with *interest* up to the date *of repayment though the appellate decree may be silent as to interest see the cases cited* in foot note (y) above In *Rodger* v *Comptoir d Escompt de Paris* (d) which is the leading case on the subject Lord Cairns in delivering the judgment of the Privy Council observed as follows It is contended on the part of the respondents here [that is A in the present illustration] that the principal sum being restored to the present petitioners [that is B in the present illustration] they have no right to recover from them any interest It is obvious that if that is so injury and very grave injury will be done to the petitioners They will by reason of an act of the Court have paid a sum which it is now a certained was ordered to be paid by mistake and wrongfully They will recover that sum after a lapse of a considerable time but they will recover it without the ordinary fruits which are derived from the enjoyment of money On the other hand these fruits will have been enjoyed or may have been enjoyed by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed So far therefore as the principle is concerned their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners and that the perfect judicial determination which it must be the object of all Courts to arrive at will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them *with interest* during the time that the money has been withheld These observations apply equally to mesne profits which form the subject of the next illustration

(3) A obtains a decree against B for possession of certain immovable property and in execution of the decree obtains possession of the property The decree is subsequently reversed in appeal B is entitled to possession of the property together with *mesne profits* during the period of dispossession see the cases cited in foot note (a) on the preceding page If the property has in the meantime been let out by A to tenants B is entitled to remove any tenant who refuses to vacate *Pohni Singh* v *Holding* (1894) 21 Cal 340

Splitting of claim for restitution —It has been held by the High Courts of Patna and Madras that the provisions of O 2 r 2 do not apply to a proceeding under this section. A obtains a decree against B for possession of certain immovable property and recovers possession of the property pursuant to the decree P appeals from the

(b) *Ganga Prasad* v *Brojo Nath Das* (1908) 1? Cal W N 64
(c) *Parbhu Dyal* v *Kalyan Das* (1916) 43 I A 43 38 All 163 33 I C 50 *Mahadeo* v *Rama* (1916) 40 Bom 194 31 I C 305
(d) L R 3 P C 465

decree and the decree is reversed in appeal. *B* then applies for restitution of the *property* and the property is restored to him. Subsequently *B* applies for *mesne profits* for the period during which *A* was in possession of the property. Is *B* debarred from claiming mesne profits on the ground that he ought to have included the claim for mesne profits in the application for restitution of the property? No. (*e*) Similarly a judgment debtor who applies for and obtains restitution of a *sum of money* on reversal by the appellate Court of the decree pursuant to which he had paid the sum to the decree holder is not precluded from making a fresh application for recovery of *interest* for the period during which the decree holder had the use of the money. (*f*)

Inherent power to grant restitution.—The power of a Court to grant restitution is not confined to the cases covered by the provisions of this section. It extends also to cases which do not come strictly within this section. The reason is that a Court has an inherent power under s. 151 irrespective of this section to order restitution. (*g*)

In *Jai Berham* v. *Kedar Nath Marwari* (*h*) their Lordships of the Privy Council said: "It is the duty of the Court under s. 144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns L. C. in *Rodger* v. *Comptoir d'Escompte de Paris* (*i*): 'One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression *the act of the Court* is used it does not mean merely the act of the primary Court or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.'" In *Jai Berham's* case a sale in execution of a decree was set aside on the ground that the sale certificate comprised property different from that which was attached. The property was purchased by a stranger to the decree and the price paid by him into Court was applied towards satisfaction of the decree. The judgment debtor applied for possession. Their Lordships held that both under s. 144 and s. 151 the purchaser was entitled to be paid the excess of the purchase price over the mesne profits. This decision, it is submitted, is an authority for the proposition that where an application for restitution does not come strictly within the purview of this section, e.g., where the sale alone is set aside in execution proceedings but the decree is not varied or reversed, or where the decree and the sale are set aside in a separate suit, the Court may entertain the application under the inherent power conferred upon it by s. 151. If this view be correct it will be needless for the Courts in future to resort to s. 47 which can only apply if the decree holder himself is the purchaser or where the purchaser is a stranger to the decree he is regarded as a *representative either of the decree holder or of the* purchaser within the meaning of that section. It is also submitted that a proceeding under this section is not a proceeding in execution.

In the exercise of their inherent power the Courts have applied the principle of this section to cases which were not strictly within the terms of the section. Thus where *A* sued *B* to establish his right to a fund in Court and *B* was allowed to draw the money on giving an undertaking to the Court to repay it if *A* succeeded in the suit and *A*

(*e*) *Kruparindhu* v. *Mohanta* (1918) 3 Pat. L. J. 36, 4 I. C. 4 [illegible].

(*f*) *Soma[illegible]ndaram* v. *Chokkalingam* (191[illegible]) 40 Mad. 80, 34 I. C. 806.

(*g*) *Mool[illegible]ond* v. *Mahomed* (18[illegible]) 14 C. 1 494; *Raja S[illegible]gh* v. *Kooli[illegible]p S[illegible]ngh* (1894) [illegible] Cal. 9[illegible]; *Collector of Meerut* v. *Kalka Pr[illegible]ad* (1906) 3 All. 663; *Shiam Sundar Lal* v. *Kaisa Zamani B[illegible]gam* (190[illegible]) [illegible] All. 143; *J[illegible]ga[illegible] N[illegible]th* v. *Fatt[illegible] Ch[illegible]nd* (1917) Punj. Re. no. 61, p. 18, 41 I. C. 910; *Pat Cha[illegible]n* v. *Deb Pra[illegible]ad* (19[illegible]) [illegible] Cal. W. N. 404, 64 I. C. 864; [illegible] A. C. [illegible]; [illegible] *Rain[illegible]gh* (19[illegible]6) 9[illegible] I. C. 804, ([illegible]6) A. L. 685.

(*h*) (19[illegible]) 40 I. A. 351, 355, [illegible] Pat. 10, 16, 69 I. C. [illegible] 8, ([illegible]) A. I. C. [illegible]9.

(*i*) L. R. 3 C. P. 465, 475.

succeeded in e tablishing his title it was held that though the undertaking given by *B* did not provide for the payment of interest the Court had inherent power to order *B* to repay the money with interest (*j*) See notes below Where a decree is varied or reversed

Place the parties in the position which they would have occupied but for such decree as has been reversed — A party is not entitled under this section to restitution of property which was not in his posses ion before suit but was in pos ession of the oppo ite party and which therefore could not have been taken out of his possession under any decree of Court A applies for letters of administration to the estate of Y B sets up a will of the deceased The movable properties in dispute are in the possession of *B* *B* delivers the properties to a Commissioner appointed by the Court who locks them up in a room under seal The High Court directs probate of the will to be granted to *B* Thereafter on *B* s application the movables are handed over to her Subsequently the order of the High Court is reversed by His Majesty in Council and letters of administration are directed to be granted to A A then applies under this section for restitution of the properties to him A is not entitled to restitution The case is not one of *restitution* at all for A was never in possession of the properties (*k*) But the fact that the property had been taken from a Receiver appointed by the Court does not affect the right of the true owner to restitution for the Receiver was in possession on behalf of the true owner (*l*)

Who may apply for restitution — Any party entitled to any benefit by way of restitution or otherwise may apply under this section

(1) *Where decree proceeds on a common ground* —The expression any party is not confined to parties to the *appeal* in which the decree has been reversed or modified It includes every person against whom the decree appealed from was passed though he was no a party to the appeal provided the appeal is in effect and substance in favour of such person (*m*) This would e pecially be the case where the decree appealed from proceeds on a ground common to all the plaintiffs or to all the defendants (*n*) see O 41 r 4 *A* obtains a decree against *B* and *C* The decree proceeds on a ground common to both *B* and *C* *B* alone appeals from the decree The decree is reversed in appeal *C* is entitled to claim restitution under this section though he was not a party to the appeal

(2) *Tran f ree of a decree* —Further the expres ion any party includes the transferee of a decree pas ed in appeal A obtains a decree against *B* for Rs 5 000 *B* appeals from the decree Pending the appeal A realizes from *B* Rs 5 000 in execution The decree is sub equently rever ed in appeal *B* assigns the d cree pas ed in appeal (in his favour) to *C* *C* is entitled as transferee of *B* s decree to the benefit of that decree and he may apply under this section for an order directing A to pay to him what *B* would be entitled to namely Rs 5 000 and interest (*o*)

(3) *Auction purchaser* — A ale in execution of a decree may be set a ide in a proper ca e even against a purcha er who is a stranger to the decree either in execution proceedings or in a separate suit *e g* where the sale certificate comprises property different from that which i attached (*p*) or when a decree is obtained on a mortgage executed by a Hindu father on behalf of him elf and his minor son and the decree and

(*j*) *Alagappa* v *Muth kumara* (1918) 41 Mad 316 4 I C 836 *Indra Ch d* v *Forbes* (191) ° Pat L J 149 39 I C

(*k*) *Baikuntha Nath* v *I r s nam* (19 4) 51 Cal 8 4 81 I C 571 (4) A C 69 See al o *Chh ber Singh* v *P dhu Ram* (19) 4 Lah L J 333 68 I C 80 (1) A L 34 [mesn profits]

(*l*) *B hesva Cha sh* (19) Pat 319 108 I C 89 (9) A I 60

(*m*) *Gu ga I r d* v *Brojo Nath Das* (1908) 12 Cal W N 64

( ) *E at Madhava* v *Ve gnat Swar pa* (1908) 18 M d L J 39

(*o*) See *Jam n Nath* v *Dharm Das* (1906) 33 Cal 8 [a case under s 583 of the Code of 1 8]

(*p*) *J L rtam* v *Keda Nath Marwari* (1922) 49 I A 351 I at 10 69 I C 8 ( ) A PC 69

the sale of the mortgaged property in execution of the decree are set aside in a suit by the minor against the decree holder and the auction purchaser on the ground that the mortgage did not bind the minor (*q*) But the auction purchaser is entitled in such cases before restoring possession to the judgment debtor to be paid the purchase price by the successful judgment debtor less the mesne profits if the sale is set aside in execution proceeding under this section (*r*) and if the sale is set aside by a decree in a separate suit under O 47 or s 151 (*s*) It has been held by the High Court of Rangoon that an auction purchaser who is not a party to the original suit or to the appeal or to the execution proceedings is not entitled to apply under this section (*t*)

Against whom restitution may be claimed —

(1) *Transferee of decree reversed in appeal.*—In two Allahabad cases decided under the old section it was held that restitution could not be claimed by *application* under that section against the transferee of a decree reversed in appeal though the transferee had obtained the full benefit of the decree by execution unless he was joined as a party to the appeal (*u*) The point of the decision may be explained by an illustration *A* obtains a decree against *B* and assigns the decree to *C* *C* applies for execution of the decree against *B* and obtains payment of the decretal amount *B* appeals from the decree and the decree is reversed in appeal It was held under the old section that *B* could not claim restitution against *C* by *summary process* under that section *unless* *C* was joined as a party to the appeal (*v*) Those decisions might perhaps be supported on the ground that where a party sought restitution under the old section he had to proceed by an application to *execute* the decree passed on appeal and that a decree cannot be executed against persons who are not parties to it The language of the present section is much wider and it is submitted that the Court has power under this section to order *C* to make restitution to *B* on an application by the latter in that behalf even if *C* was not joined as a party to the appeal See also s 146 It is worth noting that according to the same High Court *B* could not claim restitution against *C* even by way of *suit* the reason given being that *B* could have no cause of action in such a case against *C* But this decision has been dissented from by the High Court of Madras (*w*)

(2) *Auction purchaser* —Except in cases of the kind mentioned in case (3) under the heading Who may apply for restitution restitution cannot be obtained under this section against a *bona fide* purchaser for value at an auction sale held by a Court which had jurisdiction to order the sale (*x*) It is otherwise however where the decree holder himself is the purchaser (*y*) See note to s 65 above Effect of reversal of decree upon sale

(3) *Surety* —This section applies only to the parties or their representatives and does not apply to sureties Hence restitution cannot be claimed under this section against a surety (*z*)

Sub section (2) Bar of suit —This sub section is new It provides in express terms that where restitution could be obtained by *application* under this section no

(*q*) *Bi leshri Pras d* v *Badal S ngh* (19"3) 45 All 369 4 I C 873 (3) A A 394 [F B]

(*r*) (19") 49 I A 351 * Pat 10 69 I C 2 8 ( ) A I C 69 *supra*

(*s*) (19"3) 45 All 369 4 I C 8 3 ("3) A A 394 *supra*

(*t*) *Ma Tok* v *Maung Mo* (19"5) 3 Rang 251 80 I C 603 ( ) A R 215

(*u*) *Sadiq Hu* v *Lalta Prasad* (1898) 20 All 135 *Bhagwati* v *Jamna Pra ad* (18") 19 All 136 commented on and distinguished I C ru dh j *Prasad* v *La ju Mal* (1906) 4 All 33

(*v*) *Lalta Prasad* v *Sad q H en* (190") 26 All 2 8 But see *Shiam Sundar Lal* v *Kaisar Zama i Begam* (1907) 9 All 143

(*w*) *Go ndappa* v *Ha umanthappa* (1915) 33 Mad 36 17 I C 4 0 See *Subba ayudu* v *Yerram* (191) 40 Mad 99 33 I C 3)

(*x*) *I ari Lal* v *Ha if-un Nissa* (1916) 38 All 40 34 I C 303

(*y*) *Shiba* v *Te oo* (1919) 43 Bom 235 49 I C 130 *S gore* v *Mafijadd n* (1919) 4 Cal W N 50 61 I C 9 9 *Official Rece ver* v *Chettiappa* (19"6) 48 Mad 6 91 I C 16 (26) A M 8 *Za nul Abd n* v *Muhammed Asga* (1888) 15 I A 1 10 All 166

( ) *Raghuba S gh* v *Jai Indra Bahadur S gh* (1919) 46 I A 3 36 4 All 159 166 5 I C 50

separate suit shall be brought in respect of it The decisions under the Code of 1882 were not uniform it having been held in some cases that a separate suit for restitution was barred and in others that it was not (a)

Under s 583 of the Code of 1882 proceedings for restitution had to be commenced by an application for *execution* of the appellate decree This was required by the terms of that section The section further directed that the appellate decree should be executed according to the rules prescribed for the execution of decree in suits That gave rise to the question whether the rule contained in s 244 [now s 47] which provided that all questions relating to execution should be determined by the Court executing the decree *and not by a separate suit* was one of the rules referred to in s 583 It was held in some cases that it was and that a separate suit for restitution was therefore barred. In other cases it was held that it was not and that a separate suit could be maintained for restitution The present section simplifies matters by omitting all reference to *execution* The position of the section has also been changed it being transferred from the chapter headed Of appeals from original decrees to Part IX headed Miscellaneous A separate suit is *now barred* by the express terms of the section and the application for restitution is no longer one for *execution* of the appellate decree The Court is empowered to make such order as it deems proper for restitution and the order if not obeyed may be enforced as a decree (b) [see s 36]

It must be observed that the suit that is barred under this section is a suit to obtain restitution compensation or other relief *which could be obtained by application under this section* further the compensation to be awarded under this section must be consequential on the variation or reversal of a decree It follows that if the compensation claimed is *not consequential* on such variation or reversal a separate suit for such compensation will not be barred under this section (c)

Decree —An order for rateable distribution made under s 73 is not a decree within the meaning of this section (d)

Where a decree is varied or reversed —*The old section applied only where* the decree of reversal was a decree *passed in first appeal* or where by virtue of s 587 [now s 108] it was one *passed in second appeal* It was held not to apply where restitution was claimed on the reversal of a decree in appeal to the Privy Council (e) or in review (f) This was because the words of that section were when a party entitled to any benefit by way of restitution or otherwise *under a decree passed in an appeal under this chapter* that is chapter 41 relating to appeals from original decrees

As regards the present section there is a difference of opinion According to one view the section applies in all cases where a decree is varied or reversed however the variation or reversal is effected even though it be in a separate suit and by whatever Court (g) or even under colour of a decree (h) According to another view the section does not apply unless the decree is varied or reversed by a Court *superior* to the one that passed it This view is based on the ground that the words Court of first instance in this section are used to distinguish the Court which is to grant the restitution from

(a) See *Sheodihal v Bhawani* (190) 9 All 348 *Matiram v Ramkuma* (1908) 35 C 1 265

(b) *Parbhu Dial v Kalyan Das* (1916) 43 I A 43 38 All 163 33 I C 0 *Mahadeo v Rama* (1916) 40 Bom 194 31 I C 30

(c) *Arjun v Musammat Parbat* (19) 44 All 687, 69 I C 173 ( ) A A 46

(d) *Varada v Venkataratnam* (19) 42 Mad L J 473 67 I C 546 ( ) A M 93

(e) *Sadiq Husain v Lalta Prasad* (1898) 20 All 1 9 14

(f) *Collector of Meerut v Kalka Prasad* (1906) 28 All 665

(g) *Subbarayudu v Verram* (191) 40 Mad 299 300 33 I C 39 *Shiba v Yesoo* (1919) 43 Bom 35 39 48 I C 130 *Hanuman v National Bank of India* (19 6) 7 Lah. 23 93 I C 954 (6) A L 488

(h) *Narain Singh v Bachan Singh* (19) 8 Lah 41 99 I C 95 (7) A L 37 *Surya Datt v Jamna Datt* (19 0) 4 All. 563 57 I C 148

some other Court which has varied or reversed the decree (i) The point of difference between these two views is brought out by the following—

Illustration

A obtains an ex parte decree against *B* in Court X In execution of the decree a house belonging to *B* is sold by Court X and it is purchased by A Subsequently on *B*'s application the ex parte decree is set aside by Court X *B* then applies to Court X for an order against A for restoring possession of the house to him According to the former view Court X may direct restitution *under this section* though the decree was both passed and set aside by that Court (j) According to the latter view restitution cannot be ordered *under this section* (k) but the Court may grant restitution under s 151 (l) or under s 47 (m)

Does this section apply where the decree is neither varied nor reversed but the sale alone is set aside as under O 21 r 92? It has been held that it does not but that the Court may in such a case grant restitution in the exercise of its inherent power under s 151 Thus where *A* obtained a decree against *B* and in execution of the decree purchased certain property belonging to *B* and took possession of it and the *sale* was subsequently set aside under O 21 r 92 and possession restored to *B* it was held on an application by *B* for mesne profits that as no decree had been set aside this section did not apply but that the Court may in the exercise of its inherent power direct *A* to pay mesne profits to *B* during the period A was in possession of the property (n) See note above Inherent power to grant restitution.

To claim restitution it is not necessary that the original decree should have been entirely reversed The section also provides for the case where the decree is varied Thus if A obtains a decree against *B* for Rs 1 000 and in execution *B*'s property is sold and purchased by *A* himself and the decree is varied in appeal by reducing the amount to Rs 100 the Court has power under this section to order *A* to restore the property to *B* on payment of Rs 100 by *B* (o)

The Court of first instance—In a suit for ejectment under the Agra Tenancy Act 2 of 1910 [local] the Court of first instance is the Revenue Court which heard the suit and not the Court of Appeal (p) If the Court of first instance has been abolished or has ceased to have jurisdiction the phrase must be interpreted by applying the principle of s 37 above (q)

Pecuniary jurisdiction in awarding damages under this section—The Court of first instance has jurisdiction under this section to award damages even if they exceed the pecuniary limits of its jurisdiction (r)

Whether a proceeding under this section is a proceeding in execution—An application for restitution under s 583 of the Code of 1882 was held to be one by way of execution (s) There is a conflict of opinion whether a proceeding under this section is a proceeding in execution It has been held by the High Court of Madras (t) and

(i) *Chi taman v Chu i Sahu* (1916) 1 Pat L J 43 45 34 I C 747

(j) *Shivbai v Ye oo* (1919) 43 Bom 35 39 48 I C 130

(k) (1916) 1 Pat L J 43 45 34 I C 47 *supra*

(l) (1919) 43 Bom 35 39 48 I C 130 *supra*

(m) *Swamirao v Valent na* (19?0) 44 Bom 0? 57 I C 1 5

( ) *Jagd p v Holloway* (191) 2 P t L J 06 39 I C 6 3 *Subbamma v Che nayya* (1916) 41 Mad 46 4 I C 6 8

(o) *Ma ng Pan Gyi v Ma Ngwe Pon* (19?9) 7 R ng 10 11 I C 2 ('29) A R.157

(p) *Kashi P a ad v Ballhadder* (19?) ? All 293 ?88 65 I C 9? (?) A A 1

(q) *Panchap ke v Nat n* (19?6) 51 Mad L J 161 9 I C 97 (6) A M 813

( ) *Balvantrav v Sadrud n* (1889) 13 Bom 485

(s) *Prag N (v Kamakhia* (1909) 31 All 1 36 I A 19 3 I C 793

(t) *Somasundar m v Ch kkal gam* (1916) 40 M d 80 83 I C 606

Bombay (u) that it is while it has been held by the High Courts of Allahabad (t) and Patna (w) that it is not This distinction is important in the following respects —

(1) If an application under this section is one by way of execution, it would be governed by art 182 of Sch. I of the Limitation Act and further s 6 of that Act relating to the exclusion of the period of minority would apply to the application (x) If it is not it would be governed by the residuary article 181 (y) If art 181 applies the time is to be counted from the date of the decree of the lower appellate Court varying or reversing the decree of the Court of first instance and not the date of the decree in second appeal dismissing the appeal from the decree of the lower appellate Court (z)

(2) If an application under this section is one by way of execution the provisions of s 141 would not apply [see notes to s 141] But they would apply if it is not one by way of execution In the latter case if the application is dismissed for default it may be restored under O 9 r 9 (a)

(3) The difference between the two views also affects the Court fee on a memorandum of appeal from an order passed under this section (b) See note below Court fee See also note above Splitting of claim for restitution

The Allahabad High Court has held that an application for restitution as a result of a decree of Privy Council is one to enforce an order in Council and that art 183 of sch. I of the Limitation Act 1908 applies (c)

Limitation—See note above Whether a proceeding under this section is a proceeding in execution

Applicability of s 141—See note above Whether a proceeding under this section is a proceeding in execution

Appeal—The determination of a question under this section is a decree and appealable as such (d) see s 2 cl (2) definition of decree But the question must be one directly covered by the section and not one incidentally connected with or collateral to the decision of any such question Thus a decision that an application under this section is time barred *is a decision on a question* collateral to the question of restitution and hence it is not a decree and not appealable as such (e)

Court fee—It has been held by the Allahabad High Court that an appeal from an order made on an application under this section requires to be stamped *ad valorem* under the Court Fees Act 1870 sch I art 1 as an appeal from a decree This proceeds on the view taken by that Court that an application under this rule is not an application for execution (f)

(u) *Kurgodgouda* v *Ningangouda* (1917) 41 Bom 6 5 41 I C 38 *Hamidalli* v *Ahmedalli* (19 1) 45 Bom 113 6 I C 33 (1) A B 6

(t) *Jivaram* v *Nand Ram* (19) 44 All 407 66 I C 144 ( ) A A 3 *Baijnath* v *Balmakund* (19 5) 47 All 93 8 I C 3 1 (25) A A 13

(w) *Balmakund* v *Basanta Kumari* (19 4) 3 Pat 3 1 8 I C 00 ( ) A 1 1 [F B] approving *Krupasindhu* v *Mahanta* (1918) 3 Pat L J 36 5 I C 4 *Lambu Jhawar* v *Ba key* (19 8) Pat 94 (8) A P 598

(x) *Kurgodigouda* v *Ningajouda* (191) 41 Bom 6 5 41 I C 38 *Hamidalli* v *Ahmedalli* (19 1) 45 Bom 113 6 I C 33 (1) A L 67 *Sant Sahai* v *Chhattar* (19 6) 1 Luck 40 9 I C 3 (6) A O 199 In *Shibai* v *Tesoo* (1919) 43 Bom 3 48 I C 130 the Court applied art 181

(y) *Krupasindhu* v *Mahanta* (1918) 3 Pat L J 36 4 I C 4 *Balmakund* v *Basanti Kumari* (19 4) 3 Pat 3 1 8 I C 00 ( ) A 1 1 [F B] *Ram Singh* v *Sita Ram Parshad* (1918) Punj Rec no 67 p 4 44 I C 301 *G* v *M I* v *N n* (19 6) 96 I C 804 ( ) A L 685

( ) *Harimohan* v *Jogmeshar* (19) 6 Cal 61 (6) S C 646

(a) *Jivaram* v *Nand Ram* (19) 44 All 407 66 I C 144 ( ) A A 3

(b) *Baij Nath* v *Lal Chand* (19) 4 All 9 9 I C 3 1 (5) A A 137

(c) *Sobhan* v *Baijnath* (19 8) 50 All 6 11 I C 8 6 (8) A A 93

(d) *D Nath* v *J g* (1914) 19 C W N 1167 6 I C 890 *Adwaita* v *The Chittagong Co* (19 3) 3 Cal W N 933 84 I C 74 (5) A C 102 *Sarat Chandra* v *Subah* (19 9) 56 Cal 5 0 See *Sham Parshad* v *Ram Chand* (1914) Punj Rec no 10 p 0 I C 03

( ) *Ram Chand* v *Sham Parshad* (1913) Punj Rec no 110 p 409 I C 851

(f) *Baijnath* v *Balmakund* (19 5) 4 All 93 8 I C 3 1 (5) A A 13 As to cases arising in Bihar and Orissa see *Sital Prasad* v *Jagdeo* (19 5) 4 Pat 94 9 I C 4 4 ( ) A P 57

Enforcement of liability of surety

145 [S 253] Where any person has become liable as surety—

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47

Provided that such notice as the Court in each case thinks sufficient has been given to the surety

The old section—The corresponding s 253 of the Code of 1882 ran as follows —

Whenever a person has before the passing of a decree in an original suit become liable as surety for the performance of the same or of any part thereof the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety

The new section—The present section differs from the old section in the following respects —

1 The old section applied only to surety bonds for the performance of a *decree* It did not apply to surety bonds for the fulfilment of a condition imposed upon a person under an order of the Court [see cl (c) of the present section] It was also doubtful whether the old section applied to suretyships for the restitution of property taken in execution of a decree [see cl. (b) of the present section] The present section applies not only to surety bonds for the performances of a decree but also to surety bonds referred to above as also to bonds for the payment of money under an order of the Court See notes below

2 The present section applies to suretyships for the performance of *any decree* whether original or appellate [see cl. (a)] As to the old section it was doubtful whether it applied to original decrees only or applied also to appellate decrees

3 The word personally has been newly added in the present section

Object of the section—This section provides that where a person has become liable as surety for the performance of a decree [cl (a)] or for any of the purposes specified in cl. (b) or cl (c) the party for whose benefit security has been given may enforce the security by *executing* the decree or order against the surety to the extent

to which he has rendered himself *personally* liable in the same manner as if the surety was a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him It is no longer necessary to institute a *regular suit* to enforce the security as it was in some cases under the old section. The present section provides a summary remedy in *execution* and dispenses with the necessity of a separate suit to the extent to which the surety has rendered himself *personally* liable

Security for the performance of any decree —

1 *Ex parte decree* — A obtains an ex parte decree against B The decree is set aside under O 9 r 13 [Code of 1882 s 108] on C standing surety for the performance of any decree that may be passed against B on a re hearing The suit is re heard and a decree is passed against B A may enforce the security by *executing* the decree against C (g) A separate *suit* is not necessary

2 *Appellate decree* —The summary procedure contemplated by this section applies to suretyships for the performance of *any* decree whether it be an original or an appellate decree Under the old section there was a conflict of decisions as to whether the summary remedy provided by that section applied at all to suretyships for the performance of *appellate* decrees it being held by the High Court of Calcutta that it did not (h) and by the other High Courts that it did (i) The present section makes it clear that the summary procedure contemplated by this section applies to security given for the performance of *appellate* decrees also The rules that provide for security for the performance of appellate decrees are rules 5 and 6 of Order 41 corresponding to ss 545 and 546 of the Code of 1882 An illustration will make the point clear A obtains a decree against B and applies for execution B appeals from the decree and applies for stay of execution under O 41 r 5 Execution is stayed on C standing surety for the due performance of any decree that may be passed against B *in appeal* A decree is eventually passed by the appellate Court against B A may enforce the security against C by executing the appellate decree against him as if C was a party to the decree According to the Calcutta decisions under the old section A's only remedy was by way of suit against C

Security for restitution of property taken in execution of a decree — A obtains a decree against B for possession of certain lands B appeals from the decree Pending the appeal A applies for execution of the decree The Court allows execution on C standing surety for the restitution of the lands to B in the event of the decree being reversed in *appeal* or for payment to B of the value of the property [O 41 r 6 Code of 1882 s 546] The decree is eventually reversed in appeal B may enforce the security by *executing* the *appellate* decree against C According to the Calcutta decisions under the old section B could only enforce the security by a separate suit (j)

Security for payment of money —The following are some of the sections and rules providing for security for the payment of money —

S 55 sub s (4) [security on behalf of a judgment debtor who is arrested in execution of a decree and who expresses his intention to apply to be declared an insolvent]

O 25 r 1 [security for costs]

O 38 r 2 [security in cases of arrest before judgment]

O 38 r 5 [security in cases of attachment before judgment]

O 41 r 10 [security for costs of respondent in first appeal]

O 45 r 7 [security for costs of respondent in appeal to the King in Council]

(g) So [illegible] D [illegible] th (1890) 6 C [illegible] J ms [illegible] B wabh [illegible] (1901) [illegible] Bom 409
(h) Tok [illegible] Ld [illegible] (18[illegible]) [illegible] (1900) [illegible] Da [illegible] (1 [illegible]8) 3 Cal 1 (s 546) J [illegible] S rup (1 [illegible]) [illegible] All 99 Th ru m [illegible] (1 90) 13 Mad 1 B [illegible] ee Laksh ma Gop l (1906) 30 Bom 506
(i) Ve kap [illegible] (j) [illegible] B lmak d (1 [illegible]) 3 Cal 1

Security for fulfilment of any condition imposed on any person—The summary remedy provided by the old section applied only where the security given was for the performance of a *decree* and for no other purpose Thus where a defendant produced certain promissory notes in Court and the plaintiff objected to their return to the defendant but they were returned to the defendant on *C* standing surety *for their production* when required it was held that the plaintiff could not on non production of the notes proceed against *C by execution* the reason given being that the security was not given for the performance of a *decree* and that his only remedy was by way of *suit* against *C* (*k*) Under the present section the security may be enforced by execution against *C* Therefore when a sale in execution is adjourned on a security bond to produce the property attached the bond may on default be enforced against the surety for the value of the property by proceedings in execution (*l*)

The section applies only where the Court passes an order or decree which is intended to be an order or decree enforceable in execution by one party to a suit or other proceeding against the other party Therefore a bond passed by a surety under O 3 r 6 (2) cannot be enforced by summary process under this section it can only be enforced by a suit (*m*) Nor does the section apply to a surety on an administration bond under section 291 of the Indian Succession Act 19?? (*n*) See notes to O 21 r 43 Security bond for producing attached property

A is committed to prison in execution of a decree obtained against him by *B* *A* applies to be released from jail to enable him to make a petition in insolvency *A* is released from prison on *C* giving security that *A* will appear before the executing Court on the day fixed by the Court The insolvency petition fails and *A* fails to appear in Court In such a case *B* and not the Government is entitled to the security money (*o*) The money is to be appropriated towards satisfaction of the decree it is not to be given to the decree holder as a solatium or further benefit over and above the decretal amount (*p*)

To the extent to which he has rendered himself personally liable — A surety (1) may render himself personally liable or he (2) may only give a charge upon his property or he (3) may undertake a personal liability and charge his property as further security

The provisions of this section apply to the first case the personal liability of the surety may be enforced by attachment and sale of his property In *Amir* v *Mahadeo* (*q*) Banerji J said Under sec 253 of Act XIV of 188? there was a conflict of opinion in the different High Courts as to whether a mortgage made by a surety could be enforced under that section It seems to me that in order to reconcile the divergency of opinion which arose under the old Code and to remove any ambiguity that might exist on the subject the Legislature in enacting section 145 of the present Code of Civil Procedure added the word personally to the provisions of that section thus clearly enacting that in execution of the decree it is the personal liability of the surety which could be enforced and not the liability of the property hypothecated by him As pointed out by the learned Chief Justice the enforcement of the mortgage created by the surety would require the provisions of the Transfer of Property Act as regards the array of parties and the form of the decree and other matters to be complied with

(*k*) *Narayanamma* v *Ramayya* (1899) 22 Mad 6?

(*l*) *Sa ku* v *Narad man* (19?6) 51 M d L J 39 9? I C 79 (?6) A M 100

(*m*) *Kuruppa ppa* v *Soogamma* (1918) 41 Mad 40 33 I C 9?? *Rajah of ? Kalagiri* v *? rya* (19?0) 3? M d L J 4?? 60 I C 134

(*n*) *Ko Ma ? Cyi* v *D w Tok* (19?5) 6 Rang 4 4 21 I C 4 ( ) A L 49

(*o*) *P ? Lal* v *Chh do Singh* (191) ? Cal 104 16 I C 115 *Abdul H ? n* v *D J M d ? & C* (19??) 46 Bom 0? 0 06 61 I C 619 ( ) A B 310 See *? o I dh ? j* v *M habi* (19?0) 5 Lah L J 41 5 I C 303 *? h* v *Dayal* v *Muh mm d* (19?6) 6 Lah L J ?00 ?0 I C 00 (?) A L 490

(*p*) *S ? d a ? ? h* v *A ? b Lal* (19?0) ? C L W ? 36 ? I C ?

(*q*) (191) 39 All ?2? 34 I C 33 approved by Rankin J in *? ? ? ?* v *Megnoram* (19?7)? 4 C L J 13 95 I C 906 (?6) A C ?4?

This section does not apply to the second case that is the property charged cannot *be brought to sale under this section* Where a surety charges his property by way of security the security may be given to the Court itself or to an officer of the Court or any other named individual Where the security is given to an officer of the Court or any other named individual the property cannot be sold except by a suit on the charge But where the security is given to the Court the Court not being a juridical person it cannot sue and the only mode of enforcing the liability is by the Court making an order in the suit upon an application to which the surety is a party that the property charged be sold unless before a day named the surety finds the money It was so held by their Lordships of the Privy Council in *Raghubar Singh* v *Jai Indra Bahadur Singh* (r) In that case the plaintiff obtained a decree for possession against the defendant The defendant appealed from the decree The plaintiff was on his application led into possession in execution of the decree upon furnishing security The security was furnished by *S* who entered into a bond whereby he hypothecated the property The bond was passed to the Court *No obligee was named in the bond* It was argued on behalf of the surety that the liability in the bond could not be enforced except by a suit under O 34 r 14 (Transfer of Property Act 1882 s 90) but this argument was not accepted and it was held that the proper order to make was that the property charged be sold unless before a day named the surety found the money In that case their Lordships said In the course of the judgments in India section 145 was referred to but whatever might have been its effect if the sureties had been *personally* liable it has no application now that their Lordships have construed the instrument as giving only a charge upon property As to the contention that the liability could only be enforced by a suit on a mortgage their Lordships said that for such a proceeding there must be a mortgagor and a mortgagee but that there was no mortgagee named in the bond and further the Court not being a juridical person cannot assign the property to any person to enable him to file a suit on the mortgage It must however be observed that the procedure adopted by their Lordships in *Raghubar Singh s case* cannot be followed in cases where the surety has prior to the sale transferred his equity of redemption in the property to a third person (s)

In the third case also where the security is given to the Court the property may be sold by an order of the kind made in *Raghubar Singh s case* At the same time the applicant may relinquish his interest in the charge and proceed to enforce the personal liability in the bond by attachment and sale of the property charged (t)

Where a security bond charging his property is given by the judgment debtor himself the property can be realised in execution under sec 47 (u)

Notice to surety —The notice required to be given to a surety under this section is a condition precedent to the validity of an order for execution against him *An attachment issued without such notice is illegal* (v) When a decree is sent by the Court which passed the decree to another Court for execution the notice required by this section may be given by the latter Court (w) For form of notice see App H form No 13

(r) (1919) 46 I A 9 6 4 All 158 166 55 I C 5 0 approving *J nk I a* v *S rup Ra* (189) 17 All 9) *Fet Mal lal I B I Si gh* (19 3) 4 All 61) 74 I C 9 (4) A 4 10 *S ku a* v *M p eram* (19) 54 Cal 1 9 I C 908 (6) A C 89) *D U I ah* (19 3) La g 3 118 I C 63 (3) A R 1 6

(s) *A ir Mah d o* (1917) 39 All 33 I C 33

(t) *M kta I sat Mal l* (1916) 38 All 8 33 I C 98 *(q De J t Lal* (191) Pat L J 19 39 I C 645 *G ru ha tappa Cur* (19 6) 0 Bom 338 95 I C 696 (6) A B) *Jay ppa* v *Sher g uda* (19 8) 5 Bom 10 I C 10 (8) A B 4

( ) *Jy t F k h M H P ala h* (19 1) 51 C 1 1 0 81 I C 34 (4) A C 495 *S br ma a P a f l m ad* (1918) 41 M d 3 43 I C 187

( ) *Ta k U le n* (1 4) Pang 67 84 I C 99 ( ) A R 13

(w) *L ksh ha ka* v *Paghum l* (190) 9 Bom 9

Discharge of surety —The liability of the surety depends upon the terms of the bond and unless expressly limited to the original Court extends to the Court of appeal (*x*) The liability may be determined if the Court alters the terms of the security (*y*) A surety in pursuance of an order giving leave to defend a suit under O 37 is discharged when a consent decree is passed without his knowledge (*z*) Otherwise the surety is bound so long as the judgment debtor is bound and so the surety is not discharged by a payment which has not been certified under O 21 r 2 of the Code (*a*). The form which the contract of suretyship takes is immaterial it may be either in favour of the Court or of the decree holder (*b*)

Section no bar to a regular suit against surety —As to the old section it was held that it gave an additional not an exclusive remedy against a surety and that it *did not prevent* the decree holder from bringing a *regular suit* on the surety bond to enforce the security (*c*) The present section also does not bar a regular suit (*d*) It simply enables a party for whose benefit security has been given to enforce the surety bond against the surety by way of execution to the extent to which the surety has rendered himself *personally* liable and no more If the party for whose benefit security has been given proceeds against the surety in execution the surety is to be *deemed for the purposes of appeal* a party within the meaning of s 47 That is to say if an order is made in execution enforcing a claim against the surety the surety may appeal from the order as if he was a party to the suit in which the decree or order sought to be executed was passed (*e*) In this respect the section gives effect to certain rulings under the old section (*f*) The reference however to s 47 does not import into this section the provision therein contained which bars a separate suit A surety under this section is a party to the suit for the limited purpose mentioned in this section (*g*)

A surety for a deceased defendant is not liable when a decree is passed against a person who has not been adjudged to be the legal representative and he may bring a suit to negative his liability (*h*)

Appeal —An order under this section is appealable as a decree (*i*) See the penultimate paragraph of the section

Limitation —Where an appeal has been preferred from a decree for the performance whereof a person has become liable as a surety the period of limitation for an application under this section is 3 years from the date of the appellate decree as provided by art 182 cl (2) Schedule I of the Limitation Act and not 3 years from the date of the original decree (*j*)

146 [*New*] Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person,

Proceedings by or against representatives

(x) *Ira ywd i* *Irbasappa* (19) 51 Bom 31 99 I C 8 0 ( ) A B 84
(y) *H ralal* v *M l l* (19 6) 8 Bom L 1 51 94 I C 643 (6) A B 6
(z) *N t al Coal Co* v *A hutsh B* (19 6) 30 C W N 40 9 I C 400 (6) A C 818
(a) *T ml I ddy* v *Devi I eddy* (19 6) 49 Mad 3 3 94 I C 5 (6) A M 6 4
(b) *Jovm I eea* v *I S la* (19 6) 3 Cal 515 95 I C 4 3 ('26) A C 818
(c) *Abdul Kad* v *Ha e* (18 4) 6 All H C 61
(d) *Mold I* v *Thakore* (1911) 6 Bom 4 1 I C 549 Contra 1 s 144 sub-s ( )
(e) *Sr iba h Pr I K sh Prasad* (1911) 39 C I 4 6 9 I C 86
(f) *Sh k S le Sh r m* (1856) 1 Bom 1 *Akhoo Ahm d* (18 1) I W R 538
(g) *Ram K A Jala Si gh* (19) 51 All 316 11 I C 31 ( ) A A *F ma th* v *D inami* (19 0) 43 M d 3 I C 63
(h) *Pukh oj* v *Jame tj* (19) 50 Bom 80 100 I C 1 5 ( ) A B 63
(i) *See Ada* v *Pal* (1914) 19 C W N 10 30 I C 684
(j) *Chalappa* v *Rama hand a* (19 0) 44 Bom 34 53 I C 15

then the proceeding may be taken or the application may be made by or against any person claiming under him

Proceeding by or against representatives —The proceeding contemplated by the section includes an appeal The expression claiming under is wide enough to cover cases of devolution etc mentioned in O 22 r 10 *A* sues *B* to establish his right to certain property Pending the suit *B* mortgages the property to *C* The suit is decided in *A*'s favour *B* does not appeal from the decree *C* as a person claiming under *B* may appeal from the decree (*k*)

This section does not enable the legal representative of a deceased transferee decree holder to be substituted on the record to continue an execution proceeding (*l*)

See notes to O 9 r 13 under the head Application by legal representative of deceased defendant Other cases to which the section applies have been considered in their proper place

147 [*New* R S C O 16, r 21] In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement

Consent or agreement by persons under disability

Rules of the Supreme Court O 16 r 21 —This section is new It is taken from O 16 r 21 of the rules of the Supreme Court with some alterations

Any person under disability —The section applies to consent given on behalf of persons under disability such as minors and lunatics See O 32 below

As to any proceeding —These words do not refer to the *conduct* of a suit or appeal A next friend or guardian *ad litem* has undoubtedly the conduct of a suit or appeal in his hands But if he does anything in the action beyond the mere conduct of it *e g* consents not to appeal the person under disability is not bound by it unless it is done with the express leave of the Court (*m*)

Express leave —The leave must be *express* In this respect the present section differs from the English rule

148 [*New* R S C, O 64, r 7] Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion from time to time enlarge such period, even though the period originally fixed or granted may have expired

Enlargement of time

Act prescribed or allowed by this Code —The present section empowers the Court to extend the time fixed by it even after the expiry of the period originally fixed It is a legislative recognition of the rule laid down in the Bombay case of *Bhagwan Das* v *Haji Abu Ahmed* (*n*) and the cases on which that rule was based (*o*) In

(*k*) *Sitaram* v ... *Lakshmi* (1918) 41 Mad 510 48 I C 840

(*l*) *Palaniappa* v *Valliammai* (19) 50 Mad 1 99 I C 6 (7) A M 184

(*m*) *Rhodes* v *Swithenbank* (1889) Q B D 5

(*n*) (1891) 16 Bom 263

(*o*) *Dew* ... *Am* ... (1910) 14 C W N 85 884 6 I C 4 4

the Bombay case it was held that it was competent to the Court to extend the time fixed under s 54 of the Code of 1882 (now O 7 r 11) even after the expiry of the time originally granted It must however be noted that the section applies only where time is fixed for the doing of an act *prescribed or allowed by this Code.* Code includes rule and prescribed means prescribed by the rules [see s 2 cls (1) and (16)]. See for instance the following rules —

1 O 6 r 18 (amendment of pleadings)
2 O 7 r 11 (b) (requiring plaintiff to correct valuation of suit)
3 O 7 r 11 (requiring plaintiff to supply requisite stamp paper where the plaint is written upon paper insufficiently stamped)
4 O 8 r 9 (requiring written statement or additional written statement from a party)
5 O 21 r 17 (amendment of application for execution)
6 O 25 r 2 (security for costs of suit)
7 O 41 r 10 (security for costs of appeal)

Act directed or allowed by a decree of Court—This section does not apply where time is allowed for doing an act by a *decree* in a suit (*p*) It was accordingly held by the Allahabad High Court in *Saranjan* v *Ram Bahal* (*q*) that a Court has no power under this section to extend the time fixed by its decree under O 20 r 14 for payment of purchase money in a suit for pre emption The Allahabad decision has been approved by the Madras High Court (*r*) The High Court of Patna has however held that the Court has power under this section to extend the time fixed by a decree passed under O 20 r 14 (*s*) The attention of the Patna Court was not drawn to the Allahabad decision In a later case however the Allahabad High Court held that where an ex parte decree is set aside on condition that the defendant should pay a certain sum of money to the plaintiff within a certain time and payment is not made the Court has power under this section to enlarge the time for payment As to *Saranjan's* case the Court observed that it related to a decree in a suit for pre emption (*t*) In a still later case where a decree was passed in favour of the plaintiff conditional upon her paying an extra court fee of Rs 20 within a week but the amount was not paid within that period the High Court of Allahabad held that the Court had no power under this section to extend the time but that the plaintiff might proceed by an application for a review under s 114 read with O 47 r 1 The Court said There is no distinction between a pre emption decree and any other decree which embodies certain conditions and provides for the suit being dismissed if those conditions are not complied with (*u*) The Patna High Court has held that where a Court permits the plaintiff to withdraw a suit under O 23 r 1 with liberty to bring a fresh suit on payment of costs within a prescribed period the Court has power under this section to extend the time (*v*) The Oudh Court while holding that this section does not allow enlargement of time where the time is fixed by a *decree* in a suit holds that if an appeal is preferred from the decree the Appellate Court may extend the time prescribed by the decree not under sec 148 but under O 41 r 33 by varying the decree of the lower Court in that behalf It has thus been held that if a decree is passed for pre emption on payment of a certain sum in Court within a prescribed time and an appeal is preferred from the decree the Appellate

(*p*) *Dharm aja* v *Sri vasa* (1916) 39 Mad 8 6, 31 I C 40, *Bibi Sharofa* v *Mahomed* (1911) 15 Cal. W N 6 5 690 10 I C 148 *Huk m Chand* v *Hav t* (191) Punj ... no 92 p 313 15 I C 941 *Qazi* v *I am As hen* (1927) 2 Lu k 4.5 101 I C 58 (28) A O 8..

(*q*) (1913) 35 All. 55 1 I C 55

(*r*) (1916) 39 M 1 6 6 31 I C 240 *supra*

(*s*) *Abu Muhammad* v *M hul Pertap* (1916) 1 Pat. L J 9.. 34 I C 83

(*t*) *Jagarnath* v *A mla Prasad* (1914) 36 All. 7 3 I C 135

(*u*) *Sajjadi* v *Inlawar* (1918) 40 All. 5 9 47 I C 4 see also *Jalakrishna* v *I rathammal* (1927) 53 Mad L J 491 105 I C 124 (..) A M 154

(*v*) *Syed Qazi* v *Lachman* (19 6) 5 Pat. 306 96 I C 912 (..6) A P 4 9

Court has the power to extend the time for payment (w) The section does not in any case empower a Court to interfere with or modify its decree after an appeal has been filed from the decree (x) See note below Court to which etc

An application for extension of time fixed by the decree in a *redemption suit* for payment of the mortgage debts does not fall under this section but under O 34 r 8 (y)

Period of limitation —This section does not empower a Court to extend the period prescribed by the law of limitation ( ) nor the period of one month fixed by sec 95 (4) of the Code (a)

Consent order —Where the time for doing an act has been fixed by a consent order it cannot be enlarged except by consent (b)

Court to which application should be made for extension of time —Where a decree is passed against a defendant requiring him to execute a kabuliat in favour of the plaintiff within two months and an appeal is preferred from the decree the only Court that has power to extend the time assuming the case is one under this section is the appellate Court and not the Court which passed the decree (c)

Appeal —No appeal lies from an order under this section The order is not a decree nor is it one of the appealable orders mentioned in s 104 (d)

149 [*New*] Power to make up deficiency of court-fees. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part as the case may be, of such court fee, and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance

Scope of the section —This section is new It is an enabling section It empowers the Court to allow a party to make up the deficiency of court fees payable on plaints memoranda of appeal applications for review of judgment etc even after the expiration of the period of limitation prescribed for the filing of these documents The section enables a defective document to be *retrospectively* validated if the insufficiency of the stamp is subsequently made up with the leave of the Court The power however to make up the deficiency of court fees is *subject to the discretion of the Court* and is *not claimable as of right by a party* (e) See notes below Appeals and applications for review of judgment

Plaints —As to the case where a plaint is written upon paper insufficiently stamped see notes to O 7 r 11 under the head Clause (c)

(w) Q ı v P m *Kishen* (19 7) Luck 4 5 101 I C 2 8 (-8) A O 3-

(x) *Parmanand* v *Kripasindhu* (1910) 3 Cal. 548 6 I C 75

(y) *Het Singh* v *Tika Ram* (191) 34 All 388 14 I C °40

( ) *Dukh o* v *Munshi Sahu* (1919) 4 Pat L. J 4 8 5° I C 439

(a) *Na anmha* v *Pa gachari* (19°6) 50 Mad L. J 4 7 93 I C 444 ('26) A M 689

(b) *Austr lasia Automatic Weighing Mach e Co* v *Walter* (1 91) W N (Eng) 1 0

( ) *P rmanand Das* v *Krip sindhu* (1910) 37 Cal. 548 6 I C 2 5

(d) *Sara Jan* v *Ram Bahal* (1913) 35 All. 58- °1 I C 685

(e) See *Valli* v *Mahmad* (1914) 16 Bom L. R 63 66 °6 I C 746 *Brij Kishan* v *Tota Ram* (19) 50 All 9-0 118 I C 2-3 (-) A A 5

Appeals and applications for review of judgment—As to these it was provided by s 582A of the Code of 1882 as follows —

If a memorandum of appeal or application for a review of judgment has been presented within the proper period of limitation but is written upon paper insufficiently stamped and the insufficiency of the stamp was caused *by mistake on the part of the appellant or applicant as to the amount of the requisite stamp* the memorandum of appeal or application shall have the same effect and be as valid as if it has been properly stamped provided that such appeal or application shall be rejected unless the appellant or applicant supplies the requisite stamp within a reasonable time after the discovery of the mistake to be fixed by the Court

The above section was introduced into the Code of 1882 by Act 4 of 1892 to supersede a Full Bench ruling of the Allahabad High Court That ruling was to the effect that if a memorandum of appeal is not when tendered properly stamped it is not at that time a memorandum of appeal and the subsequent affixing of the proper stamp cannot have a retrospective effect so as to validate the original presentation unless it has been done by order of the Court and that such an order can only be made where the defective memorandum has been received through a *mistake on the part of the Court or its officers* and not where the insufficiency of the stamp was due to a *mistake on the part of the appellant* (*f*)

S 582A applied only to appeals and applications for a review The present section is general in its terms and applies to *all* documents chargeable with court fees under the Court fees Act such as plaints memoranda of appeal or of cross objections applications for review of judgment written statements pleading a set off or counter claim

The words and the insufficiency of the stamp was caused by mistake on the part of the appellant or applicant as to the amount of the requisite stamp which occurred in s 582A have been omitted in the present section It has accordingly been held by the High Court of Bombay that the concession provided for by this section should not be restricted to cases where there is a *bona fide* misunderstanding of the law as to valuation as it was under s 582A and that inability on the part of the appellant to pay the requisite stamp is a good ground for admitting the memorandum of appeal though presented on the last day of limitation and for extending under this section the time to pay the requisite stamp (*g*) According to the Patna High Court the Court should not give time to make good the deficiency if a litigant has deliberately and to suit his own convenience paid an insufficient court fee Time according to that Court may be given when the amount of the court fee payable is open to doubt or the amount of the court fee cannot be ascertained by the Court till the record is received or if it appears that the party has made an honest attempt to comply with the law (*h*) The Lahore High Court has taken a similar view (*i*) and held that if the insufficiency of the court fee is due to gross negligence on the part of the appellant or his pleader the negligence cannot be condoned (*j*) The Allahabad High Court has held that where an insufficiently stamped memorandum of appeal is accepted by inadvertence time may be given to the appellant to supply the deficiency but if the Court is aware ab initio of the insufficiency of the stamp it ought to return the memorandum to the appellant in order that he may if the case admits re present it properly stamped and apply for an extension of time under sec 5 of the Indian Limitation Act (*k*)

(*f*) *Balk an Rai* v *Gob d Nath* (1890) 1 All 1 9

(*g*) *Ach t* v *Nagappa* (1914) 38 Bom 41 1 I C 33

(*h*) *Ramsahay* v *K mar Lachmi* (1918) 3 Pat L J 4 4 I C 6 5 *Am r* v *Mohan* (1924) 3 I t 337 80 I C 1030 (1924) A P 663

(*i*) *Lekh Ram* v *I amj* (1920) 1 Lah 34 57 I C 35 [no bona fide mistake] *P g1bir* v *M t Soh n* (1925) 6 Lah 33 86 I C 1 (5) A L 3 1 *Satto* v *Am r Singh* (1919) 1 Lah L J 60 *Dal p Singh* v *Um o S ngh* (1913) Punj Rec no 55 p 13 19 I C 88 [unreasonable delay] *Sahib Ji* v *P t* (1919) Punj Rec no 10 p 19 49 I C 188 [mistake of pleader]

(*j*) *Gursaran Das* v *Th D strict Board* (19)9 Lah L J 290 102 I C 615 (7) A L 884 dissenting from 38 Bom 41 *supra*

(*k*) *B ijthukhan* v *Tota I am* (1928) 50 All 950 118 I C (9) A A 75 dissenting from 38 Bom 41 *supra*

The present section as stated above applies to all documents chargeable with court fees such as plaints memoranda of appeal applications for review etc As regards plaints it is well settled that in the case of a plaint insufficiently stamped the Court is *bound* under O 7 r 11 (c) [s 54 of the Code of 1882] to give time to the plaintiff to make good the deficiency even if the plaintiff has deliberately and without any excuse paid an insufficient court fee provided the plaint is presented within the period of *limitation* *As regards appeals however there is a difference of opinion* *The High* Court of Bombay (*l*) has held that a memorandum of appeal stands on the same footing as a plaint and that as in the case of a plaint so in the case of a memorandum of appeal the Court is *bound* to give time to the appellant to make good the deficiency the reason given being that O 7 r 11 cl (c) is made applicable to appeals by s 107 (2) [s 582 of the Code of 1882] As to the present section the Court said in effect that it should be read subject to the provisions in the case of plaints of O 7 r 11 (c) and in the case of appeals of O 7 r 11 (c) coupled with s 107 (2) On the other hand it has been held by the High Court of Patna (*m*) that the Court is *not bound* in the case of a memorandum of appeal insufficiently stamped to give the appellant time to make good the deficiency but that it *may* allow time if the amount of the court fee payable is open to doubt or if the amount of the fee cannot be ascertained by the Court till the record is received or if it appears that the appellant has made an honest attempt to comply with the law but that it should not allow time if the appellant has deliberately and to suit his own convenience paid on his appeal insufficient court fee According to that Court the present section should not be construed in such a way as to nullify the express provisions of s 4 or s 6 of the Court Fees Act 7 of 1870 (*n*) A similar view has been taken by the Lahore High Court (*o*) The view taken by the High Court of Bombay has also been dissented from by the Madras High Court (*p*)

Revision—It has been held by the High Court of Allahabad that an order refusing to give time to a party to make up the deficiency in court fee is not capable of revision as such an order does not amount to a decision of a *case* within the meaning of s 115 of the Code (*q*)

150 [*New*] Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred

Transfer of business

Save as otherwise provided—O 9 r 13 provides that where an ex parte decree is passed against a defendant he may apply *to the Court by which the decree was passed* for an order to set it aside Suppose now that an ex parte decree is passed by Court P *for possession of certain immovable properties and subsequently part of its* territorial jurisdiction including the locality in which the properties are situated is transferred to Court A. Has Court A power under this section to entertain an application to set aside the decree under O 9 r 13? It has been held by the High Court of

(*l*) *Achut* v *Nagappa* (1914) 38 Bom 41 21 I C 337

(*m*) *Ramahay* v *Kumar Lachmi* (1918) 3 Pat L J 4 47 I C 675

(*n*) S 4 of the Court Fees Act forbids a High Court to receive a memorandum of appeal unless the proper court fee is paid S 6 contains a similar provision with regard to other Courts

(*o*) See cases cited in f n (*a*)

(*p*) *Narayana* v *Venkatakrishna* (1914) 26 Mad L J 677, 26 I C 33

(*q*) *Chhakkan Lal* v *Kanhaiya Lal* (1923) 45 All 215 69 I C 981 (1923) A.A 113

Madras that it has O 9 r 13 does not say that the Court that passed the decree is the only Court that can set it aside (r)

Transferred —In two cases decided by the High Court of Madras it was held that the word transferred in this section is not confined to transfer of the business of one Court to another but includes cases where a new Court is given part of the territorial jurisdiction of an old Court and is authorized to try all the business arising within it (s) The High Court of Calcutta differs (t) and in a more recent case the Madras High Court has dissented from its two previous decisions and holds that the section refers to cases where certain specified business has been actually transferred by the order of a competent Court and does not apply to any other case (u)

See notes to s 37 above See also the undermentioned cases (v)

151 [*New*] Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court

Saving of inherent powers of Court

Inherent powers of Court —The Code of Civil Procedure is not exhaustive (w) The Court has therefore in many cases where the circumstances require it acted upon the assumption of the possession of an inherent power to act *ex debito justitiae* and to do that real and substantial justice for the administration of which alone it exists (x) The law cannot make express provisions against all inconveniences so that their dispositions shall express all the cases that may possibly happen and it is therefore the duty of a Judge to apply them not only to what appears to be regulated by their express provisions but to all the cases to which a just application of them may be made and which appear to be comprehended either within the expre s sense of the law or within the consequences that may be gathered from it (y) This section does not confer any powers but only indicates that there is a power to make such orders as may be necessary for the ends of justice and to prevent an abuse of the process of the Court (z) At the same time it is to be remembered that a Court has no inherent power to do that which is prohibited by the Code Thus a Court has no power after the judgment is signed to alter or add to it as to do so would be in direct contravention of the provisions of O 20 r 3 (a) Further this section does not invest the Court with jurisdiction over matters which are excluded from its cognizance Thus a Court cannot under this section entertain a suit relating purely to caste questions such a suit not being one of a civil nature (b) see s 9 above Nor can the Court ignore the provisions of the law of limitation by appealing to this section (c) Inherent jurisdiction must be exercised subject to the

(r) *Ranga atha* v *Ha umantha* (19 3) 46 Mad 1 65 I C 7 (2) A M 10 *G ruswami* v *Mahomm d'u* (19-3) 46 Mad 83 86 I C 650 (3) A M 9 [O 39 r ? (3)—temporary injunction]

(s) (19 3) 46 Mad 1 *sup a* (19 3) 46 Mad 83 *supra*

(t) *Munshi* v *Munshi* (19 1) ?6 Cal W N 216 70 I C 10 ( ) A C 41

(u) *Subrama a* v *Swaminath* (19 3) 28 Mad L W 885 (-8) A M 46 See also *Si a kanda* v *Raja of Jeypo* (19) 50 Mad 68 103 I C 4 (2) A M 6-

(v) *Seeni Nadan* v *Muthusamy* (1919) 4 Mad 8 1 833 53 I C 213 *Ami udd n* v *Atarma i* (19?0) 4 Cal W N 809 57 I C 8 9

(w) *Durga Dihal D* v *A oraj* (189) 17 All ?9 31 *Jog nd a Ch d a Sen* v *Wazdu is a Kh tun* (190) 34 Cal 860

(x) *Hukum Cl d* v *Kamala nd* (1906) 33 Cal 927 931 3

(y) *Hurro Chunder I oy* v *Shoorodhonee Debia* (1868) 9 W R 402 406

(z) *H rnand Lal* v *Chaturbhuj* (19 6) 48 All 356 9 I C ?85 (-6) A A 31

(a) *Rameshw r* v *Lala* (19 4) 3 Pat 778 84 I C 3 0 ( ) A P 6 *Adit Pra ad* v *Ramharakh* (19 5) 4 Pat 180 91 I C 213 (25) A I 43

(b) *Jethabha* v *Chapsey* (1910) 34 Bom 46 4 I C 108

( ) *Tota R m* v *Pa na Lal* (19?4) 46 All 631 9 I C 90 (-4) A A 668 *Krishnasamy* v *Che gal ya* (19?4) 47 Mad 171 5 I C 836 (?4) A M 114 *Bussa Mal* v *Kesar S ngh* (19 0) 1 Lah 363 58 I C 789 *Ajodhya* v *Musammat Phul Koer* (19) 1 Pat - 6 I C 341 (?) A P 479 *Du* v *Pritam Das* (19 5) 7 Lah L J 13 86 I C 56 (?5) A L 5?1

rule that if the Code does contain specific provisions which would meet the necessities of the case in question such provisions should be followed and the inherent jurisdiction should not be invoked (*d*) A Court cannot make use of the special provisions of this section where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it (*e*) And further no order should be made under this section unless it is necessary for the ends of justice or to prevent abuse of the process of the Court (*f*) The mere fact that there is no other remedy would not attract the application of this section (*g*) The first case in which this section was considered by the Privy Council is *Sabitri* v *Savi* (*h*) In that case the High Court of Calcutta dismissed an appeal under O 41 r 10 which provides that upon a failure to comply with an order for security for costs the Court *shall dismiss the appeal* On appeal to the Judicial Committee it was contended that the Court had inherent power under this section to give the appellant an opportunity of making an application for leave to continue the appeal in forma pauperis Referring to this contention their Lordships said A further point is taken that s 151 of the Code of Civil Procedure 1908 preserves the inherent powers of the Court to make such orders as may be necessary for the ends of justice and to this general saving section appeal is made to take the case out of the operation of the orders and rules if they are applicable to Letters Patent appeals How far a mere general saving clause gives power in effect to refuse to apply an appropriate rule made in the exercise of other powers of the Court and having statutory force is another question but for present purposes it is enough to say that in the terms of the section the inherent powers saved are such as are used to secure the ends of justice In the end their Lordships came to the conclusion on the materials before them that justice did not require that the appellant should be assisted in prosecuting the appeal before the High Court and they confirmed the order of the High Court *The Bombay High Court has said that the section should be applied with great caution* and that a Court could not under this section restore an application under O 21 r 89 which had been dismissed for default of appearance (*i*) But where the ends of justice require it the Court has an inherent power to make such order as it may deem proper It has thus been held that although the Code contains no express provision on the matters hereinafter mentioned the Court has an inherent power—

(a) to consolidate suits and appeals (*j*) including appeals to His Majesty in Council (*k*)

(b) to postpone the hearing of suits pending the decision of a selected action (*l*)

(c) to stay on the ground of convenience cross suits (*l*)

(*d*) *Ghu nov* v *The Allahabad B k Ltd* (1917) 44 Cal. 9 9 936 937 41 I C 698

(*e*) *Josh* v *Jhinguria* (19 4) 46 All. 144 8 I C 416 (’24) A A 446 *Vallabhbhai* v *Chhotalal* (19 7) 51 Bom 26 100 I C 154 (27) A B 79

(*f*) *Ganesh* v *Purushottam* (1910) 34 Bom 135 4 I C 595

(*g*) *A ant* v *Mangal* (19’5) 4 Pat. 704 91 I C 433 (26) A P 27

(*h*) (19’1) 48 I A 6 48 Cal 491 60 I C 4 *Kojo Pon* v *Atta Fua* (19 8) 47 Cal L J 3 8 107 I C. 349 (’27) A I C. 264

(*i*) *Bhagw n* v *Dattatrya* (19 6) 50 Bom 54 96 I C 411 (6) A B 377

(*j*) *Hukum Chand* v *Kamalanand* (1 [illegible] Cal 9 93 *Nanda Kishore* v *Ram [illegible]* (191) 40 Cal 955 959 960 15 I C. [illegible]

(*k*) *Chaudhry Ha Prasad* v *Brij [illegible]* (1918) 3 Pat. L J 449 4 I C 1 *Qazi* v *Mankumar* (1922) 1 Pat [illegible] I C 1000 (’22) A. P [illegible] v *Su aj kuma* (191) I Ca W N 2 15 I C 807

(*l*) *Hukum Chand* v *Kamalanand* [illegible] Cal 9 932 *Nanda Kishore* v *Ram [illegible]* (1913) 40 Cal. 9 [illegible] 1 I C 2[illegible] *Syed Abdul* v *[illegible]* [illegible] Cal W N 295 88 I. C. 1[illegible] [illegible] A. C 7

(d) to ascertain whether the proper parties are before it (*m*)

(e) to enquire whether a plaintiff is entitled to sue as an adult (*m*)

(f) to entertain the application of a third person to be made a party (*m*)

(g) to allow a defence *in forma pauperis* (*m*)

(h) to decide one question and to reserve another for investigation the Privy Council pointing out that it did not require any provision of the Code to authorize a Judge to do what in this matter was justice and for the advantage of the parties (*m*)

(i) to remand a case to which neither O 41 r 23 nor O 41 r 25 applies (*m*) See notes to O 41 r 23 Remand in case of error omission or irregularity and notes to O 42 r 1 Inherent power of High Courts to remand in second appeal

(j) to stay the drawing up of the Court s own orders or to suspend their operation if the necessities of justice so require (*m*)

(k) to stay proceedings in a lower Court pending appeal and to appoint a temporary guardian of a minor upon such stay (*m*)

(l) to apply the principles of *res judicata* to cases not falling within section 11 of the Code (*m*) see notes to s 11 Section not exhaustive on p 17 above and Orders in execution proceedings on p 77 above

(m) to add a party (*n*) or to transpose parties (*o*)

(n) to punish summarily by imprisonment contempts of Court committed by the publication of a libel out of Court (*p*)

(o) to decide questions of jurisdiction though as a result of its inquiry it may turn out that the Court has no jurisdiction over the suit (*q*)

(p) to stay proceedings pursuant to its own order in view of an intended appeal (*r*)

(q) to direct a party who has applied for leave to appeal to the King in Council to pay costs on the dismissal of his application (*s*)

(r) to take cognizance of questions which cut at the root of the subject matter of controversy between the parties *e g* whether a deed of mortgage is attested as required by s 59 of the Transfer of Property Act (*t*)

(s) to amend decrees and orders in cases not covered by s 152 (*u*) see notes to s 152 Inherent power to amend decrees and orders

(t) to set aside an order obtained by fraud practised upon the Court *e g* when a pleader not engaged by the defendant at all consents to a decree on behalf of the defendant (*v*)

(u) to restore a suit dismissed for default in cases not provided for by O 9 r 9 see notes to O 9 r 9 Inherent power of Court to restore suits on other grounds

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(*m*) 33 C L 9 7 93 40 Cal 9 4 9 9 960 18 I C 907 *supra* *Gnanendra* v *Praf lla na da* (1907) 3- C W N 101 106 I C 54 (8) A C 81?

( ) *Lakhmich d* v *Kachubhai* (1911) 35 Bom 393 11 I C 5 9 *Sri Mati Hema gi i* v *Haridas* (1919) 3 Pat L J 400 46 I C 398 [adding a respondent in an appeal]

(*o*) *S rya Ka ta* v *Tarak Nath* (19) 44 Cal L J 43 98 I C 8 (2) A C 37

(*p*) *S re d Nath B nerj e* v *The Ch ef Justice and Judge of the High Co rt of Be gal* (1884) 10 Cal 109 10 I A 1 1

(*q*) *H rree l er d* v *Koonjo B hary* (186) M rst all, 99

(*r*) *Lucl mi Na ain in the goods of* (1901) 5 C W N 81

( ) *Jogend a Chandra* v *Wandun ssa Khat n* (190) 34 Cal 860

(*t*) *Sh mu l aller* v *Abd l Kad r* (191) 35 Mad 607 39 I A 218 16 I C 2 0

( ) *Mohab r* v *Cha d a* (1914) 19 C W N 10 1 8 I C 304

(*v*) *Ba angowda* v *Churchigirigowda* (1910) 34 Bom 408 5 I C 963 *l eary Choudhury* v *So oo Dass* (1914) 19 C W N 419 27 I C 6 8 *Shreemal* v *Sa i* (1) 16 P t 108 105 I C 271 (7) A P 3 4 *Devendra Nath* v *Ram l a kpal* (1926) 1 Luck 341 93 I C 30 (6) A O 315

(v) to cause restitution to be made on reversal of decree see notes to s 144 Inherent power to grant restitution

(w) to restrain by injunction a person from proceeding with a suit in another Court see notes to O 39 r 1 Powers of Chartered High Courts to restrain a party from proceedings with a suit pending in another Court

(x) to re hear a matter before the order passed by the Court at a previous hearing is drawn up and sealed (*u*)

(y) to order a stay of execution in view of an application by a judgment debtor to the Judicial Committee for special leave to appeal to His Majesty in Council (*x*)

(z) to set aside an order of dismissal made under O 9 r 8 for non appearance of the plaintiff when the non appearance was owing to the plaintiff s death and the fact of the plaintiff s death was not brought to the notice of the Court dismissing the suit (*y*)

(zz) to set aside an order dismissing without independent inquiry an application asking for an inquiry under O 32 r 15 as to the mental infirmity of a party (*z*)

(aa) to vacate an order obtained by fraud as where an order is made recording the adjustment of a decree [O 21 r 2] and the adjustment has been brought about by fraud practised by one party upon another (*a*)

(bb) to direct an auction purchaser in a case where he has paid the purchase money and subsequently withdrawn it from the Court on the sale to him being set aside under O 21 r 91 to pay back the money into Court on the sale being confirmed in appeal (*b*)

(cc) to restore a suit as held by the Allahabad High Court (*c*) where the decree passed in the suit is set aside on the ground that the minor against whom the suit was filed was not properly represented by a guardian ad litem and to proceed with the appointment of a fit and proper person as guardian ad litem of the minor defendant according to the Madras High Court the decree is a nullity and the Court has no inherent power to restore the suit (*d*)

(dd) to interfere where its decree is being executed in a manner manifestly at variance with the purport and intent of the decree (*e*)

(ee) to stay execution of a decree obtained by *A* against *B* pending not only the decision of a *suit* by *B* against *A* but also the decision of an *appeal* by *B* against *A* from a decree passed against *B* in *B* s suit (*f*) See O 21 r 29

(ff) to stay a suit brought by *A* against *B* in Court Y in a case where substantially the whole cause of action arose at another place and the material witnesses and their books of account are at that place if no injustice is caused to the plaintiff thereby and if the defendant would be subjected to such injustice in defending the suit as would amount to vexation and oppression to which he would not be subjected if the suit were brought in another and accessible Court where substantially the whole cause of action arose (*g*)

(*u*) *Pad alatı* v *Pa L Lal* (1910) 3 Cal 59 6 I C 666

(*x*) *Nanda Kisho e* v *P m Gol m* (191) 40 Cal 9 5 18 I C 707

(*y*) *Debı Bakhsl* v *Habıb Sh h* (1913) 3 All 331 40 I A 151 19 I C 5 6

(*z*) *Chat rbh j H a I n* (19 8) 50 All 33 108 I C 141 ( ) A A 108

(*a*) *P jpa* v *A ade* (198) 6 Bom 148 *I l kath la* v *Vay l I* (1914) Mad L J 1 5 I C 913 L J 361 39 I C 63

(*b*) *Sukhdeo Da* v *Ro Si gh* (191) 2 Pat

(*c*) *Bh gw* v *Ia m Sukh Das* (1917) 39 All 8 36 I C 366

(*d*) *Arum g* v *Ferana juappa* (19 4) 46 Mad L J 348 8 I C 76 (4) A M 489

(*e*) *K lada I asad* v *Sadlu Ch n* (1918) 3 I L J 435 48 I C 10

(*f*) *Srdar* v *Fam Harnam* (1910) Punj Rec no 6 p 233 7 I C 1017

(*g*) *Jethabh* v *Amarch nd* (1923) 5 Bom L R 13 8 I C 85 (4) A B 90

(gg) to reconstruct its records as where they are lost by accident (*h*)

(hh) to stay criminal proceedings started under s 476 of the Criminal Procedure Code against a defendant in a suit pending an appeal filed by the defendant from the decree (*i*)

(ii) to strike off the defence and proceed ex parte where a suit is adjourned on the condition that the defendant should pay the costs of the adjournment within a prescribed period and he fails to do so (*j*)

(jj) to review an order of dismissal of an application under O 9 r 9 (*k*)

(kk) to dismiss in appeal a suit on the ground that it is premature even if the point was not taken in the Court below (*l*)

(ll) to order a refund of stamp duty in an exceptional case (*m*)

(mm) to stay a suit even if it does not come within sec 10 of the Code (*n*)

Prevent abuse of process of Court.—A Court has inherent jurisdiction to stay any suit which is an abuse of the process of the Court (*o*) See notes to O 16 r 1 Whether witness summons may be refu ed. See also the undermentioned case (*p*)

Where the Court is bound to grant an application and has no discretion to refuse it it has no power to dismiss it on so treacherous a ground of decision as an abuse of the process of the Court (*q*)

Appeal —No appeal lies from an order made under this section (*r*) But though no appeal lies the High Court has power under s 107 of the Government of India Act 1915 to correct subordinate Courts if they have wrongly exercised their inherent powers (*s*)

Limitation —It has been held by the High Court of Patna that an application for restitution either under s 144 or s 151 is governed by the Limitation Act Sch I Art 181 (*t*) See note to s 144 Limitation

Amendments of judgments decrees or orders

152 [*New* R S C O 28 r 11 *Cf* S 206] Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties

Amendment of decrees and orders —This section has been taken from O 28 r 11 of the Rules of the Supreme Court

There are only two cases in which the Court can amend or vary a decre or order after it is drawn up and signed namely —

(i) under its inherent powers when the decree or order does not correctly state what the Court actually decided and intended and

(ii) under this section where there has been a clerical or arithmetical mistake or an error arising from an accidental slip or omission.

(*h*) *Marakarulli* v *Verran* (19 3) 46 Mad 679 3 I C 10 0 (23) A M 647

(*i*) *Harnam Si gh* v *Atm* (19 5) 7 Lah L J 73 88 I C 6 6 (25) A L 3 3

(*j*) *East I han Railw y Co* v *Jit M l* (19 5) 47 All 538 86 I C 86 (25) A A 280

(*k*) *Sarat Chand a* v *Biswesna* (19 7) 54 Cal 405 103 I C 69 (7) A C 531 *Su end a Nath* v *Jatindra Nath* (19 3) 3 C W N 811 115 I C 3 7 (7) A C 17

(*l*) *Muhammad* v *Abdullah* (19 7) 2 Luck. 731 101 I C 8 4 (7) A O 455

(*m*) *Chetty Firm* v *Ko I Gye* (19 9) 7 Ran 88 117 I C 58 (9) A R. 158

( ) *A nd Mal* v *Tilak Ram* (19 8) 10 Lah L J 470 113 I C 783 (29) A L 1

(*o*) *H nd tan Assuranc Ltd* v *Rual Mulraj* (1914) 27 Mad L J 645 657 2 I C 455

(*p*) *Shah I lchand* v *Lieut Liston* (1914) 38 Bom 638 5 I C 3 1

(*q*) *Chhat apat S ngh* v *Kh rag S ngh* (191) 44 I A 11 14 44 Cal. 53 540 541 39 I C 789

(*r*) *Sukhdeo Dass* v *R ta Si gh* (191) 2 Pat L J 361 39 I C 763 *Raghunanda* v *Jaduna dan* (1918) 3 Pat L J 53 54 43 I C 959

(*s*) *L ji Pl a* v *Sris Chandra* (1919) 4 Pat. L J 0 4 I C 719

(*t*) *Balmakund* v *Bas ta Kum ri* (19 4) 3 Pat. 371 78 I C 00 (5) A P 1 (F B)

If a decree or order is sought to be amended or varied in any other case it can only be done by a review of judgment under O 47 r 1 or by an appeal under s 96 (u) It is doubtful whether a decree or order can be varied even by consent of parties after it is drawn up and signed (v) see O 20 r 3

Inherent power to amend decrees and orders—Every Court has an inherent power to vary or amend its own decree or order *so as to carry out its own meaning* In so doing it does nothing but exercise a power to correct a mistake of its ministerial officer by whom the decree or order was drawn up (w) it only insists that the decree drawn up in the office of the Court should correctly express the judgment given by the Court (x) It would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister (y) I cannot doubt said Lord Penzance in *Laurie* v *Lees* (z) that under the original powers of the Court independent of any order that is made under the Judicature Act every Court has the power to vary its own orders which are drawn up mechanically in the office of the Court—*to vary them in such a way as to carry out its own meaning* and where language has been used which is doubtful to make it plain. I think *that power is inherent in every Court* In *Hatton* v *Harris* (a) Lord Watson said When an error of that kind has been committed it is always within the competency of the Court if nothing has intervened which would render it inexpedient or inequitable to do so *to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce*

It will be seen from the above that the Court has no power to vary or amend its decree where it is in conformity with the judgment (b) not even if the judgment is erroneous in law (c) though the error be apparent on the face of the judgment (d)

A decree has been defined in s 2 as the *formal expression of an* adjudication which completely determines the rights of the parties with regard to the matters in controversy in a suit O 20 r 6 provides that a decree *shall be* in conformity with the judgment Where a decree is at variance with the judgment the Court has power to set right the decree and to bring it into conformity with the judgment (e)

Illustrations

(1) *A* sues *B* for Rs 5 000 and interest The judgment is for Rs 4 000 without more The decree is drawn up *in accordance with* the judgment *A* then applies to amend the decree by adding an order for payment of *interest* The application must be refused for the decree is not at variance with the judgment If *A* is aggrieved by the decree the proper course for him is to apply for a review of judgment or to appeal from the decree *Hasan* v *Sheo Prasad* (1893) 15 All 121 *Abdul* v *Chunia* (1886) 8 All 377

(2) *A* and *B* enter into an agreement for partition of certain properties *B* fails to convey to *A* the properties of *A* s share *A* sues *B* for specific performance of the agreement and a decree is passed declaring only that *A* is entitled to specific performance of the agreement The usual form is to declare that the agreement ought to

(u) *Lachman* v *Mohan* (1880) All 40 *Lakshmi* v *Batchayya* (19 7) 3 Mad L J 38 103 I C 8 9 (7) A M 20
( ) *Ainsworth* v *Wilding* [1896] 1 Ch 673 6
(w) *Mellor* v *Swire* (1885) 30 C D 3 46
(x) *In re St Nazaire Co* (1879) 12 C D 88 *Preston Banking Co* v *Allsup* [1895] 1 Ch 141
(y) *Mellor* v *Swire* (188) 30 C D 3 47
(z) (1881) App 19 34 35
(a) (189] A C 547 60
(b) *Parmeshri ya* v *Seshagiri ayya* (1889) Mad 364 *Shahab Din* v *Siraj-ud Din* (1913) Punj Rec. no 4 p 185 17 I C 418 *Harihar* v *Maheswar* (19 4) 3 Pat 654 8 I C 813 ( ) A 1 47
( ) *Lakho* v *Salamat* (1898) 20 All 337
(d) *Charles Bright & Co Ltd* v *Sellar* [1904] 1 K B 6.
(e) *Karim Mahomed* v *Rajooma* (1898) 1 Bom 174 *Irappa* v *Bhimappa* (190) 4 Bom L R 909 *Brijratan* v *Jagnarain* (1910) 37 Cal. 649 7 I C 876 *Hamangal Singh* v *Ram Gopal* (1914) 0 Cal. L. J 18 23 I C 419 *Chandra Kumar* v *Sudha* (19 4) 3 Cal W N 8 3 80 I C. 55 (4) A C 805 [partition] *Pydel* v *Chathappan* (1891) 14 Mad 150

be specifically performed and the Court doth order and decree that the same be specifically performed [i e both by *A* and *B*] The decree may be amended so as to put it in the usual form *Karim Mahomed* v *Rajooma* (1888) 12 Bom 174 [In the above case the amendment was necessary for the decree as drawn up did not contain any direction to *A* to convey to *B* the properties of *B*'s share but declared only that *A* was entitled to specific performance]

(3) *A* sues *B* and *C* for Rs 5 000 The judgment awards Rs 5 000 to *A* as prayed (i e as against *B* and *C*) The decree is drawn up so as to render the amount payable by *B* alone The decree may be amended and brought into conformity with the judgment *Chathappan* v *Pydel* (1892) 15 Mad 403 *Pherozsha* v *Sun Mills Ltd* (1898) 22 Bombay 370

Accidental omission —This section enables the Court to correct errors arising from an accidental omission (*f*) Thus where directions as to costs were *inadvertently* omitted the decree was set right by adding the directions (*g*) Similarly where the date from which payments ordered to be made were to run was *inadvertently* omitted the decree was perfected by adding the date (*h*)

Accidental slip —The Court has power under this section to correct accidental slips (*i*) A *bona fide* error as to the amount of interest due to the defendant may be corrected under this section (*j*) And so also an error as to the period for which an injunction is to continue (*k*)

May —In a recent case the High Court of Calcutta said The word may in the section does not make it discretionary with the Court to order the amendment but merely enlarges the power of the Court by providing that such correction may be made *at any time* or in other words the section simply emphasizes that no lapse of time would disentitle the Court to make the correction (*l*) The correct view it is submitted is the one taken by the High Court of Allahabad namely that under this section there is *no right* in any party to have a clerical or arithmetical mistake corrected The matter is left to the discretion of the Court and the discretion has to be exercised in view of the peculiar facts of each case (*m*)

At any time —A decree may be amended under this section *at any time* although the time for appealing from the decree has expired (*n*) There is no limitation for an application to amend the decree (*o*) Under the corresponding English rule an error in a decree was in one case amended after 39 years (*p*) and in another case after 19 years (*q*) In a Bombay case an application was made to the High Court to rectify a decree in the exercise of its inherent powers 10 years after the date of the decree and the application was allowed (*r*) But no amendment should be allowed by the Court either under this section or in the exercise of its inherent powers if it is inexpedient or inequitable to do so as where third parties have acquired rights under the erroneous decree without a knowledge of the circumstances which would tend to show that the

(*f*) *Ram Chand* v *Chhajju Ram* (19 9) 11 Lah L J 37 (29) A L 317

(*g*) *Re I dd* (188) W N 2 1 *Re Roper* (1890) 45 C D 1 6 *Chessum and Sons* v *Gordon* [1901] 1 K B 694

(*h*) *E* v *F* (1903) P 88

(*i*) *H km Singh* v *S rajpal* (19 9) 27 All L J 505 ( ) A A 33

(*j*) *Barker* v *Purvis* (1886) 56 L T 131

(*k*) *Shipwright* v *Clements* (1890) 38 W R (Eng) 46

(*l*) *Chandra K ma* v *Sudhamsu* (19 4) 3 Cal W N 8 3 8 5 80 I C 5 (4) A C 893

(*m*) *Kishori* v *Chhanga* (19 5) 47 All 44 49 8 I C 1030 ( ) A A 18 *Puran Lal* v *Balwant Singh* (19) 23 All L J 518 519 88 I C 306 (5) A A 556

(*n*) *Barker* v *Purvis* (1886) 56 L T 131 *Pydel* v *Chathappa* (1891) 14 Mad 150 [Amendment after Court sale]

(*o*) *Shivapa* v *Shivpanch* (188) 11 Bom 91 *Kalu* v *Latu* (1893) 21 Cal 59 *Jivraj* v *Iragi* (188) 10 Mad 51 *Dabo* v *Kesho* (1887) 9 All 364

(*p*) *Hatton* v *Harris* (189] A C 547 564

(*q*) *Shipwright* v *Clements* (1890) 38 W R (Eng) 46

(*r*) *Karim Mahomed* v *Rajooma* (1888) 1 Bom 1 4 183

decree was erroneous (s) Further laches may in the particular circumstances of a case di entitle a party to relief under this section (t)

Amendment and limitation —An amendment of a merely clerical error does not furnish a fresh starting point of limitation for executing the decree (u)

By which Court amendment could be made —The Court to amend a decree is the Court that pas ed it Where an appeal is preferred from a decree of a Court of first instance the appellate Court may—

(1) di mi s the appeal under O 41 r 11 (1) without issuing any notice to the respondent or it may

(2) confirm reverse or vary the decree of the Court of first instance [O 41 r 32]

In case (1) it has been held by the High Courts of Calcutta Madras Allahabad and Pangoon that it is the appellate Court alone that can amend the decree (v) On the other hand it has been held by the Bombay High Court that it is the Court of the first instance and not the appellate Court that can amend the decree the reason given being that a dismissal under O 41 r 11 leaves the decree of the lower Court untouched (w) See notes to s 36 above

In case (2) the appellate Court alone can amend the decree (x)

The Court which passed the decree has power to amend it even after an appeal is filed it is only when the appellate Court passes a decree which operates to supersede the decree of the trial Court that its power to amend ceases (y)

When an appeal is withdrawn the decree of the lower Court is left intact and that Court alone has power to amend ( )

An arithmetical error in the decree of the lower Court repeated in a confirming decree of the appellate Court may it is submitted be corrected by the appellate Court

Where an application for *revision* of a decree of a Provincial Small Cause Court is rejected by the High Court *in limine* the proper Court to amend the decree is the Small Cau e Court and not the High Court (a)

Revision —A deci ion under this section granting an application for amendment is an order and not a decree The decision may therefore be the subject of revi ion under s 115 but it cannot be the subject of an appeal (b) It has been so held by the High Courts of Calcutta Allahabad and Bombay in cases under the corresponding s 206 of the Code of 188_ A different view has b en taken by the High Court of Madras According to that Court where a decree is amended the aggrieved party has the right to appeal from the decree as amended Hence if no appeal is preferred within the period of limitation he cannot afterwards apply for a revi ion of the order allowing the amendment (c)

( ) *Hatton* v *Harris* [189] A C 547 558 *St wart* v *Rhode* [1900] 1 Ch. 386 394 39 *Pa du a g* v *Sarhar* (19) 7 Bom L R 6 7 89 I C 569 (5) A B 389 *Na ay a* v *Bi jari* (19) 43 Mad L J 5 9 69 I C 9 7 (3) A M 5

(t) *Kl isori* v *Chhanga* (19 5) 47 All 44 49 8 I C 1030 (2) A A 18

( ) See Limitation Act Sch I Art 18 cl 4 and *I mchand* v *J i Mal* (19) 0 All L J 640 63 I C 109 ( ) A A

( ) *Umasundari* v *Bi du* (1897) 4 Cal. 759 *Mun i i* v *Munisa i* (1899) _ Mad 93 *As bib* v *Ahm i Husain* (1908) 30 All 90

(w) *Bapu* v *I aj* (189) 1 Bom 548 *Sara I* v *Ham d* (19 0) 4 R n 34 98 I C 99 ( ) A R 5

(x) *Mul mm d* v *Muh mmad* (1889) 11 All. 67 *G jadl a* v *Kisl a* (191) 39 All. 641 4 I C 93 *Brij Nara n* v *Tejbal* (1910) 3 All 29 3 I A 0 6 I C 669 *Sl vlal* v *Jumaklal* (1894) 18 Bom 4 *I ichurajya gar* v *S sha iyangar* (189) 18 Mad 14 *Chettyir F rm* v *Ko l in Gy* (19 9) 7 Ran 88 117 I C 58 (9) A R 159

(y) *I el n Ragl u th* (19 6) 48 All. 4 9 I C 64 (6) A A 304

( ) *Mst D oki* v *Jwala I asaa* (19 8 50 All. 608 108 I C 564 (8) A.A 6 9

(a) *Khuda I ak h* v *Allah Ditta* (19 0) 1 Lah. 34 58 I C 6 0

(b) *Nal akshya* v *Mafaksha* (1901) 8 Cal. 1 7 *Surta* v *Ganga* (188) 7 All 8 5 *Hasan* v *Sheo Pra ad* (18) 15 All 1 1 *I a Shr I aktuba* v *Ag sangi* (190 31 Bom 44

( ) *I i ranathan* v *F manathan* (1901) 4 Mad 646

Where a case is one of accidental lip within the meaning of this section but the Court which passed the decree refuses to amend it on the ground that the case does not fall under this section the refusal amounts to a failure to exercise a jurisdiction vested in the Court within the meaning of s 115 and the High Court has power to interfere in revision (*d*) Similarly where the lower Court amends a decree in a case in which according to its own view the amendment should be refused stating as a reason for the amendment that it *was bound* under this section to bring the decree into conformity with the judgment the High Court is entitled to interfere in revision under s 115 (c) of the Code (*e*)

Amendment when to be refused—Where the order as drawn up represents the real decision of the Court the Court has no jurisdiction to rehear or alter it (*f*) Even when the order has been obtained by fraud the Court has no jurisdiction to rehear it If such a jurisdiction existed it would be most mischievous (*g*)

Consent decree—Where a decree founded on a compromise does not embody the true terms of the compromise the only remedy is by an independent suit to set aside the decree either on the ground of mistake or fraud or some other ground *ejusdem generis* with it (*h*) See note to s 96 Procedure for setting aside consent decrees

Successive applications for amendment—Res judicata—See notes to s 11 Applications for amendment of decree on p 79 above

Code of 1882 s 206—The third paragraph of s 206 of the Code of 1882 ran as follows —

If the decree is found to be at variance with the judgment or if any clerical or arithmetical error be found in the decree the Court shall of its own motion or on that of any of the parties amend the decree so as to bring it into conformity with the judgment or to correct such error Provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment

The above paragraph enabled the Court to amend its decree in the following two cases namely —

(1) Where the decree was at variance with the judgment and

(2) Where any clerical or arithmetical error was found in the decree

The present section corresponds with the second part of the above paragraph. The first part of the paragraph which empowers the Court to amend its decree so as to bring it into conformity with the judgment has been omitted An application to amend a decree so as to bring it into conformity with the judgment must now be made to the Court in the exercise of its *inherent power* This power has been saved by s 151

Appeal—No appeal lies from an order directing an amendment either under the Code (*i*) or under the Charter (*j*) In a case however where the whole method of calculation adopted by the first Court was challenged in the plaintiff's application which purported to be an application under s 152 and the first Court allowed the amendment it was held that the order allowing the amendment must be regarded as one made under O 47 and that the order was therefore appealable (*k*)

It has been held by the High Court of Madras that though no appeal lies from an *order of amendment* an appeal would lie from the *amended decree* (*l*)

(*d*) *Sahadeo v Deo Dutt* (1915) 37 All. 393 9 I C 50

(*e*) *Pitam Lal v Balwant Singh* (1925) 23 All. L J 519 88 I C 396 (1925) A.A 5 6

(*f*) *Preston Banking Co v William Allsup and Sons* (1895) 1 Ch 141

(*g*) (1895) 1 Ch 141 143 *supra*

(*h*) *Jom Lagan v Ram Burich* (1919) 4 Pat L J 05 50 I C 49

(*i*) *Valnakhya v Muzaffar* (1900) 28 Cal 1 7 *Narayanasami v Natesa* (1897) 16 Mad 4 4 4 5

(*j*) *Muhammad v Ihsan-ullah Khan* (1892) 14 All. 226

(*k*) *Ramji v Gian* (1921) 3 Lah L. J 341 66 I C 997 (1921) A L. 220

(*l*) *Viswanath v Ramanathan* (1901) 4 Mad 646

153 [*New* R S C, O 28 r 12] The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding

General power to amend

R S C O 28 r 12—This section is new It is taken from the Rules of the Supreme Court O 28 r 12 The words in a suit after the word proceeding do not occur in the English rule

Scope of the section—O 6 r 17 is confined to amendments of pleadings and s 152 to correcting errors in judgments decrees or orders The present section confers a *general* power on the Court to amend defects and errors in any proceeding in a suit and to make all necessary amendments for the purpose of determining the real question at issue between the parties to the suit This power is vested in the original as well as the appellate Court (m) In *Australian Steam Navigation Co* v *Smith and Sons* (n) their Lordships of the Privy Council said Their Lordships are strong advocates for amendment whenever it can be done without injustice to the other side and even where they have been put to certain expense and delay yet if they can be compensated for that in any way it seems to their Lordships that an amendment ought to be allowed for the purpose of raising the real question between the parties

Any proceeding in a suit—The following are some of the cases under the corresponding English rule and the present rule —

Answers to interrogatories—Where it was admitted by the defendant a solicitor in answer to interrogatories that his partner had paid into the banking account of the firm money received by the latter for investment the defendant was allowed to *amend* the answer it being shown that the admission had been made by mistake (o) In another case where the defendant charged the plaintiff (his manager) with misconduct and the plaintiff exhibited interrogatories of which the substance was to ask the defendant to specify the acts of misconduct on which he relied it was said by Thesiger L J that if the defendant answered the interrogatories and it was subsequently discovered by him that there were other acts of misconduct on which he could rely there was nothing to prevent his being *allowed to amend* his answers to the interrogatories (p) See as to interrogatories O 11 rr 1 11 below

Particulars—An application to amend particulars if made a reasonable time before the trial will generally be allowed on terms (q) But leave to amend particulars when it is applied for at the trial will as a rule be refused (r)

Notice of motion—A notice of motion in an action for the rescission of an agreement for the sale of land was allowed to be amended at the hearing by asking for the appointment of a receiver (s)

Title of appeal—If an appeal is presented against a person who is dead at the date of presentation the Court may under this section permit the title of the appeal to be amended (t)

(m) *Mukunda Lal* v *Jogesh Chandra* (1916) 1 P L J 393 397 35 I C 330
(n) (1889) 14 App Cas 318 320
(o) *Hollis* v *Burton* [189] 3 Ch 226
(p) *Saunders* v *Jones* (18) C D 435 45
(q) *Yorkshire Provident Co* v *Gilbert* [189] 2 Q B 148
(r) *Moss* v *Malings* (1886) 33 Ch D 603
(s) *Cook* v *Andrews* [1897] 1 Ch 266
(t) *Gopala* v *Lakshmana Rao* (1926) 49 Mad 80 (5) A M 91

154 [S 3, third para] Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement

Saving of present right of appeal

Any present right of appeal —There is a conflict of decisions as to the meaning of the words any *present* right of appeal which occur in this section According to the Chief Court of the Punjab the words any present right of appeal refer to a right which had actually come into existence at the commencement of this Code by virtue of the decree or order sought to be appealed from having been passed before this Code came into force (*u*) According to the Madras High Court those words refer to a right which had become vested in a litigant before this Code came into force (*v*) Thus there are cases in which a second appeal lay under the old Code from certain orders made in execution (the orders being treated as decrees) while no such appeal lies under the present Code According to the Chief Court of the Punjab no second appeal would lie in such a case from the order made in first appeal unless the *latter order* was made while the old Code was in force According to the Madras High Court a second appeal would lie if the *first appeal* from the order made by the Court of first instance was preferred when the old Code was in force though the order made in first appeal was not made until after the new Code came into force (*w*) Similarly there are cases in which an appeal was allowed from certain orders under the old Code from which no appeal is allowed under the present Code According to the Chief Court of the Punjab no appeal would lie from the order in such a case unless the *order* was made when the old Code was in force (*x*) According to the Madras High Court it would seem that an appeal would lie if the *suit* in which the order was made was instituted when the old Code was in force See s 96 sub s (3) and ss 97 and 104 See also notes to s 1

155 [*New*] The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof

Amendment of certain Acts

156 [S 3, *first sentence*] *The enactments mentioned in the Fifth Schedule are hereby repealed to the extent specified in the fourth column thereof*

Repeals

This section and the Fifth Schedule to the Code have been repealed by the Second Repealing and Amending Act 17 of 1914 s 3

157 [S 3, *second sentence*] Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall

Continuance of orders under repealed enactments

(*u*) *G mla Mal v I andutta* (1913) Punj Rec no 1 p 1 15 I C 5
(*v*) *Kal nga v Na simha* (1911) 1 Mad L J 631 9 I C 937
(*w*) (1911) 21 Mad L J 631 9 I C 93 *supra*
(*x*) (1913) Punj Rec no 1 p 1 15 I C 5 *supra*

so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf

158 [S 3 second para] In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed such reference shall so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule

Reference to Code of Civil Procedure and other repealed enactment

THE FIRST SCHEDULE

ORDER I

Parties to Suits

1 [S 26, R S C, O 16, r 1] All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits any common question of law or fact would arise

Who may be joined as plaintiffs

Scope of the Order—This order deals with joinder of parties and to a certain extent with joinder of causes of action (y) O 2 r 3 deals exclusively with joinder of causes of action Rule 4 of this Order is to be read with rule 1

General rules—Before considering the present rule it may be as well to note the general rules relating to the joinder of parties and of causes of action According to the Code the essentials of a suit are—(1) opposing parties (2) a subject in dispute (3) a cause of action and (4) a demand of relief (z) [see O 7 r 1] All these essentials must concur in every suit properly framed Order 1 deals with the joinder of parties Order 2 deals with the frame of suits In framing a suit the following three kinds of misjoinder must be guarded against —

(i) *Misjoinder of plaintiffs*—Where there are more plaintiffs than one the provisions of the present rule apply This rule relates to the joinder of plaintiffs It provides in effect that two or more persons may be joined as plaintiffs in one suit if the right to relief alleged to exist in each plaintiff arises from the *same act or transaction* and there is a *common question of law or of fact* If not they cannot be joined as plaintiffs *in one suit* and they must bring *separate suits* If two or more persons are joined as plaintiff in *one* suit in a case not covered by O 1 r 1 the result is a *misjoinder of plaintiffs* The objection on the ground of misjoinder of plaintiffs should be taken at the earliest possible opportunity if not it will be deemed to have been waived [O 1 r 13] Where such objection is taken and the Court finds that it is well founded the Court should not dismiss the suit [O 1 r 9] but the plaint may be amended [O 6 r 17] by striking out the names of such persons as have been improperly joined as plaintiffs [O 1 r 10 sub r (2)] and the suit may then be proceeded with [O 1 r 9] In other words an objection on the ground of misjoinder of plaintiff is not fatal to the suit (a)

(ii) *Misjoinder of defendants*—Where there are more defendants than one the provisions of rule 3 of this Order apply That rule relates to the joinder of defendants It provides in effect that two or more persons may be joined as defendants in one suit if the right to relief alleged to exist against each of them arises from the *same act or transaction* and there is a *common question of law or of fact* If not they cannot be joined as

(y) *Bullock v London General Omnibus Co* (190) 1 K B 64 ; *Compania Sansinena v Houlder Brothers & Co* [1910] K B 354 365 36 *Harendra v Jirna Chand* s (19_3) 55 Cal 184 109 I C 5 ('29) A C 193

( ) *Krishnappa v Shivappa* (1907) 31 Bom 393 395

( ) *Jacob ... v Ramr ...* (18 9) 4 Cal. 949

defendants in *one suit* and *separate suits* must be brought against them If two or more persons are joined as defendants in one suit in a case not covered by O 1 r 3 the result is a *misjoinder of defendants* As in the case of plaintiffs so in the case of defendants the objection on the ground of misjoinder should be taken at the earliest possible opportunity if not it will be deemed to have been waived (O 1 r 13) Where such objection is taken and the Court finds that it is well founded the Court should not dismiss the suit (O 1 r 9) but the plaint may be amended (O 6 r 17) by striking out the names of such persons as have not been properly joined as defendant [O 1 r 10 sub r (2)] and the suit may then be proceeded with (O 1 r 9) In other words an objection on the ground of misjoinder of defendants is not fatal to the suit

(iii) *Misjoinder of causes of action*—As to the meaning of cause of action see notes to 20 under the head Cause of action A misjoinder of causes of action may be coupled with a misjoinder of plaintiffs or it may be coupled with a misjoinder of defendant There may again be a misjoinder of claim founded on several causes of action Accordingly this subject may be considered under the following three heads —

(a) *Misjoinder of plaintiffs and causes of action*—Where in a suit there are *two or more plaintiffs and two or more causes of action* the plaintiffs should be *jointly interested* in all the causes of action If the plaintiffs are not *jointly interested* in all the causes of action the case is one of *misjoinder of plaintiffs and causes of action* O 2 r 3 read with O 1 r 1 forbids such a misjoinder The objection on the ground of misjoinder of plaintiffs and causes of action should be taken at the earliest possible opportunity (O 2 r) As to the procedure to be followed in the case of misjoinder of plaintiffs and causes of action see notes to O 2 r 3 Procedure in case of misjoinder of plaintiff and causes of action See also s 99 above

(b) *Misjoinder of defendants and causes of action Multifariousness*—Where in a suit there are *two or more defendants* and *two or more causes of action* the suit will be bad for misjoinder of defendants and causes of action if different causes of action are joined against different defendants separately (O 2 r 3 and O 1 r 3) Such a misjoinder is technically called *multifariousness* The objection on the ground of multifariousness should be taken at the earliest possible opportunity (O 2 r 7) As to the procedure to be followed in the case of multifariousness see notes to O 2 r 3 Procedure in case of multifariousness See also s 99 above

(c) *Misjoinder of claims founded on several causes of action*—See O 2 rr 4 5

Non joinder of parties—Where a person who is a necessary party to a suit is not joined as a party to the suit the case is one of *non joinder* A suit should not be dismissed on the ground of non joinder (*b*) The objection for non joinder should be taken before the first hearing (O 1 r 13) and the plaint may be amended by adding the omitted party either as plaintiff or as defendant bearing in mind that no person can be added as a *plaintiff* though he may be added as a defendant without his consent (*b*) See notes to O 1 rr 9 and 13

Relation of this rule to O 2 r 3—O 2 r 3 is to be read subject to the provisions of this rule (*c*)

Changes effected in the law—Before considering O 1 r 1 in detail it should be noted that under the corresponding s 26 of the Code of 1882 all persons could be joined in one suit as plaintiffs provided that the right to relief alleged to exist in each plaintiff arose from the *same cause of action* The present rule is much wider It is a

(*b*) *Mphabala v Kunha a* (1898) 21 Mad 3 3 | (*c*) *Ramendra Nath v Brajendra Nath* (1918) 45 Cal 111 41 I.C 944

production almost verbatim of O 16 r 1 of the English rules It enables several plaintiffs though they have *separate causes of action* to join in *one* suit if—

(1) the right to relief alleged to exist in each plaintiff arises out of the *same act or transaction* and

(2) there is a *common question of law or fact*

The expression act or transaction used in this rule is more comprehensive than the expression cause of action used in the old section for the same act or transaction may give rise to different causes of action as when several persons are injured by the same act of negligence on the part of a railway company Under the old section such persons could not join as plaintiffs in one suit the *causes of action being different* Under the present rule it seems they can as the right to relief arises out of the *same act*

The old section—The corresponding s 26 of the Code of 1882 was as follows —

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist whether jointly severally or in the alternative *in respect of the same cause of action*

The decisions on the meaning of cause of action in the old section were not uniform In some cases it was held that the expression cause of action meant facts constituting the infringement of a right *plus* facts constituting the right itself (*d*) while in others it was held that it referred to facts constituting the *infringement of the right* but not necessarily also those *constituting the right* (*e*)

The following are some of the cases decided under the old section It was held in those cases that the plaintiffs could not all join in one suit and that they should bring separate suits Under the present rule it is submitted the plaintiffs may in each one of the following cases all join in one suit —

1 In *Aldridge* v *Barrow* (*f*) the defendant the editor and proprietor of a newspaper published articles which referred to the Calcutta Police without naming individuals The plaintiffs six of the members of the Calcutta Police Force jointly sued the editor for damages alleging that the articles were directed against them and that they constituted a libel Here the libel was in the same words and in the same documents but of different persons It was held that the plaintiffs could not all be joined in one suit. The Court said It is true that the injury may have been caused by *one act* of the defendant as for instance in the case of a railway accident causing injury to several passengers or as is here alleged, of a collective libel on several individuals The cause of action of the persons injured will none the less remain separate and distinct. There cannot in such cases be said to be *one or the same cause of action*

2 In *Pajjo Kuar* v *Debi Dial* (*g*) several creditors to each of whom separate debts were owing by the same debtor jointly sued the debtor to avoid a deed of gift executed by the debtor in favour of his daughter on the ground that it was made fraudulently with intent to defeat their claims The Court held that they could not join as plaintiffs in one suit on the ground that the causes of action were *separate and distinct* Such a suit could now be properly brought by one or more creditors on behalf of themselves and others under O 1 r 8

(*d*) *Naserwanji* v *Gordon* (1882) 6 Bom 266 275 *Ramasiya* v *Devanayaka* (1885) 8 Mad 361, *Lingammal* v *Venkatammal* (1883) 6 Mad 239 *Sauma Bibi* v *Sheik Muhammad* (1896) 18 All 131 *Rahim Baksh* v *Aman Bibi* (1896) 18 All 219 *Pajjo Kuar* v *Debi Dial* (1896) 18 All 43

(*e*) *Haramoni* v *Hari Char* (1895) Cal 833 839 *Aldridge* v *Barrow* (190) 31 Cal 66 609 *Karapa* v *Iwir pa* (1) 16 Bom 119 *Vajlal* v *Jamdat* (190) 6 Bom 9 6 *Ganapati* v *Ganapat* (1903) 26 Mad 64 643

(*f*) (190) 31 Cal. 66

(*g*) (1896) 18 All 43

3 In *Tarajlal* v *Ramdat* (h) A and B were assaulted by C at an interview in C's house A and B jointly sued C for damages for assault It was held that the assaults on A and that on B constituted *two distinct causes of action* and the suit was therefore bad for misjoinder of plaintiffs The Court said We may go further and say that as the blows on each plaintiff were inflicted *at the same time and place* and must be proved by *the same evidence* it would be more convenient if the law permitted the trial of the two suits together than that it should be necessary to try them separately *But this is a matter for the consideration of the Legislature*

4 In *Ali Serang* v *Beadon* (i) thirteen firemen who were engaged on board a steamer were all arrested under one warrant on a charge of desertion and they were all tried together and sentenced to one month's imprisonment The term of imprisonment expired on 5th May but they were not released on that date Thereupon all the thirteen brought a suit against the superintendent of the jail for damages for wrongful detention It was held that the causes of action were *distinct and separate* and could not be joined in one suit

5 In *Ramanuja* v *Devanayaka* (j) several trustees of a temple were removed from the office of trustees by the District Temple Committee A suit by the trustees for a declaration that their removal was without just cause was held to be bad for misjoinder on the ground that the dismissal of each trustee gave rise to a *distinct* cause of action.

The new Rule —In all the cases cited above it was held that the plaintiffs having *distinct* causes of action they could not join in one suit and that the proper course for them was to bring separate suits The present rule covers such cases and allows the plaintiffs to join in *one* suit (k) Under the present rule several persons may join as plaintiffs in *one* suit though their causes of action be *separate and distinct provided that—*

(1) the right to relief alleged to exist in them arises out of the *same act or transaction or series of acts or transactions and*

(2) the case is of such a character that if such persons brought separate suits any *common question of law or fact* would arise

Both these conditions must be fulfilled to enable two or more persons to join as plaintiffs in one suit The two conditions are *not alternative* (l)

Illustrations

(1) A publishes a series of books under the title of The Oxford and Cambridge Publications so as to induce the belief that the books are publications of the Oxford and Cambridge Universities or either of them The two Universities may join as plaintiffs in one suit to restrain A from using the title because the publication and the belief induced are *common questions of fact* arising out of the *same series of transactions* (m)

(2) A a shareholder in a company sues B C and D the directors to recover damages *on his own behalf* for fraudulently inducing him to purchase shares by declaring an illegal dividend and he joins in the same suit a claim *on behalf of himself and all other shareholders* (see r 8 below) for repayment by the defendants to the company of the amount of the dividend paid out by them A is not entitled to join both causes of action in one suit because the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders *do not arise out of the same transaction or series of transactions* (n)

(h) (190) 6 Bom 59
(i) (18 5) 11 Cal 5 4
(j) (1 5) 8 M 1 361
(k) *H r dra Nath* v *Purna Chandr* (19 8) 55 Cal 184 109 1 C 5 (8) A C 199
(l) *St o d* v *L wson* [189] 2 Q B 44 5 54
(m) *The U ve sities of Oxford a d C mbridge* v *(e 20 Gul & Sons* [1899] 1 Ch 55
( ) *St o d* v *L wson* [1 9] 2 Q B 44

(3) Four persons each of whom separately took debentures on the faith of certain statements in a prospectus issued by the directors of a company joined as co plaintiffs in one suit against the directors claiming damages for misrepresentations contained in the prospectus *Held* that as the several causes of action arose out of the *same transaction* and the case would involve *common questions of fact* the suit was properly framed (*o*)

(4) In a suit instituted by *A* *B* and *C* jointly for an injunction against *D* *E* and *F* it is alleged that all three defendants as officers of several associations of workmen conspired to prevent all persons not belonging to the associations from obtaining employment in place of the members of the associations To constitute the overt acts alleged to have been committed in furtherance of the conspiracy it is averred that *D* *F* and *F* caused *A* *B* and *C* to be molested that *E* used threatening language to *A* and that *F* assaulted *C* It is proved that *D* was not a party to the conspiracy As the claim arises out of the *same series of transactions* and involves the *common question of fact and law* whether the overt acts were committed in furtherance of the conspiracy *A* *B* and *C* may join in the suit notwithstanding that an injunction is granted against *E* and *F* only (*p*) See r 4 (a) below

The illustrations given above are all English cases decided under the new English rule 1 of Order 16 That rule came into operation on the 26th of October 1896 The present rule is in the main a reproduction of the English rule The old English rule corresponded with s 26 of the Code of 1882 except that the words in respect of the same cause of action did not occur in that rule But though those words did not occur in that rule it was held that two or more persons could not join as plaintiffs in *one* suit unless the *cause of action was the same* Thus in *Smurthwaite* v *Hannay* (*q*) it was held by the House of Lords that several shippers of different shipments of cotton on the same ship for the same voyage could not jointly sue the shipowner for damages for short delivery the causes of action being *distinct* and *separate*. For the same reason it was held that persons injured by the same act of negligence could not join in one action as plaintiffs for damages against the wrong doer (*r*) But since the test under the new English rule as well as the present Indian rule is no longer the identity of the *cause of action* but the identity of the *act or transaction* such a joinder of plaintiffs would now be perfectly legitimate both in England and India (*s*) In *Thomas* v *Moore* (*t*) Pickford L J said Whatever the law may have been at the time when *Smurthwaite* v *Hannay* was decided joinder of parties and joinder of causes of action are discretionary in this sense that if they are joined, there is no absolute right to have them struck out but it is discretionary in the Court to do so if it thinks right

Plaintiffs having different interests—Under the old section there was a conflict of decisions as to whether where the plaintiffs were entitled to *different interests* in a property they could join in one suit to recover possession of the property from a third party if the *ground* on which the relief was claimed was *common* to all the plaintiffs According to the Allahabad decisions they could not (*u*) according to the Madras and Calcutta decisions they could (*v*) Under the present rule there is no doubt that such persons may be joined in one suit as plaintiffs

(*o*) *Drincqbier* v *Wood* [1899] 1 Ch 393 and *re Frankenburg* v *Great Horseless Carriage Co* [1900] 1 Q B 504

(*p*) *Walters* v *Green* [1899] 2 Ch 696

(*q*) [1894] A C 494

(*r*) *[illegible] & O Steam Navigation Co* v *Tu[illegible] A[illegible]* [1895] A C 661 *Carter* v *Rigby* [1896] 2 Q B 113 (action by representatives of fifty miners drowned by the flooding of a mine)

(*s*) *M[illegible] & Co* v *Knight Steamship Co* [1910] 2 K B 1021 103

(*t*) [1918] 1 K B 555 565 *Pay[illegible]* v *British Time Recorder Co* [1921] 2 K B 1 14 15

(*u*) *Sul[illegible] Bibi* v *Sheik Muhammad* (1896) 18 All 131 *[illegible] Bakhsh* v *Am[illegible]* (1896) 18 All 219

(*v*) *Muthu[illegible]* v *Chockalingam* (1896) 19 Mad 335 *S[illegible] Jha* v *Banema Jha* (190[illegible]) 33 Cal 30

Illustration

A succeeds to *B* s estate by inheritance and assigns a portion thereof to *C* *D* is in possession of the estate and disputes *A* s right of succession to it *A* and *C* may under *the present rule jointly sue D for recovery of possession of the portions of the estate to* which they are entitled as their claims in respect thereof are based on a *common ground* It doe not matter that *A* claims by right of *inheritance* and *C* under an *assignment* from *A* Both the conditions required by the rule are present in the case

Further having regard to the comprehensive language of this rule plaintiffs may sue in a double capacity if the conditions prescribed by this rule are complied with Thus where plaintiffs were trustees of a house part of which was let out by them and the rest occupied by them as tenants and they sued both as trustees and tenants for an injunction to restrain the defendant from committing a nuisance it was held that there was no objection to their suing as trustees to protect the reversion and as tenants to enjoy the property free from the nuisance (*w*) See notes below Jointly

Any right to relief —The words any right to relief are wider than the words *the* right to any relief which occurred in the old section (*x*)

Severally —Where a right to relief in respect of the same act or transaction is alleged to exist in two or more persons *severally* they may join as plaintiffs in one suit or they may at their option bring separate suits The rule does not necessitate one suit A Hindu priest rai es a masonry structure upon a certain platform round a sacred tree on which *every* member of the community has an *individual* right to perform religious rite Here every member of the community has *individually* a cause of action and any one member may therefore sue the priest for the removal of the structure But it is not neces ary that all the members should join as plaintiffs in one suit They *may* so join if they choose but the law does not say that they *should* all so join (*y*) The same rule applies when two or more persons are entitled to the same relief *in the alternative* see notes below under the head in the alternative The rule however is different when two or more persons are *jointly* entitled to the same relief in respect of a transaction

Jointly —Where two or more persons are *jointly* entitled to the ame relief in respect of a transaction they must all join as plaintiffs in one suit Thus if *A* *B* and *C* are *joint owners* of a property they must all be joined as plaintiffs in a suit to recover the property (*z*) So in a suit to recover joint family property all the members of the joint family mu t as a general rule be joined as plaintiffs (*a*) In a suit to recover trust property all the trustees must join as plaintiffs (*b*) In a suit to recover the estate of a *deceased* person *all the executors who have proved the will of the deceased must be* joined as plaintiffs (*c*) If any one of them does not consent to join as plaintiff he may be joined as a defendant [r 10 sub r (2)] The proper course is first to a k him to join as plaintiff and if he refuses to join him as defendant But the suit should not be dismi sed merely because he is joined as defendant without being first called upon to join as plaintiff (*d*)

A Hindu dies leaving a widow an adopted son and a separate brother A dispute ari es between the widow and the adopted son on the one hand and the brother on the other as regards certain lands The widow and the adopted son allege that the lands form part of the estate of the deceased The brother, on the other hand, alleges that the

(*w*) *I Bhi a j v Pe ojsh w* (1916) 40 Bom 401 408 33 I C 19

(*x*) Se *Han ay & C v S rthwa te* (1893) 2 Q B 41 1 *seo t Gort v I w ey* (18 6) 1 Q B D 6 5 63

(*y*) *P jul I v B l Hal* (189) 24 Cal 38

( ) *K ttu he v I llot l* (1881) 3 M 1 234

( ) *Collector of Mo ghyr v Hu da N a* (18 0) 5 Cal 4 5

(*b*) *Sh ga v S bbayy* (1922) 4 Mad L J 133 0 I C 645 ( ) A M 31

( ) *Moh narelu 4 nam lai* (1923) 44 Mad L J 49 2 I C 63 (1923) A M 33

(*d*) *Py ri v Kedarnath* (1 99) 6 C L 409 *I ran jh v Nawal* (190) 24 All 226 *bulli Mal v Jh bba* (19) 7 Lah L J 0 9 I C 69 (1925) A L 504

lands belong to him *If the window does not dispute the adoption* a suit may be brought by her and the adopted son as *co plaintiffs* against the brother to recover the property from him for the plaintiffs are *jointly* interested in disproving the defendant s title (*e*) But what *if the adoption is not admitted by the widow* and she asks the Court to decide the question of adoption *as between her and the adopted son* and prays that if the adoption is proved the property may be delivered to the adopted son *or* if not proved to herself? In such a case it has been held by the High Court of Madras that a suit by the widow and the adopted son as *co plaintiffs* to recover the property from the brother is defective on the ground of *misjoinder of plaintiffs* for the plaintiffs having *antagonistic claims* it cannot be said that the right to relief exists *jointly* in them (*f*)

In the alternative —If in the case put above the adoption is disputed not by the widow but by the brother a suit may be brought by the widow and the adopted son as *co plaintiffs* against the brother claiming *in the alternative* to recover the property for the widow if the adoption is not valid *or* for the adopted son if the adoption is valid (*g*) Here there is no misjoinder of plaintiffs for the validity of the adoption is not disputed by the *co plaintiff* as in the preceding case but by the *defendant* See O 1 r 4 (a) below

Plaintiff transferred to category of defendants —See notes to O 1 r 10 under the same head

Appeal —See notes to O 1 r 3 Appeal

Power of Court to order separate trials

2 [*New* R S C, O 16, r 1] Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient

This rule refers to a suit brought by several plaintiffs in respect of the same act or transaction but the causes of action are o distinct that it is not convenient to di po e of them at one trial (*h*) The Court may put the plaintiffs to their election as to which of them will proceed with the suit or may order separate trials or may make such other order as may be expedient A suit by several creditors joining as co plaintiffs in a creditor s action or a suit by several market gardeners claiming certain preferential rights as to stands in the market is not a suit where the joinder could embarrass or delay the trial (*i*) Where plaintiff sued for possession of several properties some in his personal capacity and some as shebait of an idol the Calcutta High Court ordered the plaint to be treated as comprising two suits (*j*)

Who may be joined as defendants

3 [S 28, *Cf* R S C O 16 r 4] All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of

(*e*) *Fakı apa* v *P ıdrapa* (189) 16 Bom 119 *Ningawa* v *R m pa* (1904) 28 Bom 94

(*f*) *Lı gammal* v *Venkatammal* (1883) 6 Mad 233 *Ba j Nath* v *Chhowa o* (1904) 26 All 218

(*g*) ee *I napat* v *Pınapatı* (1903) 26 Mad 64 *Haramonı Dassı* v *Harı Churn* (189) 2 Cal 833 *Lakshmakka* v *Nagı* (190) 28 Mad 500 *Pukman D rı* *Sl b Deı* (1916) Punj Rec no 10 p 34 I C 641 *Velappa* v *Ch dambara* (19) 43 Mad L J 77 0 I C 684 (2) A M 174

(*h*) See for an example *Arnison* v *Smith* (1889) 41 C D 98 10 *per* Lindley L J *Arni on* v *Sm th* (1889) 41 C D 348

(*i*) *B dford* v *Ell s* (1901) A C 1 1

(*j*) *H end a* v *Pur a* (19 8) 55 Cal 164 109 I C 755 (8) A C 199

acts or transactions is alleged to exist, whether jointly, severally O
or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise

Misjoinder of defendants—This rule is the converse of rule 1 It deals with joinder of defendants See notes to O 1 r 1 Misjoinder of defendants Rule 4 of this Order is to be read with this rule

Relation of this rule to O 2 r 3—O 2 r 3 is to be read subject to the provisions of this rule (k)

Jurisdiction—This rule contains a provision as to joinder of parties It assumes the existence of a suit in a proper forum the Court having jurisdiction to try the suit If the Court has such jurisdiction then this rule may come into play Hence if in a suit brought against two defendants A and B the Court has jurisdiction against A but none against B this rule does not confer jurisdiction upon the Court to try the *suit against B also merely because the conditions of this rule are satisfied (l)*

The old section—The corresponding s 28 of the Code of 1882 ran as follows —

All persons may be joined as defendants against whom *the right to any relief* is alleged to exist whether jointly severally or in the alternative in respect of *the same matter*

In some cases under that section it was said that the expression same matter was equivalent to same cause of action in others that it was equivalent to same act or transaction

New Rule—Under the present rule all persons may be joined as defendants against whom *any* right to relief in respect of the *same act or transaction* is alleged to exist where if separate suits were brought against such persons any *common question of law or fact* would arise A plaintiff is entitled under this rule to join several defendants in respect of several and distinct causes of action subject to the discretion of the Court to strike out one or more of the defendants on the analogy of O 1 r 2 if it thinks it right to do so (m) Whatever the law may have been at the time when *Smurthwaite* v *Hannay* (n) was decided joinder of parties and joinders of causes of action are discretionary in this sense that if they are joined there is no absolute right to have them struck out but it is discretionary in the Court to do so if it thinks right (o) As a general rule where claims against different parties involve or may involve a common question of fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters be disposed of at the same time the Court will allow the joinder of defendants subject to its discretion as to how the action should be tried (p) [see ill (3) below] See notes to O 2 r 3 Joinder of defendants and causes of action

Illustrations

1 *A* riding in an omnibus belonging to *B* is injured by a collision between the omnibus and a cart belonging to *C* *A* sues *B* and *C* for damages for personal injury charging the defendants *jointly* with joint negligence and alternatively charging *separate* negligence against each defendant The suit is not bad for misjoinder of defendants because the injury to the plaintiff arose from the *same transaction or series of transactions*

(k) *P me dra N th v B j ra N th* (1918) 45 Cal 111 41 I C 944

(l) *I gil I North West Ry Co v Sada m* (19) 49 Cal 69 0 I C 9 ( ) A C 00

(m) *I yne v Ir h T e Rec d C* [19 1] 2 K B 1 *Harendra Nath v Purna Chand* (19 5) 55 C 1 164 109 I C 7 (5) A C 193

( ) [1894] A C 494

(o) *Thomas v Moore* [1918] 1 K B 555 63

(p) [19 1] 2 K B 1 *supra*

and the case involves *common que tions of fact* (q) It is otherwise if the injury arises from *distinct* acts as in the next illustration

2 A sued *B* for damage done to his house by *B* s negligence *B* denied negligence and alleged that the damage was caused by the negligence of *C* Thereupon *A* applied for an order to join *C* as defendant *Held* that the order could not be made Collins L J said When we analyse this ca e we find we are dealing with it upon the assumption that the *two acts* which were done the one by [*B*] and the other by [*C*] are entirely di connected torts each of them a separate injuria—if it be injuria at all—*quite distinct one from the other* The one was done recently by [*B*] by excavation and the other at a much earlier date by [C a water company] by allowing water from its main to weaken the soil in front of the plaintiff s property *Thompson* v *London County Council* (r) *Sadler* v *Great Western Railway Company* (s) Referring to these two cases, Scrutton L J said in *Payne* v *British Time Recorder Co* (t) that neither of them would now be decided in the way they were In that case *P* entered into a contract with B Co to supply them with certain printed cards which should conform to certain specimens supplied to him by them In order to carry out that contract *P* entered into a contract with W Co to supply him with the cards and paid for them The cards w re duly sent to B Co but B Co refu ed to acc pt them on the ground that they did not conform to the specimens *P* sued B Co and W Co claiming as against B Co the price of the goods sold and in the alternatives as against W Co damages for breach of contract in not supplying the cards in accordance with the sp cimens It was held that as there was a common question of fact to be tried nam ly whether the cards were in accordance with the specimens supplied the Court would in the exercise of it discretion allow the two defendants to be joined in one action

3 *M* mortgages certain property to X After X s death *A* claiming to be the adopted son of *X* sues *M* on the mortgage and a consent decree is pa sed in the suit Sub equently *B* alleging that she is the sister and heir of X sues *A* and *M* (1) for a declaration that the adoption of *A* was not validly made and (2) that the consent decree (to which she was not a party) is not binding on her *Held* by the High Court of Bombay that the suit is bad for mi joinder (u) This decision it is submitted, is wrong and it has been dis ented from by the Calcutta High Court (v)

4 The mere fact that the relief claimed against the several defendants *differs in detail* is no ground for objection that the suit is bad for misjoinder of defendants provided that the suit against the defendants is in respect of the *same act or transaction* *A* applies for shares in a Company on the faith of a prospectus The shares are allotted to him and he pays up Rs 5 000 thereon. *A* then sues the Company and the directors alleging that the prospectus was false and calculated to mislead claiming as against the Company cancellation of the allotment to him of his shares and the return of Rs 5 000 with interest and as against the directors Rs 5 000 by way of damages Here the relief claimed against the Company is *re cission and repayment of the purchase money with interest* and that claimed against the directors is *damages* The fact that the *relief* claimed against the two sets of defendants *differs in detail* does not render the suit bad for misjoinder of defendants for the suit is in resp ct of *one transaction* namely the issue of a false and fraudulent prospectus In substance the shareholder has *one grievance* call it a cause of action or what you like and in substance he has *one complaint* and all the persons he sues have according to him been guilty of conduct which gives

(q) *Bullock* v *London General Om bus Co* [1907] 1 K B 64 *Franke bu g* v *G e t Hor ele s Carri ge Co* [1900] 1 Q B 504

( ) [1889] 1 Q B 840

(s) [189] 2 Q B 688 affirmed [1896] A C 4 0 (wh re two defendants had *independently* though simultaneously obstructed the access to the plaintiff s house)

(t) [19°1] K B 1 15

(u) *Um bai* v *Bhau Balrant* (1910) 34 Bom 358 3 I C 165

(v) *Ramendra Nath* v *Brajendra Nath* (1918) 45 Cal 111 134 13 41 I C 944

him a right to relief in respect of *that one thing* which they have done namely the issuing of a prospectus The remedy is different as against the several defendants *but not so much in substance as in form* (w) See r 5 below

5 A is an exporter of frozen meat *B* is the owner of a line of steamers By a contract between *A* and *B* *B* agrees to carry from Argentine to Europe frozen meat in steamers belonging to him or in other suitable steamers It is subsequently agreed that frozen meat should be shipped by *A* on a steamer called the *Devon* procured by *B* and belonging to *C* Meat is accordingly shipped on the *Devon* and the master of the *Devon* signs a bill of lading in respect of it and hands it to *A* *A* sues *B* and *C* in respect of damage to the meat alleged to have been caused by the unseaworthiness of the *Devon* claiming against *B* on the terms of the before mentioned *contract* and against *C* upon the *bill of lading* The suit is not bad for misjoinder of defendants (x)

6 *A* sues *B* *C* *D* *E* and *F* for the recovery of certain documents of title and the goods covered thereby and in the alternative for damages It is alleged in the plaint that the goods belonged to *A* that *B* obtained from *A* the documents of title relating thereto by fraud and made them over to *C* that *C* knowing that *B* had no title either to the documents or to the goods wrongfully dealt with them and sold the goods to *D* and *E* that *D* and *F* wrongfully claimed to retain the goods and the documents of title and, lastly that one of the documents of title namely a railway receipt was pledged by *B* to *F* though the goods covered by it were in the possession of *D* The suit is not bad for misjoinder of defendants and causes of action (y) The foundation of the case on which the rest of it depends is the alleged fraud of *B* If such fraud is proved the question is did the defendants who all claim under *B* obtain any title ? If the plaintiff fails to prove fraud on the part of *B* the case fails against all the defendants If he proves fraud it may be that the defendants may have a different answer by way of defence but that does not make the case any the less one of a common question of law and fact *The same act or transaction* which concerns all the parties is the alleged fraud of *B* and this involves *a common question of law or fact* All defendants have derived title from a person who is alleged to have obtained the goods by means of fraud By reason of this the possession of all is alleged to be wrongful should it however be convenient the Court may [*Umabai* v *Vithal* ( )] direct the successive trial of the issues separately affecting different defendants The question of the alleged fraud of *B* touching all the defendants may be tried first If it fails there is an end of the case (a).

No misjoinder where some reliefs merely ancillary—Where the relief claimed against some of the defendants is *merely ancillary* to the relief claimed against others the suit *is not bad for misjoinder* provided the suit is not in respect of [illegible] causes of action *A* and *B* are co sharers of certain lands in the occupation of *C* and *D* *A* is entitled to two thirds of the lands and *B* to one third *A* sues *B* *C* and *D* [illegible] as against *C* and *D* that they may be *ejected* from his *share* of the lands and as [illegible] that the lands may if necessary be *partitioned* between him and *B* The suit is [illegible] for misjoinder for though the relief claimed as against *C* and *D* is for possession [illegible] claimed as against *B* is for partition the latter relief is auxiliary to the [illegible] which is for possession The inclusion of *B* in this suit is merely as that of a [illegible] properly a party to the proceeding in the circumstances of the case [illegible] litigant against whom a separate claim having no necessary connection [illegible] ment of *C* and *D* is made *B* in fact is a necessary party to the suit [illegible] division between *A* and *B* is essential to the ejectment of *C* and *D* (b). [illegible]

(w) *Frankenburg* v *Great Horseless Carriage Co* [1900] 1 Q B 504
(x) *Compania Sansinena* v *Houlder Brothers & Co* [1910] K B 354
(y) *Jamendra Nath* v *Brajendra Nath* (1918) 45 Cal 111 41 I C 944
(z) (1909) 33 Bom [illegible]
(a) (1918) 45 Cal 111, [illegible] supra
(b) [illegible] Mad [illegible]

Ship —A ship is a person within the meaning of this rule so that a suit may be instituted against a ship as a defendant (c)

Any right to relief —The words any right to relief are wider than the words *the* right to any relief which occurred in the old section (d)

Jointly —(1) *B* and *C* simultaneously assault *A* in pursuance of a *conspiracy* *A* may sue *B* and *C* in one suit for damages see *Varajlal* v *Ramdat* (1902) 26 Bom 259 264 *Cf* *O Keefe* v *Walsh* [1903] 2 I R 681

(2) *A* obtains a lease of certain lands from *B* (landlord) and enters into possession of the lands *B* then lets the lands in separate portions to *C* *D* and *E* Subsequently *B* *C* *D* and *E* forcibly dispos e s *A* of the land *A* may sue *B* *C* *D* and *E* in one suit for ejectment The plaintiff being entitled to claim possession of the land *as a whole* the mere fact that *C* *D* and *E* hold *specific and distinct* portions of the land under *different* demises from *B* does not make the suit bad for misjoinder of defendants *Nundo* v *Banomali* (1902) 29 Cal 871 *Raghunath* v *Sarosh* (1899) 23 Bom 266

(3) *Walters* v *Green* [1899] 2 Ch 696 given as ill (4) in the notes to O 1 r 1 under the head The new Rule is al o an illustration under this head

Joint wrong doers—Joint tort feasors may be sued jointly or severally Thus where more per ons than one are concerned in the commission of a wrong the person wronged has his remedy against all or any one or more of them at his option But if the person wronged elects to sue only one of several joint tort feasors he cannot after wards bring a suit against the rest even though the judgment may remain unsatisfied (e)

Severally —(1) Certain property held by *A* is sold under the Madras Rent Recovery Act in separate lots for arrears of rent and purchased by *B* *C* and *D* respectively *A* sues *B* *C* and *D* to set aside the sale on the ground that proper notic of sale was not given The suit is not bad for misjoinder of defendants merely because the property was sold to *different purchasers* The proceeding under which the various items [of the property] were sold was *one* and the *ground* upon which the validity of the *sale was impugned is the same in each case* (*f*) To use the words of the present rule the right to relief claimed is in respect of *the same act or series of acts* and there is a *common question of fact and law*

(2) A suit is brought by a reversionary heir on the death of a Hindu widow to recover from *A* *B* and *C* three separate properties sold by the widow to *A* *B* and *C* respectively by three separate deeds of sale on the ground that the sales were made without legal necessity According to the Madras decision the suit is not bad for mis joinder (*g*) according to the Bombay and Allahabad decisions it is (*h*) These were decisions under the old section The question under the present rule would be whether if separate suits were brought against *A* *B* and *C* any *common question* of law or fact would ari e In a recent case under the old Code similar to the one above their Lord ships of the Privy Council said Their Lordships think it is at least very doubtful whether upon the strictest construction to be placed upon the Procedure Code it can properly be said that there was any misjoinder in this case (*i*) In a suit brought by a reversioner claiming a third share of the estate against another reversioner who was in possession of some of the property and against three other persons two of whom were

( ) *The Bombay Persia Steam Company* v *Shephard* (1888) 12 Bom 237

(*d*) See *Hanny & Co* v *Smurthwaite* [1893] Q B 412 *Viscount Gort* v *Rowney* (1886) 17 Q B D 625 63 *Universities of Oxford and Cambridge* v *George Gill and Sons* [1899] 1 Ch 5

( ) *Brinsmead* v *Harrison* (18 2) L R 7 C P 547 *P hmubhoy* v *T rne* (1890) 14 Bom 408

(*f*) *Doraisamy* v *Muthusamy* (1904) 7 Mad 94

(*g*) *Vasudeva* v *Kuleadi* (1874) 7 M H C 290 *Mahomed* v *Krish a* (1888) 11 Mad 106 *Govindraja* v *Alagappa* (19 6) 49 Mad 836 97 I C 1 (6) A M 911

(*h*) *Karhar* v *Bai Rathore* (1883) 7 Bom 289 *Ganeshi* v *Khai at* (1894) 16 All 279

(*i*) *Lala R p* *N an* v *Gopal Devi* (1909) 36 Cal 780 at p 98 36 I A 103 3 I C 38

purchasers and one a mortgagee from the widow the Allahabad High Court said that under the new Code in any event there was no misjoinder of defendants (j)

(3) In a suit for partition of joint family property by a minor against his father the Madras High Court held that vendees and mortgagees and others who had obtained decree against the father which were said to be collusive and fraudulent were proper parties (k)

In the alternative —(1) A executes a lease of his land to B for a period of two year At the end of the first year A sells the land to C C demands rent for the second year from B B alleges payment of the whole rent for two years to A in advance C may sue A and B praying for a decree against A if it be found that B paid the rent to A as alleged or in the alternative against B if it be found that B did not pay the rent to A *Madan Mohan* v *Holloway* (1886) 12 Cal 555 *Vouji* v *Kuterji* (1907) 31 Bom 516

(2) A purchases certain land from B and enters into possession Subsequently he is dispossessed by C who claims to be the owner of the land A may sue B and C praying for a decree against B for a refund of the purchase money if it is found that C is the owner or a decree in the alternative against C for possession if it is found that C is not the owner *Serajul Huq* v *Abdul Rahaman* (1902) 29 Cal 257

(3) A alleging that his agent B lent Rs 1 000 to C and that C had denied receipt of the money from B sues B and C praying for a decree against B if it is found that the amount was not paid to C or in the alternative against C if it is found that the amount was paid to him The suit is properly framed for the transaction in respect of which the relief is claimed is the same *Meyappa* v *Periannan* (1906) 29 Mad 50 *Arnnabhella* v *Venkataswami* (1884) 7 Mad 123

(4) A mortgages his property to B B assigns the mortgage to C who gives notice of the assignment to A and demands payment from A of the amount secured by the mortgage A says he paid Rs 200 part of the mortgage debt to B before the assignment of the mortgage and that he is not therefore liable for more than the balance B denies the alleged payment C sues A and B praying for a mortgage decree in the first instance against A for the whole of the mortgage debt if the Rs 200 has not been paid and *in the alternative* if the Rs 200 have been paid for a mortgage decree against A for the amount of the mortgage debt less the Rs 200 and for a decree against B for Rs 200 by way of damages The suit is not bad for misjoinder of defendants for the right to the relief claimed is in respect of the *same transaction* *Aiyathurai* v *Muhamad Meera* (1908) 31 Mad 252 *Kotturi* v *Tallapragadha* (1910) 35 Mad 39 8 I C 1057 See notes above New Rule 3 ill (4)

Costs where relief is claimed against defendants in the alternative—Where a suit is brought by A against B and C in the alternative and a decree is passed against B with costs but the suit as against C is dismissed the Court has jurisdiction in a proper case to order B (the unsuccessful defendant) to pay in addition to the costs payable by him to A (the plaintiff) the costs of C (the successful defendant) The rule has thus been stated by Vaughan Williams L J The proper way is—do not join any defendant unreasonably if the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants and who has succeeded in defending himself should be borne by the man who is to blame (l) In *Child* v *Stenning* (m)

(j) *Bal Krishna Das* v *Hira Lal* (1914) 36 All 406 24 I C 9

(k) *Shanmuka* v *Arunachelam* (19) 45 Mad 194 69 I C 961 ( ) A M 33

(l) *Besterman* v *British Motor Cab Co Ltd* [1914] 3 K B 181 187 *Bullock* v *The London General Omnibus Co* [1907] 1 K B 264 *Sanderson* v *Blyth Theatre Co* [1903] 2 K B 533 *Kondiba* v *Maderjan* (1926) 30 Bom L R 1 I C 141 (2) A B 91

(m) (1879) 11 Ch. D 82

Jessel M R dealing with a similar question said It appears to me on principle that he who was the person who caused the litigation or whose error or representation caused it ought to be the person to pay the costs of it

A representing that he is *B* s agent enters into a contract with *C* on *B* s behalf *C* demands performance of the contract from *B* *B* denies that he employed *A* as his agent and refuses to perform the contract *C* sues *A* and *B* for damages and claims relief against them in the alternative The Court finds that *A* untruly represented himself to be *B* s agent A decree is passed against *A* for damages but the suit against *B* is dismissed with costs If the Court is of opinion that *C* reasonably (*n*) took proceedings against *B* the Court may direct the cost payable by *C* to *B* to be included in the damages payable by *A* to *C* (*o*)

Appeal —An appeal lies under cl 15 of the Letters Patent from an order refusing to allow the plaintiff to proceed in one suit against several defendants on the ground of misjoinder and requiring the plaintiff to elect against which of the defendants he will proceed Such an order is a judgment within the meaning of cl 15 for it is in substance a decision that the suit does not lie as framed with the result that if the plaintiff insists the suit must be dismissed (*p*)

Court may give judgment for or against one or more of joint parties

4 [Ss 26, 28] Judgment may be given without any amendment—

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to ,

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities

Cl (a) of this rule is to be read with r 1 above and cl (b) with r 3 above (*q*)

Defendant need not be interested in all the relief claimed

5 [*New* R S C O 16, r 5] It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him

This rule is to be read with r 3 above It provides in effect that where a suit is brought against several defendants the fact that every defendant is not interested in *all* the relief claimed in the suit does not imply misjoinder of defendants See notes to r 3 above

Joinder of parties liable on same contract

6 [S 29, R S C, O 16, r 6] The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes

( ) See *Pow* v *Davis* (1861) 1 B & S 2 0 121 R R 530

(*o*) *Speld g* v *Nerell* (1869) L R 4 C P 41 *H ghe G eame* (1864) 33 L. J Q B 41 See Indian Contract Act 1872 s 235

(*p*) *Ramendra Nath* v *Brajendra Nath* (1918) 45 Cal 111 41 I C 044

(*q*) See *Harendra Nath* v *Purna Chandra* (19_8) 55 Cal 164 109 I C 155 (8) A C 199

Several liability on a contract—This rule is confined to suits on *contracts* The liability on a contract may be either (1) several or (2) joint and several or (3) joint A and B *each for himself* agrees to pay Rs 5 000 to C Here A and B are *severally* liable on the contract C may therefore bring one suit against A and B or he may bring a separate suit against A and a separate suit against B These suits may be brought simultaneously or they may be brought successively one after the other But if the suit is brought against A and a decree is obtained against him and the decree *is satisfied* C cannot subsequently sue B on the contract But if the decree remains unsatisfied C is not precluded from suing B

Joint and several liability on a contract—The legal consequences of a *joint and several* liability on a contract are the same as those of *several* liability Thus if A and B pass a bond to C for Rs 5 000 and the bond provides that A and B shall *jointly and severally* pay the amount to C C may sue A and B jointly or he may sue them separately as in the case where the liability is *several*

Joint liability on a contract—The present rule does not provide for the case of a *joint* liability arising on a contract or negotiable instrument The reason is that so far as liability on a contract is concerned s 43 of the Indian Contract Act 1872 makes all joint contracts joint and several It allows a promisee to sue one or more of several joint promisors as he chooses and excludes the right of a joint promisor to be sued along with his co promisors (r) A partnership firm consisting of two persons A and B purchases from C goods worth Rs 5 000 The liability of partners is *joint* and A and B are therefore *jointly* liable to pay the price to C But under s 43 of the Contract Act C may sue either A or B at his option It is not incumbent upon C to join both A and B defendants If C sues A alone and a decree is passed against A he cannot according to English law afterwards sue B even *though the decree against A remain unsatisfied* The reason is that there is in the case of a joint contract a *single* cause of action which can only be sued on once The same view has been taken by the High Courts of Calcutta Madras and Bombay On the other hand, it has been held by the High Court of Allahabad that the effect of s 43 of the Indian Contract Act 1872 is to make all *joint* contracts *joint and several* Therefore where C obtained a judgment against A upon a *joint* bond executed by A and B and afterwards as the judgment was not satisfied sued B for the same money the Allahabad Court held that the suit against B was not barred. See Pollock and Mulla s Indian Contract Act notes to s 43 Effect of decree against some only of joint promisors

It may be added here that if in the case put above C sues A alone A may apply under O 1 r 10 (2) to have B joined as a defendant and the Court may make such order as it thinks proper In England it has been held that in an action on a joint con tract against one only of the joint contractors the Court has jurisdiction without obtain ing the consent of the plaintiff to make an order requiring the plaintiff to add the other joint contractor as a co defendant and that where the defendant has set up a reason able case of joint contract he has in the absence of special circumstances negativing it a *prima facie* right to an order requiring the plaintiff to add the other contractor as co defendant (s)

Parties to bills of exchange—A draws a bill of exchange upon B payable to C or order The bill is accepted by B C then endorses the bill to D D endorses it to E and E to F If the bill while in the hands of F is dishonoured, F may at his option sue A (the drawer) or B (the acceptor) or C (the endorser) or D (the endorser) or E (the endorser) or F may bring one action against all or any of them (t)

(r) *Hemendro v Rajendrolall* (1878) 3 Cal 353 360 *Lukmidas v Purshottam* (188) 6 Bom 700 701 *Dick v Dhunji* (1901) 25 Bom 378 386 *Motilal v Ghellabhai* (189) 17 Bom 6 11 *Muhammad v Radhe Ram* (1900) All 307 315 *Narayana v Lakshmana* (1898) 1 Mad 56

(s) *Robinson v Nathan & Co v Griffiths* [1919] K B 63

(t) *Pestonjee v Mirza* (18 8) 3 Cal 541

7 [*New* R S C, O 16, r 7] Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties

When plaintiff in doubt from whom redress is to be sought

Scope of the rule —This rule applies only where the plaintiff is *in doubt* as to the person from whom he is entitled to obtain redress It does not enable a plaintiff to join *separate causes of action* against *different defendants* in one action in a case where he could not do so under r 3 above (*u*) Thus if damage is caused to *A* s house and he is in doubt as to whether it was caused by *excavation works* carried on by a County Council or by Water Company *allowing water from its mains to weaken the soil* in front of the house *A cannot join the Council and the Company in one action for these are two distinct torts It does not matter that the resulting damage is the same in each case* for it is not the *damage* that constitutes the cause of action but the *injuria* or the wrong done by a tort feasor (*v*) In such a case the present rule does not apply The following however is a case to which the rule has been held to apply *M* purporting to act as agent for *C* enters into a charter party with *B* for loading *B* s vessel with a cargo The cargo is not loaded and *B* sues *M* for damages alleging that *M* had no authority to enter into the charter party as agent for *C* Subsequently *B* finds upon discovery of documents that it is probable that *C* did give authority to *M* to bind him [*C*] with the charter party and applies to add *C* as a defendant The case is one within this rule and *C* may be added as a defendant (*w*)

Costs where relief is claimed against defendants in the alternative — See notes to O 1 r 3 under the same head

8 [S 30 S 32, **fourth para** *Cf* R S C, O 16, r 9] (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct

One person may sue or defend on behalf of all in same interest

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the Court to be made a party to such suit

(*u*) *Thompson* v *London County Council* [1899] 1 Q B 840 844

(*v*) *Frankenburg* v *Great Horseless Carriage Co* [1900] 1 Q B 504 510 explaining *Thompson* v *London County Council* [1899] 1 Q B 840

(*w*) *Bennetts & Co* v *McIlwraith & Co* [1896] 2 Q B 464

Object of the rule —This rule is an exception to the general rule that *all* persons interested in a suit ought to be made parties thereto (*x*) Convenience requires that in suits where there is a community of interest amongst a large number of persons a few should be allowed to represent the whole (*y*) so that trouble and expense may be saved (*z*)

Application of the rule —The provisions of this rule apply only if (1) the parties are *numerous* (2) they have the *same interest* and (3) the necessary *permission* is obtained and *notice* given

Representative suit —A suit filed by one or more persons under this rule on behalf of themselves and others having the same interest in the suit is called a representative suit. The provisions of Explanation VI to s 11 [res judicata] apply to such a suit But that Explanation is not controlled by O I r 8 and if the Court allows a suit to proceed in a representative capacity for the benefit of numerous parties all those parties will be bound by the decree although the procedure prescribed by the rule was not followed (*a*) See notes below Decree in a representative suit

Numerous parties —Fluctuating body —Thirty defendants were held to be numerous (*b*) The High Court of Madras has held that a suit cannot be brought under this rule on behalf of the *general public* (*c*) Following this decision the High Court of Calcutta held in one case that this rule did not apply unless the parties were capable of being *ascertained* and a suit could not therefore be brought under this rule on behalf of the *Hindu community* as the whole Hindu community is *incapable of ascertainment* (*d*) This decision has been dissented from by the same High Court in later cases where it was held that it was not necessary to the application of this rule that the parties should be capable of being ascertained (*e*) In this connection it may be observed that property may be owned by a fluctuating body of persons like the inhabitants of a village (*f*) or the Dhobi community of Naraında (*g*) and a suit may be brought on their behalf under this rule It has also been held that a person may render himself liable to a community like the Vysia community of Mogarala by agreeing to pay a certain sum of money to it and a suit to recover it may be brought by the community in the name of one or more members of the community under this rule (*h*)

Same interest —It is essential that the parties should have the *same* interest in the suit Thus where there are numerous legatees under a will any one legatee may sue the executors on behalf of himself and the other legatees for a discovery of the estate of the deceased come into their hands as they have all the same interest in having the will proved (*i*) Similarly where a person dies leaving numerous creditors any one creditor may sue on behalf of himself and the other creditors as they all have the same interest in representing the estate of the deceased to be as large as possible (*j*) On the same principle of the community of interest any one *rayat* of a village may sue the proprietor of the village for himself and the other rayats for a declaration of their general rights against the proprietor (*k*) Similarly a villager may bring a suit on behalf of himself and his fellow villagers for a declaration of a right of way and for an injunction against the defendant for obstructing the way (*l*) Likewise any one tax payer may

(*x*) *Ch* [illegible] *v Part ps ng* (1904) 8 Bom 0[illegible]

(*y*) [illegible] *v Ind pu m* (1866) 3 Mad H C 6

(*z*) [illegible] *v Tha on* (1883) All 60 *S* [illegible] *n* [illegible] *v* [illegible] (1900) 3 Mad [illegible]

( ) *So* [illegible] *v* [illegible] (19 8) 51 Mad 1 [illegible] 10 I C 6 5 (8) A M (F B)

(*b*) [illegible] *v* [illegible] (1 8) W N 10 [illegible]

(*c*) [illegible] (1886) 9 M 463

(*d*) [illegible] *v Laidy* [illegible] (1893) 0 Cal 397

(*e*) *Monm tho* [illegible] *v* [illegible] (1906) 33 C L 00 910 91 *Prob* [illegible] *v Hari* (1919) 4 Cal W N 906 54 I C 4

(*f*) *S* [illegible] *v M* [illegible] (1 8) 1 M d 41

(*g*) *Probl at v Hari* (1919) 4 Cal W N 906 54 I C 4

(*h*) [illegible] *v* [illegible] (19 3) 44 Mad L J 240 I C 9 (3) A M 434

(*i*) *Gee* [illegible] *v Chu d r K* [illegible] (1 55) 11 Cal 13

(*j*) *The Orie t l Ba k Corpor tion v Gob nd* (1 83) 9 Cal 604 *Ebrah mbh i v Fulbai* (190) 6 Bom 5 7

(*k*) *Ahmedbh y v Lalkrish a* (189) 19 Bom 391

(*l*) *Harish Ch dra v Pr n Nath* (19 1) 26 Cal W N 5 7 63 I C 910 (1) A C 403

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(*x*) *Cl id a v Partaps g* (1904) 8 Bom 07
(*y*) *Sr kla t v Induptram* (1866) 3 Mad H C 6
( ) *Hi al l v Bha on* (1883) 5 All 60 *Sr n ras v I ighaw* (1900) 23 Mad 8
(*a*) *Sona h l m v I um r r li* (19) 51 Mad 1 8 10 I C 6 (8) A M (F B)
(*b*) *And ews v S l o* (1 88) W N 10 [1 c]
(*c*) *Ad mi n v Ar gam* (18 0) 9 M 1 463
(*d*) *Sa f F ja v Ba ijanath* (1893) 0 Cal 397
(*e*) *M otho Nath v Ha i h Ch dra* (1906) 33 Cal 90 910)1 *I robh i v Hari* (1919) 4 Cal W N 06 54 I C 4
(*f*) *S ra man v M ll v* (1) 1 Mad 41
(*g*) *I robl t v Ha i* (1919) 4 Cal W N 06 54 I C 4
(*h*) *Nar si h lu v Noola* (19 3) 44 M d L J 40 I C 9 (3) A M 434
(*i*) *Ge balla v Chunder Kunt* (1) 11 Cal 13
(*j*) *Th Ori tal Ba k Corpora ion v Go nd* (1883) 9 C L 604 *Ebrah mbha v F Lat* (190) 6 Bom 5
(*k*) *Ahmedulog v Lalkrishna* (1 95) 19 Bom 391
(*l*) *Harish Ch i a v Pran Nath* (19 1) 6 Cal W N 3 7 63 I C 910 (1) A C 405

bring a suit against a Municipality on behalf of himself and the other tax payers to restrain the Municipality from misapplying its funds (*m*)

In *Templeton* v *Russell* (*n*) a case under the corresponding English rule it was held that the rule applies *only* to persons who have or claim *some beneficial proprietary right* which they are asserting or defending in the suit But this meaning of the word interest was disapproved by the House of Lords in *Bedford* (*Duke of*) v *Ellis* (*o*) In the last mentioned case Lord Macnaghten said It seems to me that there is no reason whatever for so restricting the rule *Given a common interest and a common grievance* a representative suit was in order *if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent* To limit the rule to persons having a *beneficial proprietary interest* would be opposed to precedent and not I think in accordance with common sense Take the case of a creditor s suit which perhaps was the earliest instance of plaintiffs being allowed to sue in a representative character It can hardly be suggested that a creditor has a *proprietary interest* in the real or personal estate of his deceased debtor Thus the disciples of a mutt have sufficient interest within the meaning of this rule to maintain a representative suit to declare alienations made by the Mahant invalid and to have the property alienated handed over to the Mahant for the time being (*p*) Similarly worshippers of a temple have sufficient interest to maintain a representative suit for a declaration that a permanent lease of temple property granted to the defendants in possession is invalid (*q*) or for recovering temple property from a trespasser (*r*)

The expression same interest must be distinguished from the expression same transaction What is required under this rule is that the parties should have the *same interest* it is not sufficient that their interests arise from the *same transaction* Therefore where goods of several persons are shipped under separate bills of lading the mere fact that the goods of all the persons are lost by the same cause does not entitle any one or more of them to bring a representative suit on behalf of themselves and others against the owner of the ship (*s*) But they may all join in one suit under O 1 r 1

When the meeting of a caste at which plaintiff was appointed to file a suit was irregularly convened and numerous members of the caste were opposed to the suit O 1 r 8 was held not to be applicable (*t*) But if the plaintiffs have been validly appointed to represent the community the fact that some members of the community subsequently side with the defendant will not affect the representative character of the suit under this rule (*u*)

Different interests —Where the parties have not the *same* interest they must all be on the record. Thus in a partition suit all co parceners must be brought before the Court (*v*) Similarly in a suit for contribution brought by a promisor all the co promisors bound to contribute must be brought before the Court (*w*) Numerous persons interested in equity of redemption should all be joined as party defendants (*x*)

Clubs and other associations —The secretary of a club or other association cannot sue alone in respect of a matter in which the association is interested even if he is authorised so to do by a resolution of the members of the association The suit must be brought by all the members of the association or by the secretary on his own behalf

(*m*) *Vaman* v *Municipality of Sholapur* (1898) 22 Bom 646
(*n*) [1893] 1 Q B 43
(*o*) [1901] A C 1 8
(*p*) *Chidambaranatha* v *Nallasiva* (1918) 41 Mad 1 4 42 I C 366
(*q*) *Veeramachaneni* v *Sona* (19 0) 43 Mad 410 58 I C 585
(*r*) *Pa gasiram* v *Krishnaswami* (19 3) 44 Mad L J 116 71 I C 463 (3) A M 6
(*s*) *M tt & Co* v *Knight Steamship Co* [1910] K B 10 1
(*t*) *H Kisandas* v *Chhaganlal* (1916) 40 Bom 158 33 I C 64
(*u*) *Purna* v *Nali* (19 8) 48 Cal L J 6 (28) A C 741
(*v*) *Faluka ta* v *Gouri* (1890) 17 Cal 906 *Sadu* v *Ram* (189) 16 Bom 608
(*w*) *Ibn H* v *Ramd* (1890) 12 All 110
(*x*) *Griffith* v *Pound* (1890) 45 Ch D 5 3

and on behalf of the other members under this rule (*y*) So if the treasurer of an association misappropriates the funds of the association no one member can sue alone to recover the amount misappropriated though he may be authorised so to do by a resolution of the association The suit must be brought by all the members or by any one member on his own behalf *and on behalf of the other members* ( ) The secretary of a club cannot unless he has expressly accepted a *personal* liability be sued personally on a contract entered into by him on behalf of the club nor can the members of a club collectively be sued through the secretary (*a*) The same remarks apply to an unregistered company (*b*) A suit to eject tenants from property belonging to the caste cannot be brought by the president of the managing committee of the caste though he may be authorised to do so by a resolution of the committee The suit must be brought by him on behalf of all the members of the caste (*c*) But no suit can be brought under this rule at all *if the caste or association is divided into two parties one party being for the suit and the* other against it In such a case it cannot be said that on behalf of all the members of a caste the members of the caste have the same interest in the suit within the meaning of this rule (*d*) See notes above Numerous parties

Trade Union—A trade union may be sued in its registered name or some of its members can be sued under this rule (*e*)

Fraudulent transfer—A suit to set aside a deed of gift or of trust on the ground that it is in fraud on creditors must be brought by or on behalf of all the creditors Such a suit cannot be entertained if it is brought by only some of the creditors (*f*)

Suit by a member of a community in his own right—This rule is an enabling rule It does not debar a member of a community from maintaining a suit in his own right though the act complained of may also be injurious to the whole community Thus if Mahomedans belonging to a particular sect are not allowed to use a mosque for prayer any member of the sect entitled to use the mosque may sue as plaintiff to enforce the right It is not necessary that the suit should be brought by him on behalf of himself and *all other members* of the sect entitled to use the mosque A Mahomedan entitled to worship in a mosque may sue for a declaration that certain property alienated by the mutavali is wakf property and for possession thereof from the alienee (*g*) Similarly any member of a community may bring a suit to set aside unauthorised alienations of endowed property or of property belonging to the community or for the removal of encroachments upon such property (*h*) or for maladministration of property belonging to the community (*i*)

When rule does not apply—The rule does not apply to an action of libel (*j*)

(*y*) *Muhammad Ismail As oc at on* v *B khshi* (1884) 6 All 84 *Michael* v *Briggs* (1891) 14 Mad 36 [debt due from a member], *Hr da Nath* v *Akhil Chandra* (19 9) 49 Cal L J 3 7 ( )) A C 445 [suit for possession of land]

(*z*) *M homed* v *Hu en* (1898) Bom 9

(*a*) *North W I Cl b* v *Sadullah* (1898) 20 All 49

(*b*) *C e ha Mund Fore t Co* (1899) 1 All 346

(*c*) *Atmaram* v *Na a n* (19) 46 Bom 13 64 I C 555 ( ) A B 103 See in this connection *I robl at* v *H* (1919) 24 Cal W N 06 54 I C 74

(*d*) *H kis das* v *C Haga lal* (1916) 40 Bom 158 164 33 I C 64

(*e*) *Taff Vale R Co* v *Amalgamated Society of R ilway Se a ts* [1901] A C 401 4 6 443 *I arr* v *Lane h ea d Che h re M ne s Fede t o* (1919) 1 Ch 366

(*f*) *I rjo* v *Dh ba* (189) 16 Bom 1 *Ish ar Dera* (1903) 7 Bom 146 *Ch tte put* v *Mah r j Lah d* (190) 3 Cal 194 [1 C] *H l m Lal* v *Mooshah r Sal* (190) 34 Cal 939

(*g*) *Maulvi* v *Jagat* (19 3) Pat 391 74 I C 403 (3) A P 4 5 *Sh nkarlal* v *D kore Temple Committee* (19 6) 28 Bom L R 309 94 I C 47 (6) A B 179 *Abd l ah m* v *Mahomed L rkat Al* (19 8) 5 I A 96 5 Cal 519 108 I C 361 (8) A I C 16

(*h*) *Zafar jab Ali* v *Bakhtawar S gh* (1883) 5 All 497 *Jaw l a* v *Akbar H s n* (1885) All 1 8 *Gi lba* v *Basa ta* (1910) 3 All 84 5 I C 54 *Da ondha* v *Muh mm d* (1911) 33 All 600 11 I C 36 *P m Chand a* v *Ali* (1913) 3 All 19 18 I C 9 *Lu ju Lal* v *B lak Lal* (189) 4 Cal 3 5 *Moh uld* v *Sayiudd* (1 93) 0 Cal 810 See also *Narim n* v *Mu cipal Corporation of Bombay* (19 3) 4 Bom 609 840 83 I C 8 6 (3) A B 305

(*i*) *Th ckersey* v *Hurbhum* (1884) 8 Bom 432 4 0

(*j*) *Mercantile M r e Service Associat on* v *Toms* [1916] K B 43 As to actions of d tt ee *Walker* v *Sur* [1914] K L 9 0 *Id l Films L mited* v *Richards* [19] 1 K B 3 4 351

At what stage of the suit leave should be obtained—The proper course is to obtain permission before the suit is instituted but if that is not done the rule does not forbid leave being granted afterwards Permission under this rule may be granted even *after* the institution of the suit (*k*)

Whether the leave should be express—It has been held by the High Court of Calcutta that the leave to sue need not be express it is enough if it can be inferred from the proceedings (*l*) On the other hand there is a *dictum* of Stuart C J in an Allahabad case (*m*) that the leave to sue must be express A Full Bench of the Madras High Court has held that the suit may be a representative suit although the procedure prescribed by this rule has not been followed (*n*)

Leave must be granted to definitely named persons—Where this was not done the suit was dismissed by the High Court of Calcutta (*o*) The other Courts would probably grant fresh leave in such a case See notes above At what stage of the suit etc

May be sued—This rule applies not only to the case of numerous plaintiffs having the same interest but also to the case of numerous defendants having the same interest Thus where the inhabitants of a village assert a right of way over land belonging to the plaintiff the plaintiff may with the permission of the Court sue any one or more of the inhabitants on behalf of them all (*p*) The consent of the defendants on the record is not necessary for this purpose (*q*)

May defend—When there are numerous defendants having the same interest any one of them may be sued on his behalf and on behalf of others But where this is not done and *all* the defendants are on the record any one defendant may defend the suit on behalf of himself and the rest with the permission of the Court

Who should apply for permission—(1) Where a plaintiff intends to *sue* on behalf of himself and others it is the plaintiff that should apply for leave (2) Similarly where a plaintiff intends to sue one defendant for himself and others it is the plaintiff that should apply for leave (3) Where numerous defendants having the same interest are all sued and they are all on the record and if any one defendant is appointed by the other defendants to defend the suit on behalf of all it is that defendant who must apply for leave (*r*)

In *Walker* v *Sur* (*s*) Vaughan Williams L J said The rule as it stands does not purport to leave it to the mere will or choice of the plaintiff or of the defendants nor to give a right in either case of selection at the choice of a plaintiff who wishes to sue representative members of an unincorporated society It lies with the judge to give the authority and if he thinks it a case in which the plaintiff may properly sue the persons that he proposes to sue as people proper to be authorized to defend in such cause or matter on behalf of or for the benefit of all persons so interested then the order may be made

Notice of suit—Where a person sues or is sued or defends a suit on behalf of himself and others any decree that may be passed in the suit is binding upon them all (s 11 Explanation VI) unless the decree has been obtained by fraud or collusion (Evidence Act 1872 s 44) It is therefore necessary that notice of the suit should be given to all the parties who would be bound by the decree for otherwise a person might be concluded by a suit of which he was unaware

(*k*) *Fernandez* v *Rodrigues* (189) 1 Bom 84 S ... v *Raghava* (1900) 23 Mad 8 *Che* ... v *Krishnan* (190) ? Mad 399 *Baldeo* v *Bir Gir* (1900) All 269 *Ahmad Ali* v *Abdul Majid* (1917) 44 Cal 58 39 I C 3 dissenting from *Oriental Bank* v *Gobind* (1883) 9 Cal 604

(*l*) *Dh* ... v *J* ... *sh* (1894) 21 C L 180 *K lu* v *J* ... *me* (190?) 9 Cal 100 *Krish* ... v *Atul* (19 4) 39 Cal L J 61 84 I C 9 (4) A C 998

(*m*) *Hiralal* v *Bh* ... *on* (1883) 5 All 60

(*n*) *So achalam* v *K maravel* (19 8) 51 Mad 1 8 107 I C 6 (8) A M F B

(*o*) *K l Ka ta* v *Court Prosad* (1890) 17 Cal 906 But see (191) 44 C 1 ? 8 3? I C 73

(*p*) *Chun Lal* v *Ramkishe* (1888) 15 Cal 460

(*q*) *Ambalam* v *Bartle* (1913) 36 Mad 418 4 5 13 I C 699

(*r*) See *London Association for Protection of Trade* v (... *lands Limited* [1916] 2 A C 15 8 39

(*s*) [1914] K B 930 934

and when notice was not given the Patna High Court held that a decree could only be passed against those defendants who were on the record (*t*) But reference must be made in this connection to the Madras case of *Sonachalam v Kumaravelu* (*u*) which holds that the representative character of a suit is a matter of substance rather than of form It is however open to any one of the parties whose name does not stand on the record and who would be bound by the decree under the provisions of this rule and sec 11 to apply to the Court under sub rule (2) to be made a party to the suit and the Court may add him as a party *provided* his interest will be seriously prejudiced if he is not so joined (*v*) See note below Adding parties.

Court shall give notice by personal service or by public advertisement — These words show that it is the *duty of the Court* to cause service of the notice or cause an advertisement to be published It is the duty of the plaintiff however to move the Court for that purpose But if he omits to do so the suit ought not to be dismissed on account of the failure of the Court to perform the duties imposed upon it by this rule The appellate Court should in such a case remand the case to the Court of first instance so that it may issue the notice (*w*)

Title of suit —When the plaintiff sues or defendant is sued on behalf of himself and others under this rule that fact should be stated in the title of the suit and not merely in the plaint (*x*) The title of the suit where the plaintiff sues in a representative character is as follows [see Appendix A I leadings (1) Titles of suits] —

A B on behalf of himself and *all other* creditors *of X Y*	*Plaintiff*
v	
C D	*Defendant*

Suit in name of wrong plaintiff —*A* brings a suit under this section on behalf of himself and other creditors of Y It turns out that *A* is not a creditor of Y Thereupon *B* an admitted creditor of Y applies to be added as a plaintiff under O I r 10 (1) Has the Court power to grant the application ? The question arose in a recent Madras case but it was left open (*y*) The Madras case was not one of a bona fide mistake and it is submitted that if the suit was instituted by *A* by such a mistake the amendment may be allowed on terms

Compromise of representative suit —A plaintiff suing in a representative character cannot compromise without leave of the Court nor can he give up or alter any right of the others without their consent or the leave of the Court (*z*) Similarly a person authorized by the Court to defend a suit on behalf of others having the same interest cannot even if there is no defence *consent* to judgment against them the proper course in such a case is to submit to judgment on their behalf (*a*)

Adding parties —The Court will not compel the plaintiff to add the persons on whose behalf he sues as co plaintiffs Thus where an action was brought by a plaintiff on behalf of himself and the other owners of a ship against the defendants for freight and dues for the use of the ship and the defendants applied to add the names of the other owners as plaintiffs in order that the defendants might have the liability of the other owners as plaintiffs for costs it was held that the plaintiff could not be compelled to add the other owners as co plaintiffs (*b*) Where a plaintiff sues on behalf of himself and others and one of the persons on whose behalf he sues objects

(*t*) *Gobardhan v Shamal Lal* (19 8) 7 Pat 19 108 I C 330 (8) A I 0

(*u*) *Sonachalam v Kumaravelu* (19 9) 51 Mad 1 3 10 I C 6 (S) A M 7 F B.

(*v*) *Vas j v Esmailbhai* (1910) 34 Bom 4 0 4 I C 130

(*w*) *M kh Lal S gh v Jaglo T car* (1908) 3 Cal 10 1 *Sh L l v M ammat I ll* (19) 44 All 31 65 I C. 259 ( ) A A 16

( ) *Re Tottenham* [1896] 1 Ch 6 8

(*y*) *Kri h a v Iacha v ppa* (19 4) 47 Mad. L.J 540 8 I C 49 ('24) A.M 883

(*z*) *Re Cal y and M due n E t La d C m p y I n ted* [1908] Ch 65 6 9 662.

( ) *Fees v Fichmo d* [1890] 6 L. T 4 7 See also *Abd r I h m v Mahomed Ja kat Ali* (19 8) 5 I A 96 5 Cal 19 103 I C 361 ('28) A P C 16

(*b*) *De Hart v Stevenson* (18 6) 1 Q B D 313

to the plaintiff so doing he may apply to have himself added as a defendant (c) If one of the persons on whose behalf the plaintiff purports to sue is dissatisfied with an order made in the suit he may apply to be added as a defendant but he cannot appeal from the order (d) The application to be added as a defendant must be made without unnecessary delay (e) Where in a suit by a creditor for the administration of the estate of the deceased debtor on behalf of himself and other creditors one of the creditors applied to be joined as a party it was held that he should not be so joined unless the Court was satisfied that his interests would be seriously prejudiced if he was not so joined (f) See note above Notice of suit

Addition of plaintiffs after decree —Where the plaintiffs on record neglect to execute the decree passed in a suit brought under this rule the Court may add other persons having the same interest as the plaintiffs to enable them to execute the decree (g)

Decree in a representative suit —The general rule of law is that in suits where one person is allowed to represent others as defendant in a representative capacity any decree passed binds those others only with respect to the *property* of those others which he can in law represent and although the party on record *eo nomine* may be made personally liable no personal decree can be passed against the others This is the principle to be applied to suits brought under this rule (h) It has accordingly been held that an injunction in a decree passed in a representative suit brought under this rule is not binding on those who are not actually parties on the record (i) See s 11 Explanation VI and notes above Representative suit

Costs in a representative suit —As to costs in a representative suit see the observations of Marten J in the undermentioned case (j)

Abatement of suit —Where a suit is brought under this rule by *A* on behalf of himself and 29 others and one of the twenty nine who had never applied to the Court to be made a party under sub r (2) dies pending the suit his death does not cause the suit to abate (k)

Abatement of appeal —A suit is brought by *A* and *B* under this rule on behalf of themselves and 387 others against *C* and a decree is passed in the suit for the plaintiffs *C* appeals from the decree Pending the appeal 3 out of the 387 who had never applied to be made parties under sub r (2) die *C* does not apply to bring on record the legal representatives of the three deceased Does the appeal abate? No because the three deceased were not parties to the suit *eo nomine* (l)

Forty persons institute a suit against *B in their own names* (and not under this rule) and obtain a decree jointly against *B* *B* appeals from the decree and applies for and obtains an order from the appellate Court when the appeal is admitted that 4 out of the 40 respondents may be permitted under this rule to defend the appeal Pending the appeal one of the 36 respondents dies but no steps are taken to bring his legal representative on the record. Does the appeal abate? Yes because the decree was obtained by the plaintiffs *for themselves* and not in a representative capacity Even if the procedure prescribed by this rule is applicable to appeals by the operation of s 107 the order passed by the appellate Court under this rule did not relieve *B* from the

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(c) *Wilson* v *Church* (18 8) 9 Ch D 55 *Fraser* v *Cooper Hale & C* (188) 21 Ch D 718 *May* v *Newton* (1887) 34 Ch D 347 349

(d) *Watson* v *Cave* (No 1) (1881) 17 Ch D 19

(e) *Conybeare* v *Lewis* (1883) 48 L J 5_7

(f) *Jassanji* v *Esmailbhai* (1910) 34 Bom 420 4 I C 130 See also Re *Schwabacher* [1907] 1 Ch 719

(g) *Sermin tha* v *Kumaraswam* (19 3) 44 Mad L J _84 7_ I C 284 (_3) A.M 47

(h) *Sahib Thambi* v *Hamid* (1913) 36 Mad 414 1_ I C 1006

(i) *Sadagopa Chari* v *Krishnamachari* (1889) 12 Mad 3 6 *Srinivasa* v *Arayar* (1910) 33 Mad 483 6 I C ??9

(j) *Bhiwoobai* v *Hariba* (1918) 4 Bom 556 5 6 5 8 4 I C 9

(k) *Ram Dyal* v *Muhammad* (1919) Punj Rec no 46 p 115 51 I C 437 *Ram Gopal* v *Har Kishen* (19_) 7 Lal L.J 517 83 I C 4 8 (2) A L 598 *Rikh Ram* v *Durg Das* (19 6) 91 I C 558 (6) A L 16

(l) *Udmi* v *H a* (19?0) 1 Lah 58 60 I C 111

necessity of impleading all those persons who were plaintiffs in the suit and had obtained a decree in their favour and the representatives of any of those persons who had died Moreover the decree having been passed in favour of all the forty plaintiffs jointly the appeal abates in its entirety (m)

Representative suit and res judicata —See notes above Representative suit and Decree in a representative suit

9 [S 31, R S C, O 16 r 11] No suit shall be defeated by reason of the misjoinder or non joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it

Misjoinder and non joinder

Misjoinder of parties —A misjoinder or non joinder of *parties* is not fatal to the suit (n) Where there is a *misjoinder* of parties the name of the plaintiff or the defendant who has been improperly joined may be struck out under r 10 sub r (2) below and the case may be proceeded with See s 99 above

Non joinder of parties —As regards non joinder of parties a distinction has been drawn between the non joinder of a person *who ought to have been joined* as a party and the non joinder of a person whose joinder is only a matter of convenience or expediency [see O 1 r 10 (2)] A suit by executors trustees co owners of immovable property partners etc for recovery of property in which they are jointly interested belongs to the former class As to this class of cases it has been held that if the suit is brought by some only of the persons interested *e g* by some of the executors and not all and if the defendant objects on the ground of non joinder the plaintiffs may apply for an amendment to join the absent parties as co plaintiffs in which case the Court should allow the application and not dismiss the suit But if after the objection has been raised the plaintiffs proceed with the suit without bringing on the record the persons whose non joinder has been objected to the suit it has been held must be dismissed This is *because O 1 r 9 is a rule of procedure which does not affect substantive law* and as the persons not joined are not bound the decree cannot be effective In the latter class of cases that is cases in which the joinder of a person as a party is only a matter of convenience the absent party may be added *or* the suit may be tried without him (o) The same principle applies in the case of defendants (p) See notes to O 1 r 10 Limitation Act sec 22

As to when objections to misjoinder and non joinder of parties should be taken see r 13 below

10 [Ss 27, 32, 33, R S C, O 16 rr 2 11, 39] (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any

Suit in name of wrong plaintiff

(m) *Tup Cha i v B y d* (19 4) 5 Lah 43 f ll in *Bal M l m al v Barkhurd* (19 4) Lah 4 3 86 I C 59 (5) A L 1 4

(n) *Ja k ath v Ramru j* (18 9) 4 Cal 949 *Diwan Shib Nath v Alliance Bank of Simla Ld* (1915) Punj Rec no 3 1 10 I C 480

( ) *Mot r lu v An amala* (19 3) 44 Mad L J 43 7 I C 63 (3) A M 337 *Sh m ga v Subbayya* (19) 4 Mad L J 133 70 I C 64 (2) A M 317 *H ran v J me h* (19 0) Cal W N 19 5 6 I C 4 *I manathan Arunach lam* (19 1) 44 Mad 43 60 I C 316 (1) A M 55 [Court should allow amendment]

(p) (19 0) Cal W N 19 6 I C 4 5 *supra* dist nguished in *u ra v Cha d* (19 4) 40 Cal L J 4 84 I C 467 ('21) A C 10 0 *where the suit was for damages against the def ndants*

0 stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just

Court may strike out or add parties

(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent

Where defendant is added plaints to be amended

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant

(5) Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons

SUB RULE (1)

Sub rule (1) is the equivalent of s 27 of the Code of 1882 It corresponds to P S C O 16 r 2

Scope of sub rule (1)—Sub rule (1) contemplates cases in which a suit is brought by a plaintiff and he subsequently discovers that he cannot get full relief without joining some other person as co plaintiff (*q*) or where it is found that some other person and not the original plaintiff is entitled to the relief claimed In the former case the application (which must be made by the original plaintiff) will be for *adding* and in the latter for *substituting* that othe person as *plaintiff* But the Court must be satisfied before the application is granted that the amendment has become necessary

(*q*) *Ayscough* v *Bullar* (1889) 41 C D 341

through a *bona fide* mistake on the part of the original plaintiff The mistake may be either one of fact (*r*) or of law (*s*) Where the point is doubtful it is in itself evidence of a *bona fide* mistake (*t*) Again where the Court of first instance takes one view of the law and the Court of Appeal takes another that in itself is evidence of a *bona fide* mistake (*u*)

Amendment allowed—(1) The Official Assignee of Madras constitutes *A B* Official Assignee of Bombay his attorney to institute a suit on his behalf in Bombay *A B* instead of suing as constituted attorney of the Official Assignee of Madras sues by mistake as Official Assignee of Bombay The plaint may be amended under sub rule (1) by substituting the former description for the latter *Sardarmal* v *Arandaval* (1897) 21 Bom 205

(2) A partner in a firm carrying on business out of British India and to which O 30 does not apply files a suit in the name of the firm He was allowed to amend by adding the names of all the partners but the case was treated as one of substitution and not misdescription and he was required to pay costs of the action up to the time of amendment *Vyankatesh Oil Mill* v *Velmahomed* (1928) 30 Bom L R 117 109 I C 99 ('28) A B 191

(3) A Hindu appoints *A* guardian of the property of his minor son under his will but appoints no executor *A* believing that his appointment as guardian has the effect of constituting him executor of the will by implication sues *B* to recover certain property belonging to the estate of the deceased The Court finds that *A* is not executor by implication The plaint may be amended by substituting the son as plaintiff *Seshamma* v *Chennappa* (1897) 20 Mad 467 [In this case the amendment was allowed in second appeal]

(4) *A* sues *B* for work done under a contract *B* contends that the contract has been assigned by *A* to *C* and *A* therefore has no right to sue *A* admits the assignment but says that the assignment is not absolute but by way of charge only and that he has therefore a right to sue It is found that the assignment to *C* is absolute and that there was a *bona fide* mistake on the part of *A* in believing that the assignment was by way of charge only The plaint may be amended by substituting *C* as plaintiff *Hughes* v *Pump House Hotel Co* [1902] 2 K B 485

In the last mentioned case *B* objected to the amendment on the ground that as the assignment was found to be absolute *A* had *no cause of action* at the time the action was brought but the objection was overruled Cozens Hardy L J said It is said that the rule does not apply when it is shown that the plaintiff has *no right of action* but there are abundant authorities to the contrary effect The cases cited in the judgment in that case clearly show that the plaint would have been allowed to be amended if that was the application by *adding C* as plaintiff This interpretation of O 16 r 2 of the English Rules which corresponds in wording with sub rule (1) of this rule would seem to be opposed to the view taken by the High Court of Bombay It would seem that the Bombay Court would not allow an amendment if the original plaintiff had *no right of action* at the time the suit was brought (*v*) But this view it is submitted is not correct and one of the cases cited by that Court in support of its view affirms the contrary (*w*) In a recent case the High Court of Madras expressly held that the fact that the original plaintiff has no cause of action does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff (*x*)

(*r*) *Duckett* v *G* [illegible] *er* (1877) 6 C D 8 See *Maharaj Kishore Prasad* v *Lal Brij M* [illegible] *n Lal* (191) [illegible] Lat L J 199 38 I C 154 where there was no mistake at all

(*s*) *Hughes* v *Pump House Hotel Co* [190] K B 48

(*t*) *Doaba* [illegible] v *H* [illegible] (1920) 2 Lah L J 40

(*u*) [190] 2 K B 485 at p 486 *supra*

(*v*) *Bha* [illegible] v *Ka* [illegible] *ath* (1896) 20 Bom 537 *S* [illegible] *ad Abd* [illegible] v *Gulam* (1896) 20 Bom 677

(*w*) See *Ch* [illegible] *nder* v *Gocool* (1881) 6 Cal 370 373

(*x*) *Krishna Bai* v *The Collector and Government Agent Tanjore* (1907) 30 Mad 419

0 **Amendment not allowed** —It would seem that no amendment should be allowed under sub rule (1) if the rights in dispute between the *new plaintiff* and the defendant would not be the same as those in dispute between the *original plaintiff* and the defendant A suit is brought by an importer of Roskopf Patent watches for infringement of trade mark alleging that he has got the *exclusive right to use* the trade mark in India. The trade mark belongs to the manufacturer and *not to the importer* The importer is subsequently advised that he cannot sue on the *manufacturer's* trade mark and he thereupon applies that the manufacturer may be either added or substituted as plaintiff If the manufacturer is made a party his claim will raise questions as to how far he is entitled to the trade mark in the *country of its origin* and consequently in India That would be a case wholly different from that of the importer Can the manufacturer be made a party under these circumstances? The question arose in a Bombay case (y) Batty J said that the point was one on which there seemed to be considerable room for doubt Eventually the application was refused on the ground that it was made too late

Upon such terms as the Court thinks fit —Liberty to amend may be given upon the terms that the plaintiff should pay to the defendant his costs of the suit upto and including the order of amendment and that the new plaintiff should only be entitled to such relief as he could have claimed if the suit had been commenced at the date on which he was added as a party (z)

Consent —No person can be added or substituted as plaintiff under sub rule (1) without his consent Thus a company cannot be made a plaintiff in a suit without its consent (a) See sub rule (3)

Limitation —Section 22 of the Limitation Act provides that when after the institution of a suit a party is *substituted* or *added* as a plaintiff or defendant the date of *substitution* or *addition* is to be deemed as regards that party as the date of institution. It has been held that this provision of the law relates only to the addition of parties under sub rule (2) and not under sub rule (1) The result is that a party may be substituted or added under sub rule (1) even after the period of limitation Thus where an agent sued in his own name and subsequently at a time when a new suit would have been barred by limitation his principals were substituted as plaintiffs it was held that the suit being the same the change of parties did not affect the question of limitation (b)

SUB RULES (2) to (5)

Sub rules (2) (3) and (5) correspond to s 32 of the Code of 1882 and to R S C O 16 r 11 Sub rule (4) corresponds to s 33 of the Code of 1882

Old section —Under the old section 32 there was a distinction between the power of the Court to *strike out* parties and the power to *add* parties Under that section the power to *strike out* parties could only be exercised *on the application* of a party and that too if the application was made *on or before the first hearing* But the power to *add* parties could be exercised by the Court *at any time* and *even without any application* Under sub rule (2) the power to *strike out* as well as to *add* parties may be exercised by the Court at *any stage of the proceedings* and even without any application by a party

At any stage of the proceedings —The power to strike out or add parties may be exercised *at any stage of the proceedings* Thus fresh parties were added in one case after a decree had been passed and a reference made to the Commissioner to take accounts and sell the property (c) In another case fresh parties were added *after* a suit

(y) *Hen ger* v *Droz* (1901) _ Bom 433 463-66 *Ja da* v *D modardas* (1) 9 Bom L R 418 103 I C ( ) A B 4 4

(z) *A o gh* v *B ll* (1889) 41 Ch D 341 346 *Mo ney Ge er l* v *Pontypridd Water Works C* [1908] 1 Ch 388

(a) *P m Narain* v *Ram Kishen* (1911) Punj Rec no 46 p 16 10 I C 515

(b) *Parm* v *Mah dev* (18 8) Bom 6 2.

(c) *Val t Jand* v *Advocate General* (18 1) 8 B H C 96

had been reinstated under s 108 of the Code of 1882 [now O 9 r 13] (*d*) In a Calcutta case a fresh party was added in a suit for partition after the preliminary decree had been passed and the Commissioner had made his report but before the drawing up of the final decree (*e*) A Court can add parties after the suit has been remanded to it by the Court of appeal (*f*) Under the corresponding English rule it has been held that the Court has jurisdiction to allow amendment even after final judgment *so long as anything remains to be done in the action* though it be only assessment of damages (*g*)

Parties when added —Under this rule a person may be added as a party to a suit in the following two cases —

(1) when he *ought* to have been joined as plaintiff or defendant and not so joined or

(2) when without his presence the questions in the suit cannot be completely decided

There is no jurisdiction to add a party in any other case (*h*) Thus a person should not be added as a defendant merely because he would be *incidentally* affected by the judgment (*i*) The Secretary of State is not a proper or necessary party in every suit in which a statute is challenged as ultra vires (*j*)

Parties cannot be added so as to introduce quite a new cause of action —*A* purchased goods from *B* by sample The bulk did not correspond with the sample and *A* thereupon sued *B* for damages *B* contended that he had purchased the goods in question from *X* by sample and applied that *X* should be added as a party to the suit as the question between him (*B*) and *X* was the same as the question between him (*B*) and *A* (ii whether the goods were according to the sample) so as to relieve him (*B*) from the necessity of bringing a fresh suit against *X* in the event of the Court holding that the goods were not according to the sample *Held* refusing *B* s application that *X* was not a person who ought to be joined as a party to the suit nor was his presence necessary to decide the questions involved in the suit In this case *A* had nothing to do with X and to add X as a party would be to introduce a new cause of action which existed only as between *B* and X The Court would then have to inquire into the circumstances under which *B* s agreement with X was entered into an inquiry with which A had nothing to do (*k*)

Parties cannot be added so as to alter the nature of the suit — *A* sued for his share of the estate of a deceased relative On an application to have other persons interested in the said estate added as parties to the suit it was held that the Court could not add them as parties as to do so would be to alter the nature of the suit by converting it into a general administration suit (*l*) It has similarly been held that parties should not be added in a suit for rent so as to change it into a suit for title though questions of title may be incidentally investigated in a suit for arrears of rent *e g* where the tenant disputes the extent of the title of the plaintiff to the arrears claimed by the plaintiff (*m*)

Transposing defendant as plaintiff —The Court has power under sub r (2) to transfer a defendant to the category of plaintiffs Thus where A and *B* are trustees

(*d*) *T kam Singh* v *Kishore* (1898) 20 All 188
(*e*) *Jot dra* v *L j* (1905) 3 Cal 483
(*f*) *Kale the* v *M M* (19 6) 3 Rang 4 4 9 I C 1 (6) A R 9
(*g*) *Th D ke of I cleuch* [1 9] P 01
(*h*) *McCh a e* v *Gyles* (No 2) [190] 1 Ch 911 918
(*i*) *Moser* v *Mar d n* [1890] 1 Ch 48
(*j*) *l a th l ng* v *S d nra* (19 6) 50 Mad 34 9 I C 14 (6) A M 836
(*k*) *Mah m d Bad l a* v *Nicol* (18 9) 4 Cal 3 5 *F leigh* v *Goschen* [1898] 1 Ch 3 81
(*l*) *Oh Ling Tee* v *Auk n fee* (1863) 10 W R 66 *H gu Lal* v *B Ideo Ram* (190) 24 All 553 555
(*m*) *Abd l Gaf r* v *Al Miah* (19 3) 8 Cal W N 60 8 I C 36) (25) A C 6 *Pr rat* v *Amulya* (19) 45 Cal L J 146 101 I C 5 ( ) A C 340

10 of certain property and *A* brings a suit to recover the property from *C* impleading *B* as a defendant the Court may on *A* s death transpose *B* as plaintiff for the further conduct of the suit (*n*) In a Bombay case *A* brought a partnership suit for accounts against 12 defendants He then settled with most of the defendants and applied to the Court for leave to withdraw the suit or that the suit might be dismissed. Two of the defendants objected to the dismissal of the suit and applied that they might be made plaintiffs and that the plaintiff might be made a defendant and the suit proceeded with The Court granted the application (*o*) *A* sues *B* to recover money borrowed by *B* from *C* who is dead alleging that *C* had created a trust of the money and that he was appointed trustee of the money *C* s widow is impleaded as a co defendant in the suit It is found that the money sued for was not trust money but it belonged absolutely to *C* This is a proper case in which the Court should remove the widow from the array of defendance and bring her in the array of plaintiffs (*p*) A defendant may be transferred to the category of plaintiffs on his application even after a preliminary decree for accounts has been passed (*q*) But the Court should not make an order transferring a defendant to the category of plaintiffs if it results in changing the character of the suit (*r*) *A* sues *B* to recover a sum of money and impleads *C* who says that he and not *A* is entitled to the money as a co defendant *C* applies that he should be allowed to continue the suit as plaintiff instead of *A* The application should be refused even if it is found that *C* and not *A* is entitled to the money To grant the application would be to deprive *A* of his right to ask for a determination upon his claim (*s*)

Transposing plaintiff as defendant—In the case of a difference between co plaintiffs the proper course is to make an order that the name of one of them be struck out as plaintiff and added as a defendant (*t*) But such an order will be made only on security being given by the plaintiff who continues on the record as plaintiff for the costs of the original defendant up to the date of the amendment (*u*) Such an order may be supported by the terms of sub r (2) namely on such terms as may appear to the Court to be just

Striking out name of party improperly joined—The impropriety referred to in this rule is in introducing a party who has no connection with the relief claimed in the plaint (*v*)

Who ought to have been joined—Sub r (2) provides for the addition of (1) necessary parties and (2) of proper parties Necessary parties are parties who ought to have been joined that is parties necessary to the constitution of the suit without whom no decree at all can be passed (*w*) Proper parties are those whose presence enables the Court to adjudicate more effectually and completely (*x*) as explained in the next paragraph

All co sharers are necessary parties to a suit for partition and they should all be joined as parties to the suit Similarly in a suit to recover trust property all the trustees must be joined as parties [O 31 r 2] But the Official Assignee is not a necessary party in a suit against an insolvent (*y*) [see O 22 r 10 notes Assignment of interest ills (3) and (4)] In a suit to set aside an order for rateable distribution all persons interested in the distribution must be parties to the suit (*z*) see s 73 In a suit for dissolution of

(*n*) *Saminatha* v *Raj gopal* (19 1) 40 Mad L J 08 6 I C 360 (‿1) A M 124
(*o*) *Eduljee* v *Vullebh j* (1883) ˜ Bom 167
(*p*) *Bool Chand* v *Bhoop S gh* (19‿8) 3 Luck 41 10 I C 4 3 (‿7) A O 484
(*q*) *Deb d Na v N e dra* (1919) 4 Cal. W N 110 54 I C 636
( ) *Jai ba dhu* v *Haris* (19) 36 Cal. L J 9 6 I C 115 (˜˜) A C 459
(*s*) *J o* v *Bhagwan* (19 1) 19 All. L. J 833 63 I C 3 (1) A A 184
(*t*) *Mathe s* In re [190] ˜ Ch 460
(*u*) *Bh abendra* v *Udai Narai* (19 3) 50 Cal 8 3 9 I C 293 (4) A C 51
(*v*) *Rama Ra* v *Th Raja of I ll pur* (1919) 4 Mal ˜19 5 49 I C 835
(*w*) *K h I s d* v *H r N ra n S gh* (1911) 33 All 2 2 6 9 I C 39 [I C] *Shah saheb* v *S d sl w* (1919) 43 Bom 5 5 581 51 I C 3
(*x*) (1919) 43 Bom 5 5 581 51 I C 2˜3 *supra* *Gu uvayya* v *Ana t* (1904) 8 Bom 11 17
(*y*) *Chandmull* v *Ra ee* (189) ˜ C 1 259
(*z*) *G wr I rosad* v *I am I al n* (1856) 13 Cal 1 9

partnership all partners are necessary parties but a person who is not in the partnership as a member of the firm but who is a member of a superior partnership in which he is on one side and the whole firm as a unit on the other is not a necessary party (*a*) See notes below Limitation Act O 1

Whose presence before the Court may be necessary —A person may be added as a defendant to a suit though no relief may be claimed against him provided his presence is necessary for a complete and final decision of the questions involved in the suit (*b*) Such a person is called a *proper* party as distinguished from a *necessary* party Thus if a suit is brought by a legatee against an executor for a legacy but the estate is not sufficient to pay all the legacies in full the executor may apply under sub rule (2) that the other legatees may be made parties so that if any rateable abatement is requisite the extent of such abatement may be ascertained in a manner binding on all the legatees (*c*) In a suit by a benamidar of the mortgagee the mortgagee may be made a party to the suit if his presence is necessary for the proper determination of the suit (*d*) Where in an administration suit in which the original parties do not dispute one another s status as heirs a person applies to be made a defendant and claims to be the sole heir of the deceased whose estate is to be administered so that if his claim is established the suit would dismissed it was held that the Court can allow him to be added as a defendant in the suit in order to prevent multiplicity of suits and such person need not be compelled to file a separate suit to establish his status (*e*) See notes above Who ought to have been joined

Questions involved in the suit — Questions involved in the suit refer only to questions between parties to the suit (*f*) Further they refer only to questions as between plaintiffs and defendants and not to questions which may arise between co plaintiffs or between co defendants *inter se* (*g*)

Improper addition of plaintiff or defendant—Sub rule (2) does not enable a Court to override the effect of O 2 r 3 Hence if the joinder of a person as plaintiff would result in a misjoinder of plaintiffs and causes of action or the joinder of a person as defendant would result in a misjoinder of defendants and causes of action the application should be refused (*h*) Similarly if the joinder of a person as plaintiff is not possible under O 1 r 1 it does not become possible under this rule (*i*)

Joint contractors—See notes to O 1 r 6 Joint liability on a contract.

Consent of person added as plaintiff—If any person who ought to have been joined as plaintiff does not consent to join as plaintiff he may be made a defendant in the suit The proper course is first to require him to join as plaintiff and if he refuses to join as plaintiffs then to join him as defendant But the suit should not be dismissed merely because he is joined as defendant without being first called upon to join as plaintiff (*j*)

Suit against a dead person—Where a suit is brought against a person who is found to have died before its institution the plaint cannot be amended by bringing his legal representative on the record though the suit may have been filed in ignorance of his death The reason is that a suit against a dead man is a nullity from the first (*k*) But if a suit is against several defendants one of whom is found to have died before

(*a*) *S thappa* v *S bra a* (19) 53 Mad L J 4 101 I C 17 ( ) A I C 0
(*b*) *Fash* v *S la lar* (183) 21 Bom 9
( ) *I rshottam* v *K la* (190) 6 Bom 301
(*d*) *I t k a* v *I tt ma* (13 8) 5 M L L J 8 6 115 I C 340 (9) A M 68
(*e*) *M g I* v *M a I* (19) Ran 159 103 I C ( ) A R 19
(*f*) *Ta th l g* v *S ti ra* (19 6) 50 Mad 34 9 I C 14 (6) A M 836
(*g*) *H r Na a n* v *J har g* (18) 9 All 44 *Iuthu* v *Bh m* (1891) 15 Bom 145
(*h*) *K l an* v *Ram I at n* (1890) 18 All 306
( ) *Ch timbaram* v *S brama iam* (19) 53 Mad L J 69 10 I C 114 ( ) A M 834
(*j*) *Py* v *Ked ath* (1899) 6 Cal 409 *Buri* v *jh* v *wal* (190) 4 All 2 6
(*k*) *Moh n Chu der* v *A en* (1 63) 12 W R 45 *I r rp* v *T nd l* (1908) 31 M 1 86 *Iampret b Garrushank* (19 3) Bom L R 11 6 I C 461 (4) A B 109

10 its institution the suit should not be dismissed. It should proceed against the other defendants and the legal representatives of the deceased should be joined if he was a necessary party (*l*)

Limitation Act sec 22 provides amongst other things that when after the institution of a suit a party is added as a plaintiff or defendant the date of addition is to be considered as regards that party as the date of the institution of the suit It has been held under this section that where necessary parties are not joined within the period of limitation the suit must be dismissed. Necessary parties mean parties necessary to the constitution of the suit (*m*) that is persons whose joinder is necessary to enable the Court to award such relief as may be given in the suit as framed (*n*) Thus in a suit by one of several joint promisees the other promisees are necessary parties for no relief can be given to one of them The suit is not perfectly constituted unless all the co promisees join for the plaintiff can only enforce his claim in conjunction with them. If in such a suit the other promisees are not joined within the period of limitation the suit must be dismissed (*o*) Similarly where *A* *B* and *C* were three partners and *A* sued *B* only for partnership accounts and *C* was added as a *defendant* after the period of limitation the suit was dismissed (*p*) On the same ground where a member of a joint Hindu family sued in his own name for a *joint* debt without making the other members parties to the suit and the defendant raised an objection on the ground of non joinder and the period of limitation had by that time expired it was held that it was too late to join the other members as *co plaintiffs* as the claim was at that date time barred and the suit was accordingly dism ssed (*q*) And the suit must likewise be dismissed even if the Court of its own motion adds the other members as plaintiffs in circumstances such as those mentioned above The mere fact that the Court of its own motion orders that the name of any person be added as a party does not render the provisions of s 22 inapplicable to the case (*r*) There is nothing in sub rule (2) which frees the Court when acting of its own motion from the restrictions of the Limitation Act in other words a Court acting under sub rule (2) is bound by the provisions of s 22 of the Limitation Act (*s*) and the rights which parties may have acquired under the Limitation Act are therefore safeguarded (*t*) On the other hand when a suit can be and is constituted without joining certain persons as parties and they are subsequently added as parties for the benefit of the defendants to ensure them against further litigation the suit should proceed though they are added as parties after the expiry of the period of limitation and the Court should award such relief as may be given in the suit as framed to such a case the provisions of s 22 do not apply (*u*) Thus where a promissory note is passed to the manager of a joint Hindu family he may sue the promisor without joining the other members of the family as co plaintiffs In such a case if the other members are joined as plaintiffs after the statutory period has expired their joinder being unnecessary does not prevent the suit as originally constituted from being in time (*v*) It has similarly been held that that section does not apply when a person is added as a party

(*l*) *Roop Chand* v *Sa dar Khan* (19_8) 9 Lah 5 6 110 I C 281 (8) A L 3 9

(*m*) *Kishan I rasad* v *Har Narain Si gh* (1911) 3 All 2 ?76 9 I C 39 [P C]

(*n*) *G rurayya* v *Anant* (1904) ?8 Bom 11 17

(*o*) *Ramsebuk* v *Raml ll* (1881) 6 Cal 815

(*p*) *Ramdoyal* v *Junmejoy* (188) 14 Cal 91

(*q*) *Kal das* v *Nathu* (1888) 7 Bom 217 *Fat m bai* v *I irbh i* (1897) _1 Bom 5?0 *Se han* v *Veera* (1909) 3 Mad 294 4 I C 33

(*r*) *Imam ud Din* v *Liladhar* (189) 14 All 5 4

(*s*) *Ramki kar* v *Akh l Ch dra* (1908) 3 Cal 519

(*t*) *Chockl g m* v *Seetha* (19) 6 Ban 29 10 I C _37 ( ) A PC 2 _

(*u*) *Gururayya* v *Ana t* (1904) 28 Bom 11 *Pat shri Partap* v *Rudra Narain* (1904) 26 All 5 8 affirmed on app to I C (1910) 3 All 41 6 I C 981 *Hazari Mal* v *Bhawani I am* (1908) 30 All 538 *Thaku Mani* v *Dai Ran Koeri* (1906) 33 C 1 10 9 *Annam lai* v *M r gappa* (1915) 38 M d 837 84 2 I C 8 6 *Virchand* v *Ko du* (1915) 39 Bom 9 31 I C 180 *Sh has heb* v *S dashiv* (1919) 43 Bom 575 580 581 61 I C ?23 Contra *Mathewson* v *I am K nai* (1909) 36 C 1 6 687 689 1 I C 6 6 *Shirubai* v *Shuddesl war* (19 1) 45 Bom 1009 1013 61 I C 590 (1) A B 15 *Coorl Mills* v *Vall bl das* (19 5) ?7 Bom L.R 1168 94 I C 5 5 (5) A B 547

(*v*) *Kishe I sh d* v *Har N ra n* (1911) 33 I A 45 33 All. 2 9 I C 739

merely to enable the Court effectually and completely to adjudicate upon the questions involved in the suit without any relief being claimed against him (w) Further the section does not apply where an assignee from a party to a suit the assignment having been made pending the suit is joined as a party to the suit (x) It has also been held that that section does not apply where a person is joined as a defendant in a suit and he is subsequently added as a plaintiff (y) In a case before the Privy Council where relief was claimed against a *debuttor* estate but none of the defendants was impleaded as representing the estate and subsequently though after the expiration of the period of limitation prescribed for the suit one of the defendants [*i e* a person *already a party* to the suit] was impleaded as *sebait* and as representing the estate it was held that s 22 of the Limitation Act did not apply to the case ( ) Where a suit is originally brought against a firm in the name of the firm but subsequently the title of the plaint is amended by substituting the names of the members of the defendants family on its being brought that the defendant is not a firm but an undivided Hindu family the suit is not affected by the provisions of sec 22 (1) of the Indian Limitation Act since there is no addition of parties but only a substitution in order to correct a misdescription (a)

Party may be added at any stage of suit—Subject to the provisions of the Limitation Act referred to above a person may be added as a party to a suit at any stage of the suit and even at the time of passing the decree (b)

Misdescription—Where there is a misdescription of a defendant in the title of a suit there is complete power in the Court to make the necessary correction without regard to lapse of time In this class of cases it is material to ascertain against whom the relief is claimed *A* sues the Municipal Committee of Gorakhpur through the Secretary instead of suing the Committee through the President as ought to have been done The relief claimed is against the Committee *No personal relief* is sought against the Secretary The case is one of misdescription and the plaint may be amended though the application for amendment is made after the expiry of the period of limitation (c) *A* sues The Agent B B & C I Ry Co Ltd The relief claimed is against the railway company No personal relief is claimed against the Agent *A* applies for amendment of the plaint after the expiry of the statutory period by striking out the word Agent The amendment should be allowed the suit being substantially against the company (d) But if the relief claimed was as against the Agent *personally* the amendment can be allowed only if there is no question of limitation (e) but not after the expiry of the period of limitation for the suit (f) Where a suit is brought against a joint Hindu family firm in the name of the firm the title of the plaint may be amended by substituting the names of the members of the joint family even after the period of limitation prescribed for the institution of the suit (g) Where a partner in a firm carrying on business out of British India and to which O 30 does not apply files a suit in the name of the firm and applies afterwards to amend the plaint by adding the names of the partners the case is not one of mis description but of substitution within sub rule (1) of this rule (h) See note to sub rule (1) Amendment allowed

(w) *Maham d Ishaq* v *Sheikh Akr ul* (1908) 1 C W N 84
(x) *Ar n h lla* v *Orr* (1917) 40 Mad 9 I C 634 But see *Abd l Rahman* v *Am r Al* (190) 34 C 1 61
(y) *Kh d r Moide n* v *I a a Na k* (1894) 1 Mad I N g dr lal v Ja pada (190) 35 Cal 106 N s gh I man (1910) 34 Bom 91 4 I C 49 Limitation Act 1908 s ( )
(z) *I e ry M ha* v *Na en l Nath* (190) 3 Cal 58 affirm l (1909) 3 Cal 9 3 I A 5 I C 404
(a) *Pa pr s d* v *Nr ın s* (19) Bom L R 11 90 I C 6 ( ) A B
(b) *Krish aj* v *M t lal* (19 9) 31 Bom L R 4 6 ( ) A B 33
(c) *Mann* v *Crooke* (1880) All 96
(d) *Saraspu Ma fact n g Co* v *B B & C I Ry C* (19 3) 47 Bom 8 3 I C 10 (3) A B 45
(e) *Ind a Ge e al S N & P Co Ltd* v *Lal Mo an* (1916) 43 Cal 44 I C 3
(f) *Ea t Ind a Ra lw y Co* v *I m Lakh n* (19 4) 3 Cal 2 0 8 I C 31 (5) A I 3 *Ag nt Beng l Nagp r R lway* v *I e ar L t* (19) 5 Cal 3 90 I C 4 6 ( ) A C 16
(g) *Ram asad* v *Shri n* (19) Bom L R 11 90 I C 6 3 ( ) A B
(h) *Bank itish Ind Mill* v *Belmat med* (19 3) 0 Bom L R 11 109 I C (5) A B 191

Appeal —No appeal lies under this Code from any order made under this rule But where the name of a d fendant is struck out under this rule on the ground that the plaint do s not dis los any cause of action against him the order operates as a decree and is appealable as such (i) Similarly if in a suit for partition the name of one of the defendants is struck out on the ground that he has no interest in the properties the subject matter of the suit he may appeal from the order as the order operates as a decree against him (j)

Revision —An order refusing to add a party as a defendant is not subject to revision under s 115 but the High Court may interfere under s 107 of the Govern ment of India Act 1915 if there is a denial of the right of fair trial (k) Nor is an order refusing to substitute as plaintiffs in a suit persons interested in the suit (l)

11 [S 32, 6th para *Cf* R S C O 16, r 39] The Court may give the conduct of the suit to such person as it deems proper

Conduct of suit

Person —The word person refers to a party to the suit and the Court cannot give the conduct of the suit to a stranger (m)

12 [S 35] (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to ap pear, plead or act for such other in any pro ceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding

Appearance of one of several plaintiffs or defen dants for others

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court

13 [S 34] All objections on the ground of non joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived

Objections as to non joinder or misjoinder

Scope of the rule —This rule refers to two kinds of objections the one for non joinder of parties and the other for misjoinder of parties These objections must be taken at the earliest possible opportunity and in all cases where issues are settled at or before such settlement otherwise the objection will be deemed to have been waived (n)

(i) *Rama Rao v The Raja of P ttapur* (1919) 4 Mad 19 49 I C 83

(j) *P mji v Alafkhan* (19 4) 3 Pat 8 9 8 I C 90 (—) A P 1 1

(k) *Rabbaba v Na j han* (1886) 13 Cal 90 *Kali Ia v T lsi Ram* (19—) 4 Pat 7 3 93 I C 93 (—) A P 07

(l) *Equitable Tru t Comp y v Hafi* (19 9) 0 All 6 108 I C 33 (23) A A 9

(m) *Ta p t v Srim t Bag la* (1928) 48 Cal L J 530 106 I C 8 4 (23) A C 143

(n) *Obhoy v H ry Ch rn* (18) 8 Cal. *Ia mas v Krish a* (1891) 14 Mad 409 *Pu hottam v Kala* (190) 8 Bom 301

Where an objection to non joinder (*o*) or misjoinder (*p*) of parties is not taken in the Court of first instance it will be disallowed in appeal See notes to O 1 r 9 above See also s 99

Unless the ground of objection has subsequently arisen —*These words* are new When the ground of objection has arisen subsequent to the settlement of issues the objection may be taken even after the settlement of issues In fact it was so held under the old section though the words unless the ground of objection has subsequently arisen did not occur in that section Thus if a co parcener or a reversioner or a remainderman is born *after* the settlement of issues in a suit to which he is a necessary party and the plaintiff does not make him a party the defendant may object to his non joinder though issues have already been settled Thus in a partition suit all coparceners must be joined as parties even though some of them may be born after the institution of the suit Similarly where a woman who is a party to a suit is married *after* the settlement of issues and the nature of the suit is such that the husband is a necessary party the plaintiff should make the husband a party and the defendant may raise this objection though it be *after* the settlement of issues (*q*)

As to misjoinder of causes of action see O 2 r 7

ORDER II

Frame of Suit

1 [S 42] Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them

Frame of suit

From this rule read with r 2 below the intention of the Legislature appears to be that as far as possible all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit (*r*)

2 [S 43] (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim *in order to bring the suit within the jurisdiction* of any Court

Suit to include the whole claim

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished

Relinquishment of part of claim

(*o*) *I hollam* v *Ka a* (190?) ?6 Bom 301 *Ja a a* v *Krishna* (1891) 14 M d 499

(*p*) *F liyrapa* v *F d pa* (1891) 16 Bom 119 1

(*q*) *Modhe* v *Dongre* (1881) 5 Bom 609

(*r*) *S r l Chand* v *M k n Bibi* (1 98) ? Cal 371 See also *J anna* v *I yth atha* (1903) 6 Mad 60 64 66 *M al ma nia* v *Th rurengadam* (1908) 31 Mad 385 394 396

2 (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted

Omission to sue for one of several reliefs

Explanation —For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action

Illustration

A lets a house to *B* at a yearly rent of Rs 1 200 The rent for the whole of the years 1905 1906 and 1907 is due and unpaid *A* sues *B* in 1908 only for the rent due for 1906 *A* shall not afterwards sue *B* for the rent due for 1905 or 1907

Changes in the section —The words obtained before the first hearing after the words the leave of the Court [see sub rule (3)] have been omitted The words and succes ive claims arising under the same obligation have been added into the Explanation The illustration has been expanded so as to comprise the case of rent due for a period *subsequent* to the one for which the suit is brought

Cause of action —In *Pittapur Raja* v *Suriya Rau* (s) their Lordships of the Privy Council referring to the expression cause of action in this rule said that it meant the cause of a tion for which the suit was brought Peferring to this decision their Lordships said in the recent case of *Muhammad Hafi* v *Muhammad Zakariya* (t) The Lordships see no reason to attempt to qualify or to extend those words because they are in fact nothing but a repetition of the exact words of the Code the cause of action is the cause of action which gives occasion for and forms the foundation of the suit and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim he cannot afterwards seek to recover the balance by independent proceedings See notes to s 20 Cause of action

Splitting of claim —This and the preceding rule are aimed against a multiplicity of suits in respect of the same cause of action (u) The object of the present rule is to use the language of r 1 of this order to prevent further litigation For that purpose the rule provides that every suit shall include the whole of the claim *which the* plaintiff is entitled to make in respect of the *same* cause of action He is not entitled to split his cause of action into parts and bring *separate* suits in respect of each part If he *omits* to sue in respect of or *intentionally relinquishes* any portion of the claim arising from the *same cause of action* he will be precluded from suing in respect of the portion so omitted or relinquished even though he states in his plaint that he intends to bring a second suit for the portion omitted (t) But it cannot be said of a plaintiff that he has *omitted* to sue in respect of a portion of his claim unless he was at some time prior to the suit *aware or informed of* the claim or of the facts which would give him a cause of action (w) If the plaintiff was aware of the claim and omitted to sue in respect thereof he could not afterwards sue in respect thereof *though the omission*

(s) (1885) 8 Mad 5 0 5 4 12 I A 116 119

(t) (1922) 49 I A 9 14 44 All 121 1 6 65 I C 79 (22) A I C 23

( ) *M u g Pe* v *Ma Lon* (1911) 38 I A 140 145 11 I C 497

(v) *M I ud* v *K rgu* (1893) 0 Cal 322.

(w) *Ve lata* v *Krishna mi* (1883) 6 Mad 344 *Ama at* v *Imdad Hosin* (1888) 15 Cal 800 15 I A 106 *Sanka an* v *Parvathi* (1896) 19 Mad 145 *B I Ku war* v *M n Lal* (1910) 3 All 6 7 I C 209

was accidental or involuntary (x) For the definition of cause of action see notes to s 20 Cause of action

Illustrations

(1) *Relinquishment*—*A* owes *B* Rs 2 200 *B* may relinquish Rs 200 to bring his suit within the jurisdiction of a Presidency Small Cause Court and may sue *A* in that Court for Rs 2 000 only Here the relinquishment being *intentional* *B* cannot after wards sue *A* for Rs 200 the portion relinquished But if the suit is transferred on *A* s application to the High Court *B* may add Rs 200 to his claim the High Court having jurisdiction over the entire claim *Ramlall* v *Bhajahari* (1896) 1 C W N 32

(2) *Accidental omission*—A Mahomedan wife sues her husband to recover property belonging to her including Government paper of the value of Rs 10 000 and a decree is passed in her favour She afterwards sues the husband to recover from him Government paper of the value of Rs 600 alleging that she omitted to include it in the previous suit *by an oversight* The suit is barred for she was *aware of her claim* when she brought the previous suit *Bu loor Ruheem* v *Shumsoonnissa* (1867) 11 M I A 551

(3) *Instalments*—Where a promissory note is payable by instalments and two or more instalments have become due and the holder of the note sues only for one of the instalments and *omits* to sue for the other instalments he cannot afterwards sue for those instalments *Mackintosh* v *Gill* (1874) 12 B L R 37 *Narayan* v *Mimba* (1906) 8 Bom L R 547 Similarly if a promissory note is made payable by instalments and it is provided that in default of payment of any one instalment the whole of the balance shall be payable immediately a suit for recovery of the unpaid instalment will bar a subsequent suit for the balance *Shrinivas* v *Chanbasapagowda* (1923) 25 Bom L R 203 72 I C 290 ('23) A B 201 In a Madras case it was said that there was no bar if the default clause gave the obligee the *option* of recovering the whole balance due at once as where the words used were wh n required or when you require or if you choose or you will be at liberty to sue *Mukyaprana* v *Kalu* (1928) 112 I C 270 ('28) A M 705 The *Mukyaprana s case* was considered by the same High Court in *Rego* v *Philip* (1929) 56 Mad L J 580 ('29) A M 371

(4) *Two promises for one debt*—*A* accompanies *B* a pleader to Hardwar as *B* s medical attendant for which Rs 1 300 become due to him as his fees *B* passes a promis sory note to *A* for Rs 700 and agrees as for the balance of Rs 600 to do certain legal work for *A* *B* dies without doing the legal work undertaken by him *A* sues *C* *B* s son upon the promi sory note and a decree is passed for him He then brings another suit against *C* to recover the Rs 600 alleging that the legal work which *B* had agreed to do for him had not been done The suit for the recovery of Rs 600 is barred *Preonath* v *Bisnath* (1907) 29 All 256 The above decision has been dissented from by the High Court of Madras on the ground that if several promissory notes are executed for portions of the same debt each promissory note creates a distinct cause of action on which a separate suit may be brought *Anantanarayana* v *Savithri* (1913) 36 Mad 151 158 13 I C 458

(5) *Set off*—*A* sues *B* for Rs 200 As against the said claim *B* claims to set off Rs 200 being *part* of a sum of Rs 1 200 alleged to be due to him by *A* but omits to counterclaim from *A* the balance of Rs 1 000 *B* cannot afterwards sue *A* to recover Rs 1 000 *Nawbut* v *Mahesh* (1905) 32 Cal 654

(6) *Continuous account*—When a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract but to be continuou so that one item if not pai l shall be united with another and form one continuous demand, the whole

(x) *Buloor Ruheem* v *Shumsoonnissa* (1867) 11 M I A 551 601-605

together forms but *one cause of action* and cannot be divided *Bonsey* v *Wordsworth* (1856) 18 C B 325 334 *Kedar Nath* v *Dinabandhu* (1915) 42 Cal 1043 31 I C 696

(7) *Omission of portion of a claim in a suit against one of several promisors*—The omission of a portion of a claim in a suit against one of several promisors is no bar to a subsequent suit against another promisor in respect of the portion so omitted *A* lets a house to *B* and *C* at a yearly rent of Rs 1 200 The rent for the whole of the years 1905 1906 and 1907 is due and unpaid *A* sues *B* in 1908 for the rent due for 1907 *A* cannot afterwards sue *B* for the rent due for 1905 or 1906 but he can sue *C* for the rent due for those two years (y) See the illustration to the present rule

(8) A suit for redemption of two out of three plots comprised in one mortgage is a bar to a subsequent suit for redemption of the third plot *Bhau Daji* v *Pallu* (1922) 24 Bom L R 1157 73 I C 862 (23) A B 63

(9) A suit by a reversioner against *X* to recover two out of three properties alienated to him by a Hindu widow having a limited interest is a bar to a subsequent suit against him to recover the third *Darbari* v *Gobind* (1924) 46 All 822 80 I C 31 (24) A A 902

(10) A suit by a coparcener that a mortgage of one property is not binding on him bars a suit for a similar relief as to another property included in the same mortgage *Abhaidat* v *Ragho* (1925) 1 Luck 1 91 I C 976 (25) A O 77 See also *Abhaidat Singh* v *Ragho* (1926) 1 Luck 1 91 I C 976 (26) A O 77

(11) If a mortgage and a lease are one transaction a suit for rent will bar a suit to recover the mortgage money *Diwan Chand* v *Ralla Ram* (1926) 8 Lah. L J 381 97 I C 396 (26) A L 599 But not so if the transactions are separate *Gurdial* v *Diwan Chand* (1928) 112 I C 15 (28) A L 732

Explanation to the Rule—

A *Obligation and collateral security for its performance*—The Explanation to the present rule is not intended to be an illustration of the foregoing provision but a substantive enactment making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the rule (z) In a recent case their Lordships of the Privy Council said (a)

The [Explanation] shows that a personal claim for the mortgage money under a mortgage and the enforcement of the security for the debt are to be regarded as *one and the same cause* of action That provision is in marked distinction to the law of this country where a mortgagee is at liberty to appoint a receiver under his deed to sue for the debt and to take proceedings for sale or foreclosure independently and at the same time It is important therefore in considering the effect of th code to bear in mind that its obvious intention is to establish a rule of law different from that accepted here

See notes below First suit for interest due under a mortgage second suit for principal and Exceptions to the rule against splitting of reliefs

B *Successive claims arising under the same obligation constitute a single cause of action*—The words successive claims arising under the same obligation have been added into the Explanation and the illustration to the rule has been expanded to give effect to a Calcutta decision where it was held that a claim in respect of *all* arrears of rent constitutes a *single* cause of action (b) *The illustration shows that if rent has become* due for the years 1905 1906 and 1907 the landlord can bring only one suit for the whole of the rent in arrears and that if he sues for the rent due for a particular year only he will be precluded from suing for the rent due for the other years It must

(y) *Ramanujulu* v *Aravamudu* (1910) 3 Mad 317 5 I C 735

(z) *Rajana* v *Rana Lal* a (1914) 41 I A 14 148 6 I C 2_8

(a) *Kish n Na a n* v *Pala M l* (19_3) 50 I A 115 117 4 Lah 3 34 7 I C 197 ( ) A PC 41

(b) *Taruck Ch nder* v *Panch* (1881) 6 Cal 791 *Mahomedbhai* v *Ad mj* (1922) 46 B m 220 35 61 I C 919 ( ) A B 1

however be noted that though this rule precludes the landlord from bringing *a fresh suit* for rent not included in the former suit it does not prevent him from adopting *any other remedy* the law gives him to recover the rent Thus though in the case put in the illustration the landlord *cannot sue for the rent* due for the year 190 or 1907 he *can distrain* for the rent due for those years (c) On the same principle as in the illustration a suit for an annuity for the year 1917 is a bar to a subsequent suit for annuity for the years 1914 1915 and 1916 (d) See also ill (7) above

Interest accruing due from time to time under a mortgage deed maintenance *malikana* &c are other instances of *successive claims* arising under *the same obligation*

Distinct causes of action —If the cause of action in the subsequent suit is *different* from that in the first suit the subsequent suit is not barred (e) What the rule requires is that every suit shall include the *whole of the claim* arising from *one and the same cause of action* and not that every suit shall include *every claim* or *every* cause of action which the plaintiff may have against the defendant (f) As observed by their Lordships of the Privy Council in *Payana* v *Pana Lana* (g) the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action even though they arise from the same transaction One great criterion when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit is whether the same evidence will maintain both actions (h) For the meaning of cause of action see notes above Cause of action

Illustrations

(1) *Different properties different defendants* —A claiming *as his father s heir* sues B for possession of a certain piece of land. He then sues C *also as his father s heir* for possession of another piece of land. The fact that both pieces of land are claimed by *A under the same title* does not preclude A from maintaining separate suits against B and C *Dampanaboyina* v *Addala* (1902) 25 Mad 736 *Narayan* v *Shamrao* (1903) 27 Bom 379 *Ramchandra* v *Gajanan* (1920) 44 Bom 35_ 362 56 I C 349

(2) A suit brought by some members of a joint Hindu family against other members of the same family for partition of joint family property does not bar a second suit by the same plaintiffs for partition of other property belonging *jointly to the family and strangers* *Purshottam* v *Atmaram* (1899) 23 Bom 597

(3) A sues B for specific performance of an agreement for the sale to him of B s land and obtains a decree In execution of the decree A is put in possession of a portion only of the land as it is found that the rest of the land did not belong to B but to B s son A subsequent suit by A against B for recovery of an aliquot portion of the price to the extent of the son s share is not barred under this rule the cause of action being entirely distinct *Venkatarama* v *Venkatta* (1901) 24 Mad 27 *Parangodan* v *Perumtoduka* (1904) 27 Mad 380

(4) A suit by a Mahomedan widow for *dower* is no bar to a subsequent suit by her for a declaration of her right to possess for life her husband s estate in accordance with a proved local custom *Mahomed* v *Hasin Banu* (1894) 21 Cal 157 20 I A 155

(c) *E a a Doss* v *Venkatarayer* (1898) 1 Mad 0

(d) *Abl l Jar m* v *M hammad* (19) 44 All 663 68 I C 9 0 ( ) A 4 3 0

(e) *Mullick* v *Sheo Proshad* (1896) 3 Cal 8 1 8_5 *S ra l asad* v *Br n* (19 8) 48 Cal 1 J 303 114 I C 13 (9) A C 93

(f) *Put j r I j* v *Surya I a* (18) 8 Mad 5 0 5 4 1 I A 116 119 *Am t* v *Imdad* (1888) 15 Cal 800 15 I A 106 *H man* v *H uman* (18) 19 C 1 1 3 18 I A 158 *Jay a* v *I a Ja a* (1914) 41 I A 14 148 6 I C 8 *I kda Pra a I* v *Kh d m* (19) Cal W N 6 3 6 4 0 I C 18 (3) A C 3 I *Jal ja* v *Ask* (19 8) 9 Lal 451 108 I C 613 (8) A L 38 *I h J d I t* (19 6) 30 C W N 8 3 9 I C 73 (6) A C 10

(g) (1914) 41 I A 14 148 23 I C 8

(h) *S u* v *Bah ba* (1916) 40 Bom 3 1 355 33 I C 9 0 *M hamm d L ma* v *L mm t l* (19 3) 45 All 3 6 1 I C 965 (3) A A 311 *Ma g l e* v *M Low* (1911) 33 I A 140 145 21 I C 49

(5) A suit to *eject* a tenant holding under a lease is no bar to a subsequent suit against him for *rent* under the same lease *Subraya* v *Rathnavelu* (1909) 32 Mad. 330 2 I C 313

(6) The dismissal of a suit for a *declaration of title* under s 42 of the Specific Relief Act 1877 on the ground that the plaintiff not being in possession ought to have asked for possession also is no bar to a subsequent suit for a *declaration of title* and for possession *Darbo* v *Keshorai* (1879) 2 All 356 *Sarsuti* v *Kunj Behari Lal* (1883) 5 All 345 *Jibunti Nath* v *Shib Nath* (1882) 8 Cal 819 *Nonoo Singh* v *Anand* (1885) 12 Cal 291 *Mohan Lal* v *Bilaso* (1892) 14 All 512 *Sayed Siliman* v *Bontala* (1915) 38 Mad. 247 20 I C 418 Similarly the dismissal of a suit for an *injunction* to restrain the defendant from interfering with the plaintiff s possession of certain lands on the ground that the plaintiff was not in possession is no bar to a subsequent suit for *possession* *Bande Ali* v *Gokul Misir* (1912) 34 All 172 13 I C 154

(7) *Promissory note—original cause of action* —A sues *B* upon a *promissory note* but the action fails owing to a material alteration in the note *A* is not precluded from subsequently suing *B* on the *original cause of action* i e from suing *B* to recover the consideration for which the note was given The two causes of action are quite distinct *Payana* v *Pana Lana* (1914) 41 I A 142 26 I C 228 *Beni Ram* v *Ram Chandar* (1914) 36 All 560 26 I C 302 See also *Bhag Bhari* v *Gujar Mal* (1917) Punj Rec no 63 p 230 38 I C 623

(8) *A* alleging that he is entitled to one moiety of a piece of land and that *B* is entitled to the other moiety and that *B* falsely claiming the ownership of the whole land demolished the structures standing on *A* s moiety of the land and dispossessed *A* of his moiety sues *B* for damages for demolition of the structures and appropriation of the materials A decree is passed in the suit for *A* Subsequently *A* alleging that since the demolition of the structures *B* has been occupying the entire property to the exclusion of *A* by denying *A* s title thereto sues *B* for a declaration of title to one moiety of the land and for separate possession thereof Here the cause of action is the act of dispossession and it being the same in both the suits the second suit is barred under this rule *Khardah Company Ltd* v *Durga Charan* (1919) 46 Cal 640 58 I C 636

(9) A suit by *A* against *B* to recover immovable property in consequence of having been improperly turned out of possession is no bar to a subsequent suit to recover from the same defendant movable property in consequence of its wrongful detention *Pittapur Raja* v *Suriya Rau* (1884) 8 Mad 520 12 I A 116

(10) A suit by reversioners against a Hindu widow for a declaratory decree and for an injunction forbidding alienations of her husband s property is no bar to a subsequent suit by them for a declaration that a gift made by her of the property is inoperative and cannot affect their reversionary rights *Chand Kour* v *Partab Singh* (1888) 15 I A 156 16 Cal 98

(11) The dismissal of a suit for specific performance by a purchaser is no bar to a subsequent suit by him for the recovery of earnest money *Munni Bibu* v *Kunwar Kamla* (1923) 45 All 378 72 I C 86 (23) A A 321

(12) The dismissal of a suit for *rent* on the ground that the plaintiff was not the landlord but that he and the defendant held the land as tenants in common is no bar to a subsequent suit by the same plaintiff against the same defendant for *partition* of the land *Timappa* v *Manjamya* (1923) 25 Bom L R 491 73 I C 424 (23) A B 440

(13) The dismissal of a suit for possession by *A* against *B* on the ground that *B* held the property as a mortgagee is no bar to a subsequent suit by *A* against *B* for redemption *Jaimal* v *Ganeshi Mal* (1923) 4 Lah 187 75 I C 5 8 (24) A L 143

(14) A mortgage deed contains a stipulation conferring upon the mortgagee the option to sue for interest or for possession in the event of the mortgagor s failure to pay

interest at the stipulated time The mortgagor fails to pay interest and the mortgagee sues him *for the interest* The mortgagor again fails to pay interest and the mortgagee brings a suit against him for *possession* The previous suit is not a bar to the subsequent suit *Parmeshri Das* v *Fakiria* (1920) 1 Lah 4o7 59 I C 71 [I B]

(15) The dismissal of a suit for rent at an enhanced rate is no bar to a subsequent suit for rent at the rate originally fixed *Saddruddin* v *Bani* (1888) 15 Cal 14o Nor is a decree for the plaintiff in a suit for arrears of rent at the old rate a bar to a suit to recover the difference between rent at the old rate and that at the enhanced rate for the same period if the plaintiff had obtained a decree that he was entitled to rent at an enhanced rate *Deb Narain* v *Raja Jagadish* (1928) 32 C W N 870 110 I C 39o (28) A C 684

For other cases see foot note (i)

First suit for possession sub equent suit for mesne profits prior to suit —It has been held by the High Courts of Calcutta (j) Madras (k) Bombay (l) and Rangoon (m) that a suit for possession of land is not a bar to a subsequent suit for m sne profits of such land accrued due *prior to* the in titution of the suit for possession (n) the reason given being that the cau e of action for possession is quite distinct from the cause of action for mesne profits and conversely a suit for mesne profits is not a bar to a sub equent suit for possession (o) On the other hand the High Court of Allahabad (p) has held that a suit for possession is a bar to a sub equent suit for mesne profits accrued due prior to the date of the suit As regards mesne profits accrued due *subsequent* to a suit for possession the High Court of Allahabad has held in one case that the suit for possession is not a bar to a suit for the mesne profits (q) and in another that it is (r) See O 20 r 12 see al o notes to s 11 on p 7o above

First suit for interest due under a mortgage second suit for principal —Where the principal secured by a mortgage *has become due* and the mortgagee sues for interest only a suit for interest alone will bar a subsequent suit for principal (s) unless there is a separate covenant for the payment of interest secured in a sepirate manner e g a covenant enabling the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of principal (t) But there is no bar at all if the principal had not become due at the date of the first suit (u)

(i) *Ha raj* v *Lalj* (1904) 8 Bom 447 *Chal dom* v *Kakkath* (190) 5 Mad 669 *Umda Legam* v *Muhammads* (1911) 33 All 91 9 I C 00 [fr t suit for prompt dower second suit for deferred dower] *Sonu* v *Bahinibai* (1916) 40 Bom 351 33 I C 950 *Ram Harakh* v *Ramlal* (1916) 38 All 317 33 I C 124 [partition suits relatin to properties in different districts] d ssented from in *Basava a* v *Dodda Lingappa* (19 3) 44 Mad L J 6 6 4 I C 430 (3) A M 584 *Sheobaran Singh* v *Bhajwan Sahai* (1919) 41 All 86 50 I C 953 *L ki mi Das* v *Balak Ram* (191) Punj Rec no 104 p 353 16 I C 24 *G l b Shah* v *Havel Shal* (1915) Punj Rec no 87 p 3 5 31 I C 463 *Abd Rashid* v *Quadr t un nissa* (19 4) 46 All 54 9 I C 338 (24) A A 13 [first suit for specific share in immov ble property—second suit for sha e in a dower d bt] *Thot am* v *Nawa* (19 3) 4 Lah 6 I C 6 (4) A L 1 *Mth mmad Hussa n* v *Abd l* (19) 3 Lah I 65 I C 10 ( ) A L 111 *I h* v *Amir* (19 3) 4 Lal 5 4 I C 1 (3) A L 03 *Sardarim* v *H rde ath* (19 5) Lah L J 36 8 I C 894 (5) A L 459 *Sha m gan* v *Ianch l* (19 6) 49 Mad 596 9 I C 909 (6) A M 683 *I thi a abapathy* v *Gopal* (19 3) 56 Mad L J 673 (9) A M 54 *Mohar S ngh* v *D l t P m* (19 0) 11 L h L J 64 *Durga Pras d* v *Raja Rampan* (19 8) 3 Luck 487 11 I C 169 (8) A O 3o9

(j) *Lallessor* v *Jank* (189) 19 Cal 615

(k) *Ponnammal* v *R m rda* (1915) 38 Mad 8 9 7 I C 6 9 *Kl u idus* v *Sowdagar* (19 6) 51 Mad L J 5 9 I C 399 (6) A M 101

(l) *Ram ha dra* v *Lodha* (19 4) 6 Bom L R 88 80 I C 59 (24) A B 363

(m) *Ma Mya ng* v *Ma q I o Ch t* (19 6) 4 Rang 103 9 I C 380 (6) A R 13

(n) *L llessor* v *Janki* (18) 19 Cal 615

(o) *Mo oh r Lall* v *Gour Sunkur* (1883) 9 Cal 93 *Tirupat* v *Narasimha* (1888) 11 Mad 210

(p) *Mewa ku r* v *B narsi Prasa l* (189) 1 All 533

(q) *Sheo Kum r* v *h a ndas* (190) 24 All 501

( ) *Gordh n* v *F h mbar* (19) 49 All 59 (7) A A 716

(s) *H km t lla* v *Im m Al* (1890) 1 All 01

(t) *I e hc t* v *I U l* (18) 1 Bom 6 *K he Na a n* v *Pala M l* (191) Punj Rec no 88 p 91 47 I C 937 *Natha S ngh* v *Chun l l* (1918) Punj Rec n 69 p 30 47 I C 364 [where i ter t was made payat le in the shap of r nt un let a separate writin] See al o Davidson on Con eyancing 3rd ed Vol II Part II p 591

( ) *S m S bram a* v *Nag pp* (19) 5 Mad L J 636 10 I C 187 ( ) A M 580 *Joseph* v *Joseph* (19) 6 Lah 71 115 I C 671 (29) A R 1

2 In *Muhammad Hafi* v *Muhammad Zakariya* (v) *A* executed a simple mortgage in 1910 The mortgage provided by cl. 2 that the interest should be paid monthly and that if it was not paid for 6 months the mortgagee could realize either the unpaid interest only or both the principal and interest by bringing a suit without waiting for the expiration of the time provided for repayment of the principal By cl 7 it was provided that if the principal with interest was not paid within 3 years the mortgagee should be entitled to sue for principal and interest In 1914 the mortgagee sued in respect of the *interest* due and obtained a decree In 1915 he brought a second suit in respect of the *principal and the interest th n due* Their Lordships of the Privy Council held that the second suit could not be maintained having regard to the provisions of this rule Their Lordships said What was the cause of action that the plaintiffs possessed when the proceedings were first instituted ? It was the cause of action due either to the fact that the interest had been unpaid for more than six months or that the three years had elapsed and the principal was also unpaid *and in either case they could have sued for realisation to provide for the whole amount secured by the deed* Not having done so they were debarred from instituting the second suit

The question came up again before their Lordships of the Privy Council in *Kishan Narain* v *Pala Mal* (w) The rule to be deduced from that decision may be stated thus If a mortgage deed provides for the payment of principal and interest as *independent obligations* a suit for a *personal* decree for the interest due is no bar to a subsequent suit to realize the principal In such a case the two causes of action are distinct But if the mortgage deed in default of payment of interest gives the mortgagee the right to realize both the principal and interest and the mortgagee upon a default occurring sues to realize the interest *from the property* O 2 r 2 he is precluded from afterwards suing to realize the principal due even though his plaint in the first suit has purported to reserve the right to do so The reason is that in such a case the cause of action—the non payment of the interest—gives rise to two forms of relief which the Code provides shall not be split see the Explanation to the Rule Their Lordships observed that if the mortgagees in their first suit claimed only a *personal* relief in respect of the unpaid interest their case would be on surer ground. But their claim in the first suit was for a decree for interest *recoverable from the mortgaged property*

First suit for produce payable under a mortgage second suit for possession —A mortgage bond provides that the mortgagor shall pay a share of the produce of the mortgaged land to the mortgagee every year and that in default the mortgagee shall be entitled to take possession of the land. The mortgagor fails to pay the produce for the year 1896 In 1897 the mortgagee sues for the value of the produce for 1896 but he does not claim possession of the land as he was entitled to do under the bond This suit is a bar to a subsequent suit for possession on the mortgagor s failure to pay the produce for sub sequent years The mortgagee ought to have claimed possession in the first suit (x) See notes below Omission to sue for one of several reliefs ill (1)

Properties held under separate titles —A plaintiff is not bound to include in the same suit separate properties held by different persons under diff rent titles (y) But he is bound to include in the same suit all properties held by the same defendant thou h under different titles ( )

Different causes of action arising from the same transaction —This rul does not require that when several causes of a tion ari e from *on transa ti n* th

(r) (19) 49 I A 9 44 All 1 1 6 I C 9 (") A I C "3 in appeal from (191) 39 All 06 41 I C 33
( ) (19 3) 0 I A 115 4 Lah 3 – I C 187 ( ) A PC 41 *S amy I ao* v *Official Assig ee* (19) 49 Mad 03 (5) A M 11 0 01 I C 403 [i dependent covenant to pa int rest—first suit for interest claimi g only a *pe o al r* li f— nd suit for I t rest h ll n t barred]
(x) *Chh l l Das* v *M su* (1914) I R no 4 19 I C 941
(y) *L alo F bi* v *I am Cha d a* (1919) 41 All 83 0 I C 90
(z) *M rli* v *Bhola Ram* (1894) 16 All. 165 [F B]

plaintiff should sue for all of them in one suit What the rule lays down is that where there is *one entire cause of action* the plaintiff cannot split the cau e of action into parts so as to bring separate suits in respect of those parts As observed by their Lordships of the Privy Council in *Payana* v *Pana Lana* (a) the rule is directed to securing the exhau tion of the relief in respect of a cause of action and not to the inclusion in one and the ame action of different causes of action *even though they arise from the same transaction* It was held in that ca e that a suit upon a promissory note the suit failing owing to a material alteration in the note was not a bar to a subsequent suit to recover the consideration for which the promis ory note was given

In *Anderson* v *Kalagarla* (b) A agreed to purcha e 10 bales of yarn from *B* A took delivery of 7 bale but failed to pay the price of those bales and as regards the remaining 3 bales refu ed to take de ivery thereof Garth C J expre sed the opinion that a suit by *B* again t A to recover *damages* for failure to take delivery of the three bales wa *not* a bar to a subsequent suit by *B* to recover from *A* the *price* of the 7 bales The learned judge observed that a claim for the *price* of goods sold was a cause of action of a different nature from a claim for *damages* for the non acceptance of goods and the fact that both claims aro e under the *same contract* did not constitute them *one and the same cause of action* Wilson J expressed a different opinion stating that the claims having ari en under the *same contract* the cau e of action was but *one* and that the subsequent suit was therefore barred The opinion of Wilson J was followed in *Duncan* v *Jeetmull* (c) which also was a case of breach of *one and the same contract* These two cases show that all existing breaches of *the same contract* must be joined in the same suit but they have been held not to apply to the case where there are *separate contracts* though contained in the *same instrument* (d) Thus where it is expressly provided by an indent that each monthly shipment and item should be treated as a separate contract the plaintiff is entitled to bring a separate suit for damages in respect of each shipm ent (e) Conversely where goods are delivered under separate orders each order and delivery of goods is a separate contract and a separate cause of action unless it be proved that *all* the goods were delivered as under a *single contract* (f) See notes below He shall not afterwards sue in respect of the portion so omitted

Closely connected with this question is a point which was left open by their Lordships of the Privy Council namely whether a mortgagee who hold *several mortgages on the same property* can treat them with respect to the provi ions of this rule as separate causes of action or whether he must bring one suit on all the mortgages (g) This subject has already been considered in the notes to s 11 under the head Application of the above rules to suits on mortgage

Omits to sue in respect of any portion of his claim —This rule refers to cases where a suit *has been filed* and the plaintiff omit in such suit to sue in respect of a portion of the claim (h) It does not apply where no suit has been filed as where a plaint is returned to the plaintiff for pre entation to the proper Court and the plaintiff does nothing further in the matter (i) nor does it apply where a suit is filed and sub equently withdrawn under O 23 r 1 (1) below (j)

He shall not afterwards sue in respect of the portion so omitted — The bar is not avoided by an expre ion of intention to ue again (k) [illegible]

(a) (1914) 41 I A 14 148 6 I C 8 [illegible]

(b) (1886) 1 Cal 339

(c) (189) 19 Cal 3 See al o [illegible] (1909) 11 Bom L R 46 1 I C 310

(d) [illegible] (18[illegible]) [illegible] B m 6 [illegible] approved in [illegible] (19) 49 I A 9 15 44 All [illegible] A [illegible] Bom 134

(e) [illegible] (1 36) 19 Mad 304 [illegible] (1911) [illegible] Cal [illegible] 09

(f) [illegible] A R [illegible]

(g) [illegible] 9 I A 118

(h) [illegible] I C 1 9 [illegible]

(i) [illegible] (191) [illegible] 833

(j) [illegible]

(k) Maksud v [illegible]

2 by obtaining leave to sue in respect of the portion so omitted the reason is that the leave contemplated by this section is the leave to sue for one of several *reliefs* referred to in sub r (3) it does not relate to the portion so omitted referred to in sub r (2) (*l*)

The rule says he shall not *afterwards* sue It does not therefore apply where the suits are simultaneous and not successive (*m*) But fractions of a day are recognized and on the presumption that suits filed on the same day are filed in the order of their numbers in the register it has been held that the suit of the subsequent number is barred (*n*) But that presumption has been doubted and the plaintiff allowed to elect which suit shall be held to be barred under this rule (*o*)

It has been held by the Calcutta High Court that the present rule refers to a case where there has been a suit in which there has been an omission to sue in respect of portion of a claim and a *decree has been passed* in that suit So long as no decree is passed a second suit in respect of the portion so omitted is not barred It follows from this that where a suit brought in respect only of a portion of a cause of action has not been heard and decided the Court may allow the plaint in the suit to be amended by adding the omitted portion of the claim (*p*) Similarly if such a suit is withdrawn under O 23 r 1 (2) with liberty to bring a fresh suit the plaintiff may include in the fresh suit the portion that was omitted in the suit withdrawn by him (*q*)

A sues *B* in respect of a portion only of a cause of action *Pending this suit A* brings another suit against *B* in respect of the remaining portion of the same cause of action. According to the Calcutta decision cited above neither suit is a bar to the other so long as no decree is passed in either suit It is open therefore to *A* to rectify his error in bringing two suits in respect of the same cause of action by applying for leave to amend the plaint in either suit by adding the omitted portion which forms the subject matter of the other suit and then withdrawing the other suit under O 23 r 1 (1) The Chief Court of the Punjab has gone further and held that if in such a case *A* is allowed to withdraw either suit with liberty to bring a fresh suit under s 23 r 1 (2) he is entitled to bring a fresh suit *by virtue of the leave* granted to him though the other suit has been carried to a decision (*r*)

Omitting to sue for one of several reliefs —Where a person is entitled to *more than one relief* in respect of the *same cause of action* he may sue for all the reliefs or he may sue for one or more of them and reserve his right *with the leave of the Court* to sue for the rest (*s*) If no such leave is obtained he will be precluded from afterwards suing for any relief so omitted (*t*) But if the right to the relief in respect of which a further suit is brought did not exist at the date of the institution of the former suit the subsequent suit is not barred (*u*) The words in s. 43 of the Code of 1882 were with the leave of the Court *obtained before the first hearing* Those words were construed literally and it was held that leave might be applied for and obtained when the case was called on for first hearing and before anything had been done towards the hearing of the suit (*v*) The italicized words have been omitted with the result that the leave may now be granted *at any stage of the suit* The leave however must be obtained from the Court before which the original suit was pending The leave if granted is good even if the pecuniary value of the relief allowed to be omitted from the suit exceeds the pecuniary limits of the jurisdiction of the Court granting the leave (*w*)

(*l*) *Raja Bahadur Shivlal v Raja Tirupappa* (1909) 11 Bom L R 46 1 I C 319

(*m*) *Vithu v Narayan* (1868) 5 Bom H C A C 30 *Kaleshar v Jagan* (18 8) 1 All 6 0 *Appasami v Ramasami* (1886) 9 Mad 279

(*n*) *Moti v Bhola Ram* (1894) 16 All 165 173

(*o*) *Raylu v Ramudu* (19 6) 49 Mad 869 97 I C 413 (26) A M 934 *Appasami v Ramasami supra*

(*p*) (1918) 45 Cal 30 316 7 I C 1 9 *supra*

(*q*) *Behari Lal v Srimati Baran* (1895) 17 All 53

(*r*) *Ghulam Muhammad v Nur Khan* (1917) Punj Rec no 6 p 23 41 I C 89

(*s*) *I ... v Abdool* (1881) 5 Bom 463

(*t*) *Abdul Hakim v Karan Singh* (1915) 37 All 646 30 I C 9 1

(*u*) *Pran v Khalil Ram* (1891) 3 All 8 7

(*v*) *Pestonji v Abdool* (1881) 5 Bom 463

(*w*) *Muhammad Faraz v Kallu Singh* (1911) 7 All L J 1901 8 I C 6 9

Illustrations

(1) *Rent and possession* —A lets his land to *B* for a period of five years on condition that if *B* fails to pay the rent every year the lease shall be void *B* fails to pay the rent due for the second year Here *A* is entitled to two reliefs namely to sue *B* (1) for recovery of the rent and (2) also for possession of the land on the ground that the lease has become void and he may sue for both these reliefs If he sues for rent only and does not reserve his right with the *leave* of the Court to sue for possession he cannot afterwards sue for possession *Subbaraya* v *Krishna* (1883) 6 Mad. 159 Similarly if he sues for possession only and does not reserve his right with the *leave* of the Court to sue for arrears of rent he cannot afterwards sue for the rent *Kashinath* v *Nathoo* (1914) 38 Bom 444 25 I C 73

(2) *Specific performance and possession* —*A* agrees to sell his land to *B* *B* sues *A* for *specific performance* of the agreement and obtains a decree *B* then sues *A* for *possession* of the land Is the suit for possession barred under this rule? Yes according to the decision in *Narayana* v *Kandasami* (1899) 22 Mad 24 the reason given being that the right to possession arises *coincidentally* with the right to the execution of conveyance No according to the decision in *Nathu* v *Budhu* (1894) 18 Bom 537 *Krishnammal* v *Soundararaja* (1915) 38 Mad 698 22 I C 912 and *Krishnaji* v *Sanjappa* (1925) 27 Bom L R 49 86 I C 132 (25) A B 181 the reason given being that the right to possession accrues only on the execution of the deed of conveyance See also *Sundara* v *Sivalingam* (1923) 47 Mad 150 77 I C 542 (24) A M 360 and *Deonandan* v *Janki* (1920) 5 Lah L J 315 317

(3) *Possession and specific performance* —On 1st March 1905 *A* enters into an agreement with *B* for the sale of his lands to *B* the sale to be completed on 1st August 1905 It is agreed that *B* shall pay part of the purchase money on the date of the agreement and that *A* shall on such payment being made put *B* in possession of the land. *B* pays part of the purchase money and *A* puts him in possession of the land The sale is not completed on 1st August owing to certain differences between the parties On 15th August *A* forcibly ejects *B* from the land and enters into possession Thereupon *B* sues *A* for *possession* but omits to sue for *specific performance* of the agreement for sale *B* cannot afterwards sue *A* for specific performance *Pangayya* v *Nanjappa* (1901) 24 Mad 491 28 I A 221 with facts slightly varied

(4) *A* agrees to sell his property to *B* He then enters into a contract to sell it to *C* *B* sues *A* for a permanent injunction restraining *A* from selling the property to *C* The suit is dismissed on the ground that such a suit did not lie A subsequent suit by *B* against *A* for specific performance of the agreement is not barred *Sardari Mal* v *Hirde Nath* (1925) 6 Lah 384 87 I C 994 (25) A L 409

Exceptions to the rule against splitting of reliefs—

1 *Order* 34 *rule* 14 —Sub rule (3) provides that where a person entitled to more than one relief in respect of the same cause of action omits *except with the leave of the Court* to sue for all such reliefs he cannot afterwards sue for any relief so omitted According to this sub rule if a mortgagee sues the mortgagor on the *personal* covenant to repay the mortgage debt and omits to sue for *sale of the mortgaged property* he cannot afterwards sue for sale *unless he has reserved his right to do so with the leave of the Court* To this however there is an exception being that contained in O 34 r 14 The latter rule may be stated thus a mortgagee sues the mortgagor to recover the mortgage-debt from the mortgagor *personally* and obtains a decree He then applies for the attachment and sale of the *mortgaged property* in execution of the decree The mortgaged property may be attached but it *cannot be sold in execution proceedings* The only mode of bringing it to sale is by instituting a *fresh suit for sale* O 34 r 14 says that the mortgagee

may institute such a suit notwithstanding anything contained in O 2 r 2 (x) The suit will be one under s 67 of the Transfer of Property Act 1882 It must however be noted that though O 34 r 14 allows a mortgagee to split his *remedies* it does not allow him to split his *claim* (y)

2 *Order* 34 *rule* 6 —The effect of this rule is that where a mortgagee has obtained a *decree for sale* of the mortgaged property and the property is sold but the net sale proceeds are not sufficient to pay the mortgage debt he may subsequently *apply* for a *decree for the balance* notwithstanding anything contained in O 2 r 2 although a claim to such relief has not been included in his suit ( ) This however is not strictly speaking an exception for *no separate suit* has to be brought for a decree for the balance

3 *Deccan Agriculturists Relief Act* 1879 (*as amended by Act XXII of 1882*) s 15 1 —The effect of the said section is to allow a *mortgagor* to split his *remedies* by providing in effect that if he sues the mortgagee for an *account* he will not be precluded from suing him subsequently for *redemption* (a)

Leave to sue —See notes He shall not afterwards sue in respect of the portion so omitted and Omission to sue for one of several reliefs

Amendment of plaint —See notes above He shall not afterwards sue in respect of the portion so omitted

Withdrawal of one of two pending suits —*See notes above He shall not* afterwards sue in respect of the portion so omitted.

Minors —The provisions of this rule apply to adults as well as minors Thus a suit by a minor by his guardian and next friend for rent due for 1903 and 1904 will bar a subsequent suit by the minor on attaining majority for the rent due for 1901 and 1902 The acts of a guardian in the conduct of a suit must be upheld, unless it is shown that they were unreasonable or improper (b) or that the minor s interests were not properly safeguarded (c)

Official Assignee —This rule merely bars a second suit Therefore the Official Assignee cannot by an application to the Insolvency Court ask for a declaration on behalf of the insolvent mortgagor that the right of the mortgagee to sue for the principal is barred under this rule (d)

Execution proceedings —The present rule does not apply to proceedings in execution of a decree A decree holder may therefore present successive applications for realizing different portions of his decree Thus if a decree gives reliefs for *possession* and *costs* there is nothing in the Code which prevents separate and successive applications for execution as regards either of them (e)

Joinder of causes of action

3 [S 45 *Cf* R S C , O 18, r 1] (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit

(x) *I iarpal v Mewa Lal* (1914) 36 All 561 23 I C 4 9
(y) *G rind v I rash m* (1901) 5 Bom 161 *Kehavram v Ranchhod* (1906) 30 Bom 156
( ) *Mus heb v Inaj t illah* (189) 14 All 513 *Hamidullah v Kedar Nath* (1898) 20 All 386
(a) See *Bhau v Hari* (1883) 7 Bom 377
(b) *Gopal v Na an 7* (1899) 22 Mad 309
(c) *I ya k l v O k* (1921) 45 Bom 809 819 61 I C 76 (1) A I 434
(d) *S rm r F v Official A ne* (1925) 48 Mad 701 ( ) A M 11 91 I C 403
(e) *I adha Kishe I dha Pra ad* (1891) 18 C 1 515 *Balasubrama ia v arnammal* (1915) 38 M 1 199 1 I C 5 *Upendra Nath v D u* (19 6) 3 Cal 58 96 I C 56 (6) A C 1010

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject matters at the date of instituting the suit

Scope of the rule.—O 1 r 1 deals with joinder of plaintiffs O 1 r 3 deals with joinder of defendants The present rule deals with joinder of causes of actions It is to be read subject to the provisions of rr 4 and 5 below as is shown by the words save as otherwi e provided (*f*) It is also to be read subject to the provisions of O 1 rr 1 and 3 The frame of a suit may not be supported by this rule and yet it may be justified by O 1 r 1 or O 1 r 3 (*g*) Rules 6 and 7 of this Order are to be read with this rule

Cause of action—See notes to s 20 Cause of action

One plaintiff one defendant and two or more causes of action—Where there is only one plaintiff and only one defendant the rule says that the plain tiff may unite in the same suit several causes of action against the same defendant provided of course that the provisions of rr 4 and 5 of this Order are not contravened If the causes of action are so disconnected that they cannot be conveniently tried together the Court may order separate trials under r 6 below These trials however will not be distinct suits but they will be in the nature of sub suits under the title and number of the principal suit from which they spring (*h*) In *Saccharine Corporation Ltd* v *Wild* (*i*) the plaintiff corporation the owners of twenty three patents for saccharin sued the defendant for alleged infringement of all the trade marks There were thus twenty three causes of action united in one suit It was ordered that the suit should be confined in the first instance to any three of the patents which the plaintiffs might select Collins M R said Now we start here with a writ launched covering twenty three causes of action *Prima facie* in old days one cause of action was thought to be enough That was gradually more or less relaxed and one cau e of action was *allowed to be coupled with one or two subordinate or necessarily connected causes of* action Then came by the Rules under the Judicature Acts a still further relaxation but always subject to the one underlying principle namely that the burden lay on the plaintiff to prove his case and that no extra burden should be impo ed on the defendant through the plaintiff needlessly enlarging the area of dispute Prima facie a *do en causes of action cannot be combined in one writ they mu t be so intimately connected as to justify their being included in one writ* but when one finds no less than twenty three that seems to me to be an outrageous extension of the latitude given by the rules to the plaintiff (*j*) Cozen Hardy L J said The action strikes me as almo t an abuse of the proce s of the Court (*k*)

The rule that a plaintiff may unite in the same suit several cau es of action against the same defendant does not apply to suits for rent under the Agra Tenancy Act Hence a plaintiff cannot join in one suit claims for arrears of rent of occupancy and non occupancy holdings though the claims may be against the same defendant (*l*) In a cas under the Bengal Tenancy Act 8 of 188 the Privy Council held that a plaintiff may join in one suit claims against a defendant in respect of more than one tenure (*m*)

(*f*) See *J rraj v I urush ta* (1884) 7 Mad 171
(*g*) *Ia e I a Nath* v *Braje I a Nath* (1915) 4 Cal 111 1 1 3 41 I C 944 *Thor as* v *Moir* (1918) 1 K B 5 5 *Pay British T e Recorder Co* [19 1] K B 1
(*h*) *Khali heb* v *Chot b b* (1 84) 6 L m 616
(*i*) [1903] 1 Ch 410
(*j*) [1903] 1 Ch 410 p 4 p
1
(*k*) *Ib* p 4 7
(*l*) *Jaga nat* v *Tore* (190) 3 All L J 610 *H a Lal* v *Hot Lal* (19 1) 2 All L J 459 9 I C 560 (4) 4 A 0
(*m*) *P fulla N th Saty Ph ua Da* (19 9) 56 I A 238, 33 C W N 82 (9) A PC 171

Misjoinder of plaintiffs and causes of action—Where there are *two or more plaintiffs* and *two or more causes of action* the rule says that any plaintiffs having causes of action in which they are *jointly* interested against the same defendant may unite such causes of action in the same suit But the rule is to be read subject to the provisions of O 1 r 1 The result is that where there are two or more plaintiffs and two or more causes of action they may be joined in one suit if the right to the relief and the causes of action arise from *the same act or transaction* and that there is a *common question of law or fact* though they may not all be *jointly* interested in all the causes of action But if the right to the relief claimed does not arise from *the same act or transaction* or if there is no *common question of law or fact* the plaintiffs cannot all join in one suit unless they are *jointly interested* in the causes of action as provided by this rule (*n*) See notes to O 1 r 1 The new Rule ills (1) to (4)

Where the plaintiffs are *not jointly interested* in the causes of action united in one suit the suit is said to be bad for misjoinder of plaintiffs and causes of action X sell to *Y* two plots of land adjoining each other one of which is claimed by *A* by adverse possession and the other by *B* by adverse possession Under the Code of 1882 A and *B* could not join together as plaintiffs in one suit against X and Y for the evidence of adverse possession by *A* would not be evidence of adverse possession in favour of *B* and *vice versa* (*o*) This would also be the case under this Code Similarly where five plaintiffs contract separately to sell cotton though to the same defendant they cannot all join in one suit for damages for breach of the five contracts (*p*)

Procedure in case of misjoinder of plaintiffs and causes of action — Under the Code of 1882 where a plaint was presented which was bad for misjoinder of plaintiffs and causes of action the Judge to whom the plaint was presented might return it for amendment under s 53 If the plaint having been returned for amendment was not amended it might be rejected under s 54 cl (d) If the defect was not noticed when the plaint was presented but was brought to the notice of the Court at a later stage the Court might grant leave to the plaintiffs to amend the plaint within a time fixed by the Court and might order that if the amendment was not made within the time prescribed the suit should stand dismissed with costs Where leave to amend was granted the plaintiff had to elect as to which of them should proceed with the suit and the plaint had then to be amended by striking out the names of the other plaintiffs and making consequential amendments (*q*) At the same time liberty was given to the defendant to amend his written statement to meet the case of the particular plaintiff who had elected to proceed with the suit (*r*) It was also held in some cases under that Code that where a suit was bad for misjoinder of plaintiffs and causes of action it was not proper to dismiss the suit without giving the plaintiff an opportunity of amendment (*s*) If the suit was dismissed and the *plaintiffs* appealed the appellate Court might set aside the decree and remand the case to the lower Court with a direction to that Court to return the plaint for amendment (*t*) As to the procedure to be followed under the present Code see notes to r 7 below

Where the defendant objects to the frame of a suit on the ground that the suit is bad for misjoinder of plaintiffs and causes of action but the objection is overruled and *a decree is passed for the plaintiffs* and the defendant appeals from the decree on the ground that the suit ought to have been held to be bad for misjoinder of plaintiffs and

( ) *Ramendra Nath v Brajendra Nath* (1915) 4 Cal 111 1 123 41 I C 914

(*o*) *A v Vellay* (1911) 34 Mad 55 6 I C 15

(*p*) *Chand lal v Dagd* (19) 7 Bom L R 47 8 I C 43 ( ) A B 31

(*q*) *Alleraty v Barrow* (1907) 34 Cal 66 *Va ajlal v Jamdat* (190) 6 Bom 2 9 6 *P j N th v Chhowaro* (1901) 6 All 18

(*r*) *Alleraty v Barrow* (1907) 34 Cal 66 6 I

(*s*) *L hanl l v Kod P m* (1893) 15 All 3 0

(*t*) *P m ja v Dera yaka* (1 9) 8 Mad 61 *J han Lal v Kolu Ram* (1893) 15 All 3 0

causes of action the appellate Court if it found there had been such a misjoinder should not interfere with the decree unless the misjoinder has affected the merits of the case This is the effect of the provisions of s 99 of this Code which enjoins *inter alia* that no decree shall be reversed or substantially varied in appeal *on account of any misjoinder of parties or causes of action* where such misjoinder does not affect the merits of the case The italicized words are new They did not occur in the corresponding s 578 of the Code of 1882 They have been added into s 99 to supersede the practice followed under the old Code Under that Code where a decree was passed for the plaintiffs in a suit involving a misjoinder of plaintiffs and causes of action the course adopted by the appellate Court was to *reverse* the decree in appeal and *remand* the case to the lower Court with the directions to that Court to return the plaint to the plaintiffs for amendment so that the *plaintiffs might elect as to which of them should continue as plaintiffs in the suit* (u) Such a course would not have been necessary if a misjoinder of plaintiffs and causes of action was an irregularity such as could be condoned under s 578 But the practice referred to developed as the cases were against the application of s 578 (v) The effect of section 99 is to preclude the appellate Court from reversing a decree on the ground of misjoinder of plaintiffs and causes of action and remanding the case to the lower Court as was done under the old Code unless the misjoinder has affected the merits of the case

Misjoinder of defendants and causes of action—Where there are *two or more defendants* and *two or more causes of action* the rule says that the plaintiff may unite in the same suit several causes of action against the same defendants *jointly* *Joint* interest in the questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants (w) If the causes of action alleged are *separate* and the defendants are arrayed *in different sets* the suit is bad for misjoinder of defendants and causes of action and is technically *multifarious* (x) There is no provision in the Code allowing *distinct* causes of action against *distinct* sets of defendants that is to say causes of action in which the defendants are *not all jointly interested* to be united in one suit (y) This rule however is to be read subject to the provisions of O 1 r 3 which relates to joinder of defendants Hence two or more defendants may be joined as parties in one suit though there are two or more causes of action provided the right to the relief claimed arises from the *same act or transaction* and there is a *common question of law or fact* and this is so although they may not all be jointly interested in all the causes of action But if the right to the relief claimed does not arise from *the same act or transaction* or if there be no *common question of law or fact* the defendants cannot all be joined in one suit unless they are *jointly interested* in the causes of action as provided by this rule ( ) See notes to O 1 r 3 New [illegible] (4) (5) and (6) The following are instances of cases in which it was held that the suit was bad for misjoinder of defendants and causes of action

Suits held to be multifarious

1 *B* agrees to sell certain lands to *A* *A* sues *B* and a third person *C* on the [illegible] that *B* was willing to execute the deed of sale but was unable to do so a[illegible] sion of the title deeds under a false claim of an equitable lien upon the la[illegible] to part with them As against *B* *A* claims specific performance of t[illegible]

( ) *Sai* a *B* bi Sheikh M ha m *I* (1 96) 18 All 131 *I* *h* *I* kh h 1 ra *B* b (1898) 18 All 19 *I* in *I* *D* b *D* *I* (1898) 18 All 43 1 *oil* *l* v *I* *I* t (190) 6 Bom 259 of m *Ch* d a 11 *I* *Ch* *I* a (1 97) 1 C 1 10 t p 41

( ) *T* *ajl* *l* *I* a *d* t (190) 6 Bom 59 at p 68 *M* h m *Cha* *I* a *ital* *Cha* *I* a (1 3) 1 Cal 540 t 544

(w) *Bh* *I* *I* a *I* *I* *I* *Ic* *hs* (1 4) 6 All 106 108 The principl tands thougl

tl tual [illegible] fr n In *H* *bo* [illegible] 3 All 11 31 [illegible]

(x) [illegible] *gh* *Dis* [illegible] All 163 171

(y) *M* [illegible] (1 96) 3 [illegible]

( ) *P* *mend* [illegible] Cal 111, 1[illegible] [illegible]

3 against *C* he asks for a declaration that he has no lien upon the lands and for delivery of the title deeds The suit is bad for misjoider of defendants and causes of action The two causes of action are entirely distinct they do not arise from the same transaction nor would their trial involve any common question of law or fact *Luckumsey* v *Fa ulla* (1881) 5 Bom 177 following *De Houghton* v *Money* (1876) L R 2 Ch App 166 distinguished in *Krishnaswami* v *Sundarappayyar* (189ↄ) 18 Mad 415

The rule in *De Houghton* v *Money* and *Luckumsey* v *Fa ulla* is that if on the face of the plaint or of the plaintiff s case it appears that a third party who was not a party to the contract upon which the suit was brought had a *distinct interest* but which interest is sought to be declared null and void upon some equitable ground such a claim against the aid third party could not be made a part of the suit In the case of *De Houghton* v *Money* it was admitted by the plaintiff that there was a conveyance in favour of Money but it was said that that conveyance was executed under such circumstances as would make it a voidable one and in the case of *Luckumsey* v *Fa ulla* it was clearly admitted by the plaintiff that the third party who was not a party to the contract had a distinct interest (*a*) The case is different however where *A* (purchaser) sues *B* (vendor) and *C* (vendor s benamidar) claiming specific performance against *B* and a declaration against *C* that *C* is a mere benamidar for there the two defendants are identical and there is but one cau e of action and no misjoinder *Mokund Lall* v *Chotay Lall* (1884) 10 Cal 1061 1068 1069

2 Seven different salt manufacturers enter into seven different contracts with *A* to manufacture salt for *A* and to deliver it in his factory *A* alleging that all the seven persons had failed to deliver salt according to the terms of the agreement with them brings one suit against them for a decree that they might be directed to deliver the salt to him The suit is bad for multifariousness for the breach of each contract gives ri e to a distinct cause of action and no one defendant is interested in any of the causes of action arising from the breach of contract with the other defendants *Ramasamaya* v *Kadir Ammal* (1894) 17 Mad 168

3 *A* and *B* at Madura enter into an agreement to carry on business in partnership at Silangoor and they send *C* as their agent to Silangoor to conduct the business there *A* alleging that *C* had failed to carry out his instructions and to furnish accounts and that *B* was colluding with *C* sues *B* and *C* claiming *dissolution* of partnership as again t *B* and *damages* for breach of contract as agent as against *C* The suit is bad for multifariousness for there are two distinct causes of action and neither defendant is liable in respect of the cause of action against the other *Muthappa* v *Muthu* (1904) 27 Mad 80 See this case commented upon in *Aiyathurai* v *Muhamad Meera* (1908) 18 Mad L J 238 243 244

4 A joint Hindu family consisting of 3 members *A* *B* and *C* owns several properties *A* agrees to sell his share to *P* *A* fails to execute the nece sary sale deed *P* sues *A* for specific performance and includes in the suit a claim for partition and possession against all the members of the family namely *A* *B* and *C* The suit is bad for misjoinder The claim for partition cannot be joined with the claim for specific performance as at the date of the suit the plaintiff had no right to sue for partition not having completed his title by a sale deed Wallis C J said The other members of the family were no parties to the alleged contract and therefore were not proper parties to the suit in so far as it is a suit for specific performance and it would in my opinion be a distinct hardship to them to force them to defend a suit for partition which would not lie if the plaintiff failed to prove his contract *Rangayya* v *Subramania* (1917) 40 Mad. 365 40 I C 429 [F B] See ill. (1) above

(*a*) *Mokund Lall* v *Chotay Lall* (1884) 10 Cal 1061 1068

In ills (1) and (3) what were really two suits were combined into one In ill (2) what were really seven suits were united in one suit In all these cases it was held that the suit was bad for misjoinder of defendants and causes of action The reason why the law forbids a joinder in one suit of distinct causes of action against different defendants *each of whom is unconnected with the cause of action against the others* may thus be stated in the words of Peacock C J (*b*) Such a joinder complicates the case before the Judge and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him though admissible against one or more of the others Moreover it is vexatious and harassing to the different defendants Such a procedure renders it almost compulsory on all the defendants to be present either in person or by their pleaders whilst the case is going on against the others in respect of matters in which they are not interested and moreover it is harassing and inconvenient as regards the attendance of the witnesses of the several defendants as it renders it necessary for the witnesses of each to be present and to be detained whilst the case of the others is being heard and determined For further illustrations see notes to O 1 r 3 under the heads New Rule and Severally

Procedure in case of multifariousness that is misjoinder of defendants and causes of action—Under the Code of 1882 where a plaint was presented which was bad for misjoinder of defendants and causes of action the Judge to whom the plaint was presented might return it for amendment under s 53 If the plaint having been returned for amendment was not amended it might be rejected under sec 54 cl (d) If the defect was not noticed when the plaint was presented but was brought to the notice of the Court at a later stage the Court might on the application of the plaintiff and on such terms as to costs as the Court thought proper permit the plaintiff to withdraw from the suit against those defendants who were not interested in the cause of action in respect of which he elected to proceed and grant leave to bring a fresh suit or suits against them (*c*) [O 23 r 1] or allow the plaintiff to amend the plaint by striking out the names of those defendants and making consequential amendments Where leave to amend was granted to the plaintiff and the plaintiff did not amend within the time fixed by the Court and the suit was dismissed the appellate Court might confirm the decree if it found that the suit was multifarious (*d*) As to the procedure to be followed under the present Code see notes to r 7 below

Where the defendants object to the frame of a suit on the ground that the suit is multifarious but the objection is overruled and a *decree is passed for the plaintiff* and the defendants appeal from the decree on the ground that the suit ought to have been held to be multifarious the appellate Court even if it finds the suit to be multifarious should not interfere with the decree unless the misjoinder has affected the merits of the case This is the effect of s 99 which declares *inter alia* that no decree shall be reversed or substantially varied in appeal *on account of any misjoinder of parties or causes of action* where such misjoinder does not affect the merits of the case The words italicized are new They did not occur in the corresponding s 578 of the Code of 1882 They have been inserted in s 99 to supersede the practice followed by the Courts under the old Code Under that Code where a decree was passed for the plaintiffs in a suit which was bad for multifariousness the course adopted by the appellate Court was either to *reverse* the decree of the lower Court and dismiss the plaintiff's suit (*e*) or to sustain the decree of the lower Court as against a particular set of defendants in respect of the causes of action in which they were jointly interested and grant permission to the plaintiff to withdraw from the suit against the other defendants with liberty to bring a fresh suit

(*b*) *Raj Ram Tew* v *Luchmun* (1867 8 W R 15

(*c*) *Luckumsey* v *Fazulla* (1881) 5 Bom 1 7 1 9

(*d*) *Ka har* v *Bai l th re* (1883) Bom 89

Ram Na a n v *A oda* (1887) 14 Cal. 6 1

(*e*) *M thappa* v *Muthu* (1904) 27 Mad 80 85 *Namanaya* v *Kadir* (1 94) 17 Mad 164 1 8

or suits against them (*f*) Such a course would not have been necessary had the Court held that a misjoinder of defendants and causes of action was an irregularity such as could be cured by s 578 But it was held that the section did not apply to a misjoinder of this kind and that even if it did apply the misjoinder should be regarded as a defect that *must* affect the merits of the case within the meaning of that section (*g*) The insertion of the words on account of any misjoinder of parties or causes of action in s 99 makes it quite clear that the appellate Court should not interfere with a decree if the only objection to the decree is that of multifariousness unless the misjoinder has affected the merits of the case

Two or more defendants and one cause of action—Every case of multifariousness presupposes *more than one* cause of action Hence where there is only one cause of action there can be no multifariousness

Suits held not to be multifarious

1 *A* alleging that his brother *B* mortgaged his (*A* s) share in his father s property to *C* without his knowledge and consent and that *C* was in possession as mortgagee sues *B* and *C* for a declaration of title to his share of the property and for possession of the share The suit is not bad for multifariousness for there are no two causes of action but only one namely the infringement of *A* s right of ownership by *B* The mortgage and dispossession are both acts evidencing the *infringement* of *A* s right *Indur Kuar* v *Gur Prasad* (1889) 11 All. 33 *Mazhar Ali* v *Sajjad Husain* (1902) 24 All 358 *Kubra Jan* v *Ram Bali* (1908) 30 All. 560

2 *A* sells three properties by private contract to *B* After the sale to *B* all the three properties are attached in execution of a decree held by *C* against *A* and they are sold in execution to *D* *E* and *F* respectively A suit by *B* against *A* (the vendor) *C* (the decree holder) and *D* *E* and *F* (execution purchasers) to set aside the execution sale is not bad for multifariousness *Haranund* v *Prosunno Chunder* (1883) 9 Cal. 763 *Gunami* v *Ram Charan* (1878) 1 All. 5[illegible]

Note—In the Calcutta case cited above Garth C J said The plaintiff has but one object namely to establish his private purchase as against the claim in execution and the defendants who contest his claim *have but one defence which is common to them all viz that the plaintiff's purchase is invalid*

Unnecessary parties added as defendants—Where persons who are not necessary parties are joined as defendants they should not be reckoned as parties in considering whether or not the suit is bad for multifariousness *A* and *B* are two co sharers of a village *A* and *B* sell their respective shares to *C* by two separate deeds of sale *D* alleging that he is entitled to pre empt the property sues *A* *B* and *C* for pre emption Here the suit is not bad for multifariousness for *A* and *B* being vendors they are not necessary parties to a suit for pre emption. The suit is really against the vendee *C* (*h*)

Suit for ejectment by real owner against holders under derivative titles from a trespasser as the common source—In a suit for possession all persons claiming by derivative titles from a trespasser *as the common source* may be joined as defendants *A* obtains a lease of a piece of land from *B* and enters into possession of the land. Subsequently *B* ignoring the lease lets the land in separate portions and by *separate leases* to *C* *D* and *E* *A* sues *B* *C* *D* and *E* to eject them from the land. The suit is not bad for multifariousness. In this as in every action of ejectment there is but one cause of action namely dispossession It is immaterial that *C* *D* and

(*f*) *Ga[illegible] Lal* v *Kha[illegible] Singh* (1[illegible]94) 16 All. [illegible]

(*g*) *Ga[illegible] Lal* v *Kha[illegible] Singh* (1894) 16 All [illegible] *Venkatraya* v *Ka[illegible]* (1[illegible]91) 1[illegible] Mad 16[illegible] 1[illegible]6 *Muthappa* v *Muthu[illegible]* (1904) [illegible] Mad 80 84

(*h*) *[illegible]* v *Tota Sah* (1910) 3[illegible] All. 14 3[illegible] [illegible] 35 *[illegible]* v *[illegible] Nath* (19[illegible]) 6 Lah L J 349 [illegible] 1[illegible] 60 ([illegible]) A L[illegible] 1[illegible]6

F claim under *different titles* The title by which *they* claim forms no part of the plaintiff s cause of action (i) The case is different if the defendants do not all claim under the same trespasser Thus if *A* owns lands and he is dispossessed of one portion by *B* of another portion by *C* and of a third portion by *D* *A* cannot bring one suit for possession against *B* *C* and *D* (j)

Where two or more persons conspire together to commit a wrong or to commit a breach of several contracts entered into with them separately by the plaintiff they may all be joined as defendants in one suit — The reason is that the plaintiff has in such a case but one cause of action against all the defendants namely a conspiracy to do the act complained of Thus if in ill (2) on p 445 above the seven salt manufacturers had conspired together not to deliver the salt to *A* *A* could have brought one suit against them all Similarly if *A* and *B* conspire together to assault *C* *C* may bring one suit against them for damages for assault (k) Upon the same principle where *A* obtained a decree against *B* for possession of certain lands in which 86 persons had distinct and separate tenures and these 86 persons combined together to keep *A* out of possession and declined to pay the rent to him it was held that *A* might join the 86 tenants as defendants in one suit for a declaration of his proprietary right to the lands (l) But separate suits should be brought if there i no collusion or combination between the tenants (m)

Two or more plaintiffs two or more defendants and two or more causes of action —In such a case the plaintiffs must be *jointly* interested in the cause of action and the defendants also must be *jointly* interested in the causes of action The rule says Any plaintiffs having causes of action in which they are *jointly* interested against the same defendants *jointly* may unite such causes of action in the same suit If the plaintiffs are not *jointly* interested in the causes of action the suit will be bad for misjoinder of plaintiffs and causes of action If the plaintiffs are jointly interested in the several causes of action but the defendants are not the suit will be bad for multifariousness And if neither the plaintiffs nor the defendants are jointly interested in the causes of action the suit will be bad for a double misjoinder namely misjoinder of plaintiffs and causes of action and misjoinder of defendants and causes of action Thus if *A* agrees to sell and deliver salt to *B* and *C* agrees to sell and deliver salt to *D* and *B* and *D* sue *A* and *C* for damages for breach of the contracts entered into with them respectively the suit is bad for a double misjoinder Neither plaintiff has any inte est in the cause of action of the other nor has either defendants any interest in the cause of action against the other But if two contracts are entered into each between *B* and *D* of the one part and *A* and *C* of the other part *B* and *D* may bring one suit against *A* and *C* on the two contracts

Jurisdiction —Where a plaintiff combines several causes of action against the same defendant in one suit the jurisdiction of the Court as regards the suit depends on the value of the *aggregate* subject matters (n) See sub r (2)

Revision —It has been held by the High Court of Madras that a decision on the question whether a suit is bad for misjoinder of parties and causes of action is subject to revision (o)

(i) *Nundo F m r v I a om l* (190) 9 Cal 8 1 8 0 *Ishan Chu der* v *Pameswa* (183) 4 Cal 831 *Parbiti* v *Mahmud* (190) 3 All 6 *Umabai* v *Vith l* (1903) 33 Bom 93 1 I C 1 0 *Ighunath* v *Sa o h* (1 99) 3 Bom 66

(j) *Afzal hah* v *L chmi Na a n* (1918) 40 All 11 4 I C 8 6

(k) *F ajlal* v *F md t* (190) 6 Bom 59 *Sing I di* v *Mad ra I au* (189) 0 Mad 360

(l) *Joke Nath* v *Ke hab I m* (1886) 13 C 1 14

( ) *Fam Nara n* v *An od i* (188) 14 Cal 631 *S dh ndu* v *Durga* (1887) 14 Cal 43

(n) *Ch agh Din* v *Bh gwan Das* (1915) Punj Rec no 100 p 400 3 I C 40

(o) *V lappa* v *Chulamba a* (19) 43 Mad L J 0 I C 694 ( ) A M I 4 *Sh muks* v *Aru chelam* (19) 45 Mad 191 19 69 I C 961 ( ) A M 33 *Arunachell m* v *Ar nach llam* (19) 43 Mad L J 1 69 I C 906 ( ) A M 436

Proviso to the Rule—The proviso to the rule enables a plaintiff to claim in one suit redemption or foreclosure *and* possession (*c*)

Leave of Court—Objection as to misjoinder—Leave should be obtained *before* the plaint is filed (*d*) But the leave under this rule is not a *condition precedent* to jurisdiction and it may therefore be granted on good cause shown even *after* the institution of the suit (*e*) Under s 44 of the Code of 1882 it was held that an objection that the plaintiff had joined together claims which under that section could not be joined together without the leave of the Court should be taken in the Court of first instance and that if it was not so taken it should be regarded as waived and it should not be entertained by the Court of appeal (*f*) Under this Code the objection should be taken at the earliest possible opportunity and in all cases where issues are settled at or before such settlement if it is not so taken it will be deemed to have been waived (r 7 below) And even if the objection is taken in time and disallowed the appellate Court should not interfere with the decree in appeal merely on the ground that claims which ought not to be joined under this rule have been joined in one suit unless the misjoinder has affected the merits of the case (s 99 above)

Where a claim cannot be joined with a claim for the recovery of immovable property *without the leave* of the Court it is optional with the plaintiff either to obtain the leave and bring *one* suit in respect of both the claims or to bring *separate* suits in respect of each of them The plaintiff is not confined to the first only of these two courses (*g*)

Counterclaim—This rule applies to a counterclaim as well as to an original action (*h*)

Appeal—No appeal lies from an order under this rule rejecting an application for leave to join a claim with a claim for the recovery of immovable property (*i*) See s 99 above

Revision—See notes to r 3 Revision

5 [S 44 R S C O 18, r 5] No claim by or against an executor, administrator, or heir, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or such as he was entitled to, or liable for, jointly with the deceased person whom he represents

Claims by or against executor administrator or heir

Scope of the rule—This rule provides that no claim by a person in his *representative character* shall be joined in the same suit with claims by him *personally* nor shall claims against a person in his representative character be joined with claims against him personally—

(1) unless the claims by or against him personally arise with reference to the *estate* which he represents or

(2) unless he was entitled to or liable for those claims *jointly* with the deceased person whom he represents

The object of the rule is to prevent an executor or administrator from intermingling the assets of his testator with his own moneys (*j*)

(*c*) I k b Lal v Jh pal (19 4) 3 I at 44 8 I C 8 (4) A P 613

(*d*) P lch r v H nd (18 9) 11 C D 90

(*e*) See H jd G t Wester a d M t opol ta Da ry Co Ltd [190] 3 Times R p 5 0

(*f*) Dh d ba v I meh nd a (1981) 5 Bom 5 4 Ma la v G I (1) 16 All 139 Uje l a v Ta a (1903) 30 C I 91 800

(*g*) Sh o I atan v She S J (1884) 6 All 3 36 Lale n v Ja Li (190) 19 Cal 615

(*h*) C mpt n v Pr ston (18) 1 D C 1 3 (l k v W y (188) 31 C D 64

(*i*) Ba di an v Sotha (1 6) 8 All 191

(*j*) Tred ga v I obert [1914] 1 K B 83

Illustrations

(a) A is a tenant for life of certain property and B is the remainderman A gives a lease of the property to C A dies leaving a will of which B is the sole executor Some months after A s death B sues C (1) for arrears of rent due to the *estate* of A and (2) for rent due to him *personally* subsequent to A s death Here the first claim is by C *as executor* and the second claim is by him *personally* as remainderman The claim by C personally does not arise with reference to the estate of A of which C is executor The two claims therefore cannot be joined together in the same suit *Tredegar* v *Roberts* [1914] 1 K B 283

(b) A dies leaving a will of which B is the executor By his will A directs B to continue his business The executor purchases *for the purposes of A s business* certain goods from C in *his own* name C may in such a case sue B for the price of the goods and he may claim the price against B *personally* or in the alternative against him *as executor* The reason is that the personal claim against B arises with reference to the *estate* of which he is the executor But if B purchased certain goods from C *as executor* in the course of the administration of A s estate and other goods under a separate contract altogether *in his own name* and expressly for the purpo e of his own business C cannot join both claims against B in one suit (k)

(c) A and B carry on business in partnership A dies leaving a son S who obtains letters of administration to his father s estate After A s death S and B continue the busine s in partnership with the old partnership assets S *as administrator* sues B for the accounts of the partnership between his father A and B He also claims dissolution of the partnership between him *personally* and B and for his share in the partnership The suit does not offend the provisions of this rule as the personal claim of S in respect of the partnership between him and B arises with reference to the estate in respect of which he is suing as administrator *Arunachallam* v *Arunachallam* (1922) 43 Mad. L J 218 69 I C 966 (22) A. M 436

(cc) The suit is against N as executor of V deceased for administration of the estate of V and also for an account of a partnership which had been carried on by V and N The suit is not bad for misjoinder of causes of action for O 3 r 5 allow a claim against an executor as such to be joined with a claim against him personally which is alleged to arise out of the estate in respect of which the executor is sued *Nathubai* v *Narayana charya* (1927) 51 Bom 800 104 I C 764 (27) A B 470

(d) The second branch of the rule may be illustrated by the following case A and B *jointly* purchase goods from C A dies leaving a will of which B is the executor Here A and B are jointly liable for the price of the goods C may therefore sue B for the price in his (B s) personal as well as representative character If A and B had pur cha ed goods from C under *separate* contracts C ought to bring two separate suits against B one as A s executor to recover the price of goods sold to A and the other against B personally to recover the price of the goods sold to him (B)

Heir as such —An heir may sue or be sued in his *p rsonal* capacity or he may sue or be sued in his *representative* capacity [see notes to O 7 r 4] The words claim by an heir as such in th s rule refer to a claim by him in his *representative* capacity that is as representing the estate of the deceased whose heir he claims to be (l)

Illustrations

1 A Mahomedan dies leaving a widow and daughters by a predeceased wife The widow sues the dau hters (1) for her dower and ( ) for her share of the inheritance in her husband s estate It is contended on behalf of the daughters that the first claim is

(k) S *Fairtlough* v *Scott* (18 6) ? Ch D 6 43 *Whitworth* v *D bish* (1893) 41 W 1 31

(l) *Ah ad ud d n* v *S ka d r* (1896) 18 All 256

Hafi boo v *Mahom d* (190?) 31 Bom diss ting from *Asl bai* v *Haji* (1 8) 6 Bom 390

by the widow *personally* and that the second claim is by her *as an heir* and that the two claims cannot be joined in one suit This contention is not sound for the second claim cannot be said to be *by an heir as such* The claim is made by the widow not as *representing* her husband s estate and *for the benefit of the estate* but *for her own and personal benefit* The two claims may therefore be joined in one suit *Ahmad ud-din* v *Sikander* (1896) 18 All 256

2 A Hindu widow sues her husband s executors to recover (1) certain ornaments forming part of her *stridhana* and (2) her share in her husband s estate The suit is properly constituted see *Hafi aboo* v *Mahomed* (1907) 31 Bom 105 dissenting from *Ashabai* v *Haji Tyeb* (188_) 6 Bom 390 *Janl ibai* v *Shrinivas* (1914) 38 Bom 120 ?0 I C 533 [suit against husband s coparceners for *stridhana* and maintenance]

Procedure—Where two claims which this rule does not allow to be joined are joined in one suit the practice is to amend the plaint by striking out one of them and the suit may then be proceeded with (*m*)

Objection as to misjoinder when to be taken—See r 7 below

Appeal—See s 99 above

Revision—See notes to r 3 Revision

6 [S 45, 2nd para R S C, O 18, r 1] Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient

Power of Court to order separate trial

This rule does not apply to cases of *misjoinder* but to cases where several causes of action have been *properly* joined in one suit and the causes of action so joined cannot be conveniently tried together (*n*) See *notes to r 3 One plaintiff one defendant* and two or more causes of action.

7 [*New*] All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled at or before such settlement unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived

Objections as to misjoinder

Objections as to misjoinder of causes of action—This rule is new It places objections on the ground of misjoinder of causes of action on the same footing as objections on the ground of non joinder and misjoinder of parties [O 1 r 13] Such objections must be taken at the earliest possible opportunity and any such objection not so taken is to be deemed to have been waived (*o*) Sec 99 provides that no decree shall be reversed or varied on account of any misjoinder of causes of action not affecting the merits of the case or the jurisdiction of the Court

(*m*) *Ashabai* v *Haji Tyeb* (188) 6 Bom 390 394 *Tredegar* v *Roberts* [1914] 1 K B 83

(*n*) *Muthappa* v *Muthu* (1904) 27 Mad 80 84

(*o*) *Natl bhai* v *Narayan ch rya* (19_7) 51 Bom 800 104 I C 764 (7) A B 4 0 *Jo t H d Family* v *Ghulam H ssan* (19 8) 10 Lah L J 40 108 I C 52, (_8) A L _89 *T n ee Ch rn* v *Hunsman* (18 3) 20 W R 40

Under the Code of 1882 when a plaint was presented which was bad for misjoinder of causes of action it could be returned for amendment under s 53 at any time before the settlement of issues if the plaint was not amended it could be rejected under s 54 cl (d) These provisions have not been re enacted in this Code The Court however may under this Code allow an amendment under O 6 r 17 if the plaintiff applies for it It may also direct the plaintiff under the same rule to amend the plaint on the application of the defendant or where there are two or more defendants on the application of any one of them O 6 r 18 deals with failure to amend after order

As under the old Code so under this Code the Court may where a suit is bad for misjoinder of plaintiffs and causes of action direct the plaintiffs to elect as to which of them shall proceed with the suit and where a suit is bad for misjoinder of defendants and causes of action direct them to elect against which defendants they will proceed and direct all necessary amendments to be made within a time to be prescribed by the Court If the plaintiff does not comply with the order and amend the plaint the Court may stay the action

The misjoinder of causes of action referred to in this rule is not only the misjoinder contemplated by r 3 above but also that contemplated by rr 4 and 5 above

ORDER III

Recognized Agents and Pleaders

Appearance etc may be in person by recognized agent or by pleader

1 [S] Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting on his behalf

Provided that any such appearance shall, if the Court so directs, be made by the party in person

Amendments—The words appearing applying or acting were substituted for the words duly appointed to act by the Code of Civil Procedure (Second Amendment) Act 1926

Appearing applying or acting—These words as stated above have been substituted for the words duly appointed to act which occurred in the original rule The changes made in rule 4 below provide for the various purposes for which a pleader may be appointed The words duly appointed to act appear in the proviso to the amended r 4 (5) below See notes to r 4 below Pleaders appointed to act and pleaders engaged only to plead

Appearance—If a recognized agent although able to do so does not conduct the case on behalf of his principal his *mere presence* in Court is not an appearance in the suit within the meaning of r 6 or r 8 of O 9 (p) See O 9 below and notes to O 9 r 9 Meaning of Appearance

Appearance by party in person—See O 5 r 3

Application for leave to sue in forma pauperis—Such an application cannot be made by a recognized agent (q) See O 33 r 3

(p) *Soonderlal v Goorp asad* (1899) 3 Bom 414 | (q) *Dergurguru ex parte* (1869) 4 B.H C.A C 91

2 [S 37] The recognised agents of parties by whom such appearances, applications and acts may be made or done are—

Recognized agents

(a) persons holding powers of attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties,

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts

Clause (a) has been amended by the Bombay High Court under s 122—See Appendix IV below Rules made by the High Court of Bombay Where a power of attorney instead of being a general power as required by r 2 (a) as amended by the Bombay High Court was a special power it was held that it was a defect not affecting the merits of the case within the meaning of s 99 and that the decree should not be disturbed in appeal (r)

Clause (b)—Where a plaint is signed and presented by the plaintiff's clerk who has no authority from the plaintiff to carry on business in the plaintiff's name the plaint cannot be said to have been signed by the plaintiff's recognized agent. In such a case the Court may rightly dismiss the suit (s)

3 [S 38] (1) Processes served on the recognised agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs

Service of process on recognised agent

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognised agent

Service of process on recognised agent—A person holding a power of attorney is not bound to accept service of summons he may refuse to do so for he is not bound to act under the power (t)

4 [S 39] (1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognised agent or by some other person duly authorised by or under a power of attorney to make such appointment

Appointment of pleader

(r) G p t v J oa bai (19?3) 4 Bom 6 I L 34 (-3) A B 44 64 I C 5 (?) A B 113

(s) Uttamram v Thakordas (19) 46 Bom 150

(t) Luchmee Ch d In re (188) 8 Cal 317

(2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client O 3

(3) For the purposes of sub rule (2) an application for review of judgment, an application under section 144 or section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining *copies of documents or return of documents produced or filed* in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit

(4) The High Court may, by general order, direct that where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order

(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating—

(a) the names of the parties to the suit,

(b) the name of the party for whom he appears, and

(c) the name of the person by whom he is authorised to appear

Provided that nothing in this sub rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party

Old rule —The present rule was substituted for the old rule 4 by the Code of Civil Procedure (Second Amendment) Act 1926 The old rule was as follows —

(1) The appointment of a pleader to make or do any appearance application or act for any person shall be in writing and shall be signed by such person or by his recognized agent or by some other person duly authorized by power of attorney to act in this behalf

(2) Every such appointment when accepted by a pleader shall be filed in Court and shall be considered to be in force until determined with the leave of the Court by a writing signed by the client or the pleader as the case may be and filed in Court or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client

(3) No advocate of any High Court established under the Indian High Courts Act 1861 or of any Chief Court and no advocate of any other High Court who is a barrister shall be required to present any document empowering him to act "

Amendment of the rule—This rule is as amended by the Code of Civil Procedure (Second Amendment) Act 1926 Sub rules (1) and (2) correspond with the previous sub rules (1) and (2) except that in sub rule (2) the words when accepted by a pleader which occurred after the words every such appointment have been omitted. Under the old rule which required an acceptance it was held that the acceptance need not be in writing but that if the rules of the Court required a written acceptance the pleader would not be heard unless it was in writing (u) Sub rules (3) to (5) and the proviso are new

Pleaders appointed to act and pleaders engaged only to plead—Under the rule as it stood originally every pleader had to be appointed by a writing signed by the party or by his recognized agent etc Under the present rule a distinction is drawn between —

(1) a pleader appointed to act in Court

(2) a pleader engaged for the purpose of pleading only and

(3) a pleader engaged to plead by a pleader duly appointed to act in Court

(1) As regards a pleader appointed to *act in Court* it is provided by sub rule (1) that he cannot act for any person in any Court unless he is appointed by such person by a *document in writing signed* by such person or his recognized agent etc It is only if the appointment is made by a writing signed by the party etc that he can act and it is only where he is so appointed that he can be said to be duly appointed to act See the proviso to sub rule (5)

When a suit is instituted by a plaintiff through an agent the Court has the power to enquire into the agent s authority (v) A pleader appointed by an official liquidator who has obtained the sanction of the Court to institute a suit is duly appointed within the meaning of this rule though no sanction has been obtained under the Indian Companies Act for the appointment of the pleader (w) Where a party to a suit authorizes an agent by a special power of attorney to appoint a pleader to sign execution petitions a pleader appointed by the agent to support a petition verified by the agent is a pleader duly appointed to act on the party s behalf (x) Omission to file a vakilpatra together with the memorandum of appeal does not prevent the appeal from being an appeal properly perferred (y)

A pleader duly appointed by a person to *act in Court* on his behalf may appear or make an application or otherwise act for him

(2) A pleader engaged for the purpose of pleading only has to file a *memorandum* of appearance signed by himself as provided by sub rule (5)

(3) A pleader engaged to plead on behalf of a party by any other pleader who has been duly appointed to act has not to file either a vakalatnamah or a memorandum

Rules of Courts—This rule does not give an absolute right to any practitioner to appear in any Court in any matter he chooses It is subject to the rules governing the admission of different classes of practitioners in different Courts and to rules framed by the High Court (z)

(u) *M he h Cha dra v Pa hu* (1916) 43 Cal 884 3 I C 39 *Jogesh Ch ndra Gupt in the matter of* (1916) 0 Cal W N 83 33 I C 831 *In the matter of two Pleaders* (1917) 1 at L J 59 41 I C 3 8 *I dh I m v Kal R m* (19) 6 Lah 461 91 I C 30 (6) A L 3

(v) *Nam Na ain v Raghu* (189) 19 Cal 6 8 19 I A 135

(w) *Kathiawar a d Ahmedabad Ba ki g Cor porat on Ltd v G das* (19 4) 5 Lah 414 84 I C 510 (5) A L

(x) *Thiruvenkatasami v I rada I th i* (19 1) 48 I A 534 44 Mad 736 70 I C 81 ( ) A I C

(y) *M ho d v Sh kh Ahmed* (19 6) 8 Bom L R 538 9 I C 266 (26) A B 336

(z) *Veerappa S I esa* (19 5) 48 Ma 1 6 5 *In r The Pl ade s of th H gh Co rt* (1884) 8 Bom 10

Advocates—See original sub rule (3) and the undermentioned case (a)

Bombay Pleaders Act 1920—S 10 and Form C in Schedule II of the Bombay Pleaders Acts have been repealed by the Code of Civil Procedure (Second Amendment) Act 1926

Delegation of authority by pleader—Where a pleader cannot attend he has no power to delegate his authority to another pleader (b)

Until determined with the leave of Court—A pleader cannot determine his appointment without the leave of the Court and after reasonable notice to the client (c) An attorney s retainer cannot be revoked by his client by a mere letter it can only be revoked with the leave of the Court by a writing signed by the client and filed in Court as provided in this rule (d) No formality is necessary about the leave of the Court (e)

Until all proceedings in the suit are ended—Where a suit is dismissed for default a pleader engaged to act in Court must not require a fresh power of attorney for the purpose of applying for the restoration of the case (f)

Service of process on pleader

5 [S 40] Any process served on the pleader of any party or left at the office or ordinary residence of such pleader and whether the same is for the personal appearance of the party or not shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person

Agent to accept service

6 [S 41] (1) Besides the recognised agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process

Appointment to be in writing and to be filed in Court

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court

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ORDER IV

Institution of Suits

Suit to be commenced by plaint

1 [S 48] (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf

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(a) *L r ti s v Dhuki* (19 5) 4 Pat 66 9 I C 1 9 (6) A I 3
(b) Shiedi v I v J h tu (1896) 0 Bom 93
(c) *L p r v Fa* (19) 49 Cal 3 11 C 81 ( ) A C 515
(d) *At i Ch d r v Lakshman* (1909) 36 Cal 609
2 I C 8 0
(e) *Ma ickram v Mah dam* (19 4) 4 Mad 819 8 I C 10 (5) A M 21 (F L)
(f) *Abd l A v P jab Natio al Bank Ltd* (19 9) 10 Lah L J 0 114 I C 6 (9) A L 96

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable

Plaint presented to judge at club after office hours—There is nothing in this rule to show that the presentation of the plaint must be during office hours or must be to the officer appointed at the Court or at any particular place A judge therefore may accept a plaint at his residence or at his club after office hours if presented to him at that place In so doing the judge constitutes himself an officer to receive the plaint (g)

2 [S 58] The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits Such entries shall be numbered in every year according to the order in which the plaints are admitted

Register of suits

ORDER V

Issue and Service of Summons

ISSUE OF SUMMONS

r 1 **1** [S 64] (1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified

Summons

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim

(2) A defendant to whom a summons has been issued under sub rule (1) may appear—

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court

Decree without issue of summons—The proviso to sub r (1) contemplates cases where a decree may be passed against a defendant without issue or service of summons upon him (h)

(g) *S ttaiya* v *So d rathachi* (19 4) 47 Mad 31 9 I C 1017 (4) A M 448 *Thakur D n R m* v *H rida* (191) 34 All 48 14 I C 44 [Memorandum of appeal presented at judge s residence]

(h) *B k of Be gal* v *C rrie & Co* (1969) 3 B L R 396

2 [S 65] Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement

Copy or statement annexed to summons

3 [S 66] (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified

Court may order defendant or plaintiff to appear in person

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance

Consequence of non attendance—As to the consequence of non attendance in person see O 9 r 12

Non attendance of party on adjourned date—Where an order is made under this rule for the personal appearance of a party on a specified day he is not bound to appear personally on any adjourned date unless a fresh order is made requiring his appearance on that date Where no fresh order is made and the Court disposes of the suit under O 9 r 12 the order is one made without jurisdiction (i)

No party to be ordered to appear in person unless resident within certain limits

4 [S 67] No party shall be ordered to appear in person unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate), less than two hundred miles distance from the court house

5 [S 68] The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit, and the summons shall contain a direction accordingly

Summons to be either to settle issues or for final disposal

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit

Summons for final disposal—As a general rule summonses for final disposal of suits should be issued only in simple cases (j)

(i) *S nd Nath v Mallu* (191) 9 All 4 6 30 I C 634 (j) *T lykram v Sitaram* (1914) 38 Bom 3 7 3.0 4 I C 665

6 [S 69] The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons, and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day

Fixing day for appearance of defendants

7 [S 70] The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case

Summons to order defendant to produce documents relied on by him

8 [S 71] Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance all witnesses upon whose evidence he intends to rely in support of his case

On issue of summons for final disposal defendant to be directed to produce his witnesses

Service of Summons

9 [S 72] (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates

Delivery or transmission of summons for service

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct

10 [S 73] Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court

Mode of service

Object of service—The object of the service of a summons in whatever way it may be effected (other than substituted service to which other considerations apply) is that the defendant may be informed of the institution of the suit in due time before the date fixed for the hearing (l) See notes to r 17 below Service of summons.

(l) *Bhomsh ... v ... Lmab ...* (189) 21 Bom 3 5

11 [S 74] Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant

Service on several defendants

Partners — As to service on partners see O 30 r 3

12 [S 75] Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient

Service to be on defendant in person when practicable or on his agent

13 [S 76] (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service

Service on agent by whom defendant carried on business

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer

Manager or agent personally carrying on business —The manager or agent contemplated by this rule is one who has an initiative and independent discretion albeit subject possibly to general orders for his guidance A *mere servant* employed to carry out orders or to execute a particular commission or a factor or commission agent who is not identified with the firm for which he acts is not such an agent (l)

14 [S 77] Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property

Service on agent in charge in suits for immovable property

15 [S 78] Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him

Where service may be on male member of defendant's family

Explanation —A servant is not a member of the family within the meaning of this rule

(l) *Goculd v Caeshlal* (1880) 4 Bom 416.

Service on adult male member—Where no attempt is made to find the defendant and the summons is served on his son the summons cannot be said to be duly served. The inquiry as to the whereabouts of the defendant must not be perfunctory (*m*)

16 [S 79] Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons

Person served to sign acknowledgment

Refusal to sign acknowledgment—A mere refusal to sign an acknowledgment of service is not an offence under s 173 or s 180 of the Indian Penal Code (*n*)

17 [S 86] Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable deligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed

Procedure when defendant refuses to accept service or cannot be found

The old section—This section corresponds with s 80 of the Code of 1882 except in the following particulars —

1 The words after using all due and reasonable diligence are new They give effect to the decisions cited in the notes below under the head After using all due and reasonable diligence

2 The words or carries on business or personally works for gain have been added to remove a doubt which arose under the old section as to whether it was good service to affix a copy of the summons on the outer door of the defendant s *place of business* (*o*)

3 The words and the name and address etc at the end of the rule are also new They merely give effect to the existing practice.

(*n*) *Bi ra Cha d v Ka ak* (19 1) 6 Cal. W N 3) 68 I C 991 (1) A C 638

( ) Q *Emp v Kri h a* (1 93) 0 Cal 3 8

(*o*) *Cha basappa v Mai aba* (18 0) B H C A C 139

Service of summons—The Code prescribes three modes of service of summons upon a defendant They are as follows —

1 In the first case the summons is served by delivering a copy thereof to the defendant personally or to an agent or other person on his behalf and by obtaining the signature of the person to whom the copy is delivered to an acknowledgment of service endorsed on the original summons See rr 10—16 and r 18

2 In the second case that is cases mentioned in r 17 service is effected *without an order of the Court* by affixing a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and it is for the *Court to declare* after examination of the serving officer that the summons has been duly served When this mode of service is adopted the provisions of r 19 have to be complied with and the Court concerned has to decide whether the summons has or has not been duly served. See rr 17 and 19

3 *In the third case that is cases mentioned in r 20 service is effected after obtaining an order of the Court* by affixing a copy of the summons in some conspicuous place *in the Court house* and *also* upon some conspicuous part of the house (if any) in which the defendant is known *to have last resided or carried on business or personally worked for gain or in such other manner as the Court thinks fit* Service so effected is as effectual as if it had been made on the defendant personally This is called *substituted service* See r 20 and the marginal note thereto (p)

Refuses to sign the acknowledgment—Where a defendant refuses to sign the acknowledgment the provisions of the present rule must be complied with namely the serving officer *shall* affix a copy of the summons on the outer door of the defendant s house otherwise the summons cannot be said to have been duly served (p) Thus if the defendant refuses to sign the acknowledgment it is not sufficient to leave a copy of the summons on a table in his house the copy must be affixed on the outer door of the house (q) In a recent Patna case the Court expressed the opinion that where a copy of the summons is delivered to the defendant under r 10 above and the defendant *retains* it but refuses to sign an acknowledgment the provisions of this rule do not apply and that it was not necessary to affix a copy of the summons on the door of the defendant s house the reason given being that in such a case the serving officer would have *no other copy* of the summons to be affixed on the outer door and that the summons must be deemed to be duly served *though no copy was so affixed* (r) But it has been held by the same High Court that if the copy of the summons is *not retained* by the defendant the provisions of this rule must be strictly complied with (s)

After using all due and reasonable diligence—The present rule enjoins that in cases where the defendant cannot be found, the mode of service prescribed by this rule should not be resorted to *until* the serving officer has used *all due and reasonable diligence* to find the defendant and the defendant could not be found. To justify such service it must be shown that *proper efforts were made to find the defendant* e g that the serving officer went to the place or places and at the times where and when it was reasonable to expect to find him (t) Thus if a serving officer goes to a defendant s

(p) *Maruti* v *F th* (1891) 16 Bom 11 (notice of ppeal) *Dur Cha d* v *Ja bai* (1918) 1u j R c no 9) I 3 48 I C 8

(q) *Gra* v *L bav* *m h p* (19) 31 Bom L R 4 4 118 I C ( ) A I 7

(r) *N ra* v *l sewar* (19 4) 3 Pat 36 8 I C 889 (4) A P 446

(s) *M had L g* (19) 4 Pat 13 91 I C 1 4 ( ) A 1 441

(t) *Raj ndro* v *Jan Meah* (1899) 26 Cal 101 *Coh n* v *N n g Dass* (189) 19 Cal 01 *S nk l ga* v *Ratna bhapat* (1898) 1 Mad 3 4 *kas m* v *Johurmull* (1916) 43 Cal 44 34 I C 93 *L H ola* v *S bl and* (19 5) 5 Cal 179 85 I C 508 (5) A C 6 *D na Nath* v *Upend* (19 4) 40 Cal L J 1 4 8 I C 03, (4) A C 1004

house but does not find him there and the defendant's adult son who is in the house refuses to accept service on behalf of the father these facts by themselves do not justify the officer in resorting to the mode of service prescribed by this rule he must before effecting such service inquire of the son as to where the defendant is and otherwise exercise due and reasonable diligence in finding the defendant (u) When a defendant is *temporarily* absent from home and is not represented in his house by an agent or male member of his family the summons should be again taken to the defendant's house to be served upon him at the time when enquiries made show that he is likely to be found at home (v) Mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of the defendant's house (w) especially if the serving officer knows where the absent defendant is (x) See notes above under the head The old section

Cannot find the defendant—These words are wide enough to cover the case of a serving officer *not being able to obtain access* to a *purdanashin* lady or to deliver or tender a copy of the summons to her (y) See notes to r 19 below and notes also to O 9 r 13 Grounds on which *ex parte* decree may be set aside

Proof of service—If the plaintiff appears at the hearing of the suit but the defendant does not appear at the hearing the question whether the summons was duly served arises directly for the determination of the Court for the Court cannot proceed *ex parte* unless it is proved that the summons was duly served [O 9 r 6 (1)] Where a decree is passed *ex parte* against a defendant and the defendant satisfies the Court which passed the decree that the summons was not duly served upon him the Court may set aside the decree [O 9 r 13]

18 [S 81] The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons

Endorsement of time and manner of service

Form of return—See Appendix B to Schedule I Form No 11 The said Form has been altered in certain respects by the Chief Court of the Punjab see Appendix VII below

19 [S 82, 1st para] Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit

Examination of serving officer

(u) *S ka m* v *Padmakar* (1906) 30 Bom 6 3
(v) *Bh m hett* v *Umabai* (18) 21 Bom 3
(w) *S b ma ia* v *Subra ia a* (1898) 1 Mad 419 *Abraham* v *Donald* (1906) 29 Mad 3 4
(x) *Sak na* v *Ga n* (190) 4 All 30
(y) *Kal ode* v *Nah n Chandra* (1915) 19 C W N 1 31 30 I C 64

Or order such service as it thinks fit —These words empower the Court even when there has been a technical compliance with the provisions of r 17 to order service in another mode if the Court thinks fit to do so in the interests of justice Thus where the person to be served is a *purdanashin* lady and the serving officer not being able to obtain access to her affixes a copy of the summons on the outer door of her dwelling house as provided by r 17 yet although the mode of service is not improper the Court may under this rule direct the service of summons by means of notice by registered post so that the cover may in due course reach the lady herself (z)

20 [S 82, 2nd para, Ss 83, 84] (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason, the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house [if any] in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit

Substituted service

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally

Effect of substituted service

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require

Where service substituted time for appearance to be fixed

Substituted service —See notes to r 17 above Service of summons

Where the Court is satisfied —The advisability of effecting service by substituted service is a matter primarily for the trial Court The Appellate Court has no power to consider whether the order for substituted service was made on sufficient grounds or not It has only to see whether the order was made according to law and whether the trial Court was satisfied that the conditions mentioned in this rule were fulfilled (a)

For any other reason —Where by the custom in India a defendant (being a Hindu woman of rank) could not be personally served with summons the Judicial Committee allowed service to be substituted on her *Deewan* [chief servant] (b)

21 [S 85 1st para] A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides

Service of summons where defendant resides within jurisdiction of another Court

(z) *J hi od v Nahin Cl dra* (1915) 19 C W N 1 31 30 I C 64

(a) *Diraisua v I la ndaram* (19) 5 Mad L J 477 10 I C 43 ( ) A M 507

(b) *Clark v Mullick* (19 9) 2 M I A 63 68

house but does not find him there and the defendant's adult son who is in the house refuses to accept service on behalf of the father these facts by themselves do not justify the officer in resorting to the mode of service prescribed by this rule he must, before effecting such service inquire of the son as to where the defendant is and otherwise exercise due and reasonable diligence in finding the defendant (u) When a defendant is *temporarily* absent from home and is not represented in his house by an agent or male member of his family the summons should be again taken to the defendant's house to be served upon him at the time when enquiries made show that he is likely to be found at home (v) Mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of the defendant's house (w) especially if the serving officer knows where the absent defendant is (x) See notes above under the head The old section

Cannot find the defendant—These words are wide enough to cover the case of a serving officer *not being able to obtain access* to a *purdanashin* lady or to deliver or tender a copy of the summons to her (y) See notes to r 19 below and notes also to O 9 r 13 Grounds on which *ex parte* decree may be set aside

Proof of service—If the plaintiff appears at the hearing of the suit but the defendant does not appear at the hearing the question whether the summons was duly served arises directly for the determination of the Court for the Court cannot proceed *ex parte* unless it is proved that the summons was duly served [O 9 r 6 (1)] Where a decree is passed *ex parte* against a defendant and the defendant satisfies the Court which passed the decree that the summons was not duly served upon him the Court may set aside the decree [O 9 r 13]

18 [S 81] The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons

Endorsement of time and manner of service

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Examination of serving officer

(u) *S k m v Palm l* (1906) 30 Bom 6 3 3 4
( ) *Bl om hell v Umabai* (189) 1 Bom 3
(w) *Subr ma a v S brama a* (1898) 21 Mad 419 *Abraham v Do ald* (1906) 9 Mad
(x) *S l a v Ga ri* (190?) 4 All 30
(y) *Ashirode v N hin Cl and a* (1915) 19 C W N 1 31 30 I C 64

Or order such service as it thinks fit —These words empower the Court even when there has been a technical compliance with the provisions of r 17 to order service in another mode if the Court thinks fit to do so in the interests of justice Thus where the person to be served is a *purdanashin* lady and the serving officer not being able to obtain access to her affixes a copy of the summons on the outer door of her dwelling house as provided by r 17 yet although the mode of service is not improper the Court may under this rule direct the service of summons by means of notice by registered post so that the cover may in due course reach the lady herself (z)

20 [S 82, 2nd para Ss 83 84] (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason, the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court house, and also upon some conspicuous part of the house [if any] in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the Court thinks fit

Substituted service

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally

Effect of substituted service

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require

Where service substituted time for appearance to be fixed

Substituted service —See notes to r 17 above Service of summons

Where the Court is satisfied —The advisability of effecting service by substituted service is a matter primarily for the trial Court The Appellate Court has no power to consider whether the order for substituted service was made on sufficient grounds or not It has only to see whether the order was made according to law and whether the trial Court was satisfied that the conditions mentioned in this rule were fulfilled (a)

For any other reason —Where by the custom in India a defendant (being a Hindu woman of rank) could not be personally served with summons the Judicial Committee allowed service to be substituted on her *Deewan* [chief servant] (b)

21 [S 85, 1st para] A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides

Service of summons where defendant resides within jurisdiction of another Court

(z) A h rod v N h *Chandra* (1915) 19 C W N 1 31 30 I C 64

(a) *D ra* wam v P l lar m (19 7) 5 M 1 L J 477 10 I C 43 ( ) A M 50

(b) *Cl k v Mull I* (1839) 2 M I A 63 68

Service by registered post—This rule is to be read with s 27 of the General Clauses Act 10 of 1897 by which it is provided that when any document is required by an Act passed after 11th March 1897 to be served by post and the expression used is send [which is the expression used in the present rule] then unless a different intention appears [and no such intention appears in the present rule] the service shall be deemed to be effected by properly addressing pre paying and posting by registered post a letter containing the document and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post Reading the present rule with the said s 27 the High Court of Bombay held in a case in which it appeared that the postal packet enclosing the summons was properly addressed to the defendant and was registered duly stamped and posted but the packet was returned endorsed refused that the Court was entitled to draw the inference indicated in the said s 27 and to hold that there was sufficient service (c) In the earlier cases which arose under the corresponding section of the Code of 1882 where a postal packet was returned endorsed refused it was held that the service was not sufficient and that further evidence was necessary before the Court could act upon such endorsement (d) As to these cases however it is to be noted that they were all decided without any reference to s 27 of the General Clauses Act as all except one were decided before that Act came into force and the one decided after that Act came into force was not governed by the provisions of s 27 as that section did not apply to the Code of 1882 which was an enactment passed before 11th March 1897 the date on which the General Clauses Act came into force

The High Court of Bombay has recently held that the Court must allow the defendant a retrial if after a decree has been passed against him on evidence that the summons was served by registered post and returned refused he appears and denies receipt of the packet Macleod C J said Service by registered post is at any time a poor substitute for personal service which is directed by the Court It is allowed to litigants as a matter of convenience (e)

Service within Presidency towns and Rangoon of summons issued by Courts outside

22 [S 86] Where a summons issued by any Court established beyond the limits of the towns of Calcutta Madras Bombay and Rangoon is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served

Additions made to the rule by the High Court of Bombay—See App IV

Duty of Court to which summons is sent

23 [S 85, 2nd para] The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto

Form of Return—See Schedule I Appendix B Form No 10 and note the alterations made in the said Form by the High Court of Bombay in exercise of the powers conferred by s 122 above

(c) *B l am Pa abai* (1911) 3 Bom 13 11 I C 3 1 See also *Roopel l v H n Huss n* (1914) 16 Bom L R 04 24 I C 437

(d) *Joge dro Chunder* v *Du l Nath* (1888) 15 Cal 681 *Jaga nath* v *S ssoo* (1893) 18 Bom 606 *Aga G lam Hu n* v *Sas oo* (189) 21 Bom 41 418 *Fakhr l-d n* v *Ghafu r l-d* (1901) 23 All 93

(e) *Sund r Spinner* v *M l Bh lt* (19) 46 Bom 130 64 I C 386 ( ) A I R 3 *Gobi dj ee* v *C J Sm th* (9) A P 563

Sufficiency of service—Where a summons has been transmitted by one Court to another for service by the latter and the return made by the Court serving the summons states that the service has been duly effected the presumption will be that the service was sufficient unless the return itself shows the insufficiency (*f*) Similarly when the return made by the Court serving the summons states that the summons has not been duly served and the summons is returned with that declaration to the Court from which it was issued the presumption is that the service was not sufficient and the Court from which the summons was issued should act upon that presumption unless there is good and strong evidence which comes or is brought to its notice showing that the summons was duly served (*g*) According to the Calcutta High Court however the Court issuing the summons must not proceed upon any presumption either way but must determine for itself whether the service was sufficient or not the reason given being that the present rule does not require the Court to which the summons is sent for service to make any return touching the *sufficiency* of service (*h*) This view has been dissented from by the High Court of Allahabad on grounds of expediency and further on the ground that it ignores the last sentence of rule 19 above which applies not only to the Court issuing the summons but also to the Court to which it is sent for service (*i*)

Service on defendant in prison

24 [Ss 87, 88] Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant

As to the duty of the officer to whom the summons is sent for service see r 29 below

Service where defendant resides out of British India and has no agent

25 [S 89] Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate

Service by post—See notes to s 21 above

Service in foreign territory through Political Agent or Court

26 [S 90] Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor General in Council, a Political Agent has been appointed, or a Court has been established or continued with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(*f*) [illegible] Mohomed v K[illegible]ba (1886) 10 Bom [illegible]

(*g*) Dw[illegible] la Ira[illegible] v Br[illegible]j Mohan Lal (1911) 33 All 649 11 I C 39

(*h*) Tomanath v G[illegible]modo (18[illegible]) 22 Cal. 6[illegible]9

(*i*) Dwarka Pr[illegible]ad v B[illegible]j Mohan Lal (1911) 33 All. 649 11 I C 39

(b) the Governor-General in Council has, by notification in the *Gazette of India*, declared *in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be a valid service*,

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other Officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service

The words italicized in cl (b) of this rule are new They were inserted in this rule by the Repealing and Amending Act XVII of 1914

27 [S 422] Where the defendant is a public officer (not belonging to His Majesty's military, naval or air forces or His Majesty's Indian Marine Service), or is the servant of a railway company or local authority, the Court may if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant

Service on civil public officer or on servant of railway company or local authority

Amendments—The words or air were added in the rule after the word naval by the Repealing and Amending Act 1927

Officer belonging to the Indian Marine Service—An officer or mechanic in the employ of the Indian Marine Service is subject to exactly the same rules as every other person under the Code that is to say service upon him is to be effected in the manner prescribed by rr 15 to 17 above (j)

28 [S 468] Where the defendant is a soldier or airman the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant

Service on soldiers

Amendments—The words or airman were inserted in the rule after the word soldier by the Repealing and Amending Act 1927

(j) *Intu Meah v Darbi ksh* (1915) 4 Cal 6 51 I C 380

29 [*Cf* Ss 87 88 468] (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with a written acknowledgment of the defendant and such signature shall be deemed to be evidence of service

Duty of persons to whom summons is delivered or sent for service

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non service

30 [Ss 91 92] (1) The Court may notwithstanding anything hereinbefore contained substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf where the defendant is, in the opinion of the Court of a rank entitling him to such mark of consideration

Substitution of letter for summons

(2) A letter substituted under sub rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub rule (3), shall be treated in all respects as a summons

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit, and where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent

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ORDER VI

Pleadings generally

1 [*New* *Cf* Jud Act 1873 S 100] "Pleading" shall mean plaint or written statement

Pleading

Introduction of English rules of pleadings—The object of this Order is to introduce into British India the leading rules of pleadings followed in England. The whole of this Order excepting rr 14 and 15 is new The rules comprised in this Order except rr 14 and 15 have been taken most of them from Order 19 and the rest from Order 28 of the English Rules made under the Judicature Acts In one respect however the rigour of the English Rules has been relaxed by providing that the Court may notwithstanding the absence of any specific denial require any fact to be proved by the party who alleges it (see O 8 r 5)

Function of pleadings — The whole object of pleadings is to bring the parties to an issue and the meaning of the rules (relating to pleadings) was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was In fact *the whole meaning of the system is to narrow the parties to definite issues* and thereby to diminish expense and delay especially as regards the amount of testimony required on either side at the hearing (k) To attain this end the plaintiff should state in his plaint all the facts which constitute his cause of action It is not sufficient to allege what may be a ground of action if something else be added which is not stated in the plaint Upon all sound principles of pleading it is necessary to allege what must and not what may be a cause of action (l) The defendant also should state in his written statement the material facts on which he relies for his defence When the result of the pleading on both sides is that a material fact is affirmed on the one side and denied on the other the question thus raised between the parties is called an issue of *fact* When one party answers his opponent s pleading by stating an objection in point of law the legal question thus raised between the parties is called an issue of *law* See O 14 r 1

A plaintiff s pleading is his plaint (O 7) A defendant s pleading is his written statement (O 8) In some cases a plaintiff who has filled his plaint may with the leave of the Court file a *written statement* or the Court may require him to file a *written statement* In such cases the written statement forms part of the plaintiff s pleadings Again there are cases in which a defendant who has filed his written statement may with the leave of the Court file an *additional written statement* or the Court may require him to do so In such cases the *additional written statement* forms part of the defendant s pleadings The plaintiff s written statement and the defendant s additional written statement are called *subsequent pleadings* See O 8 r 9

Pleading to state material facts and not evidence

2 [*New* R S C, O 19, r 4] Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively Dates, sums and numbers shall be expressed in figures

General rules of pleading —O 6 deals with Pleadings in general O 7 deals with Plaints and O 8 with Written Statements The following is a summary of the rules comprised in this order —

1 State your *whole* case in your pleading in other words set forth in your pleading *all* material facts on which you rely for your claim or defence (r 2)

2 State facts and *not law* (r 2) If any matter of law is set out in your opponent s pleading do not plead to it (m)

3 State the material facts on which you rely and *not the evidence* by which they are to be proved (rr 2 10 11 12)

4 State *material* facts only omit immaterial and unnecessary facts. Do not anticipate your opponent s pleading and plead to any matter which is not alleged against you (r 2)

(k) *Per* Jessel M R in *Thorp* v *Holdsworth* (18 6) 3 Ch D 637 639

(l) *West Rand Central Gold Mining Co* v *Rex* [190] 2 K B 391 400

(m) *Richardson* v *Mayor of Oxford* (1 93) H B 1

5 State the facts of your case *concisely* but with precision (r 2)

6 It is not necessary to allege the performance of any condition precedent an averment of performance is now implied in every pleading (r 6)

7 It is not necessary to set out the whole or any part of a document unless the precise words thereof are necessary It is sufficient to state the effect of the document as briefly as possible (r 9)

8 It is not necessary to allege any matter of fact which the law presumes in your favour or as to which the burden of proof lies upon your opponent (r 13)

Fundamental rule—Rule 2 of this Order is the fundamental rule of pleadings When analysed it will be found to require four things —

I Every pleading must state *facts* and not law

II It must state *material facts* and material facts only

III It must state only the facts on which the party pleading relies for his claim or defence and *not the evidence* by which they are to be proved

IV It must state such facts *in a concise form*

The main object or one of the main objects of this rule is that the one party may know what are the facts on which the other party relies in order that he may be prepared to meet the case (*n*)

I Every pleading must state facts and not law—A pleading must not set forth a public statute for the Court is bound to take judicial notice of it (*o*) Nor should parties plead conclusions of law or of mixed law and fact it is for the *Court* to declare the law arising upon the facts before it The parties should only state the *facts* on which *they rely for their claim* or defence

It is bad pleading to allege merely that a *right* or a *duty* exists the *facts* must be set out which give rise to the right or create the duty Thus in a suit for damages for negligence it is not enough for the plaintiff to state that the defendant has been guilty of negligence without showing in what respect he was negligent and how he became bound to use care to prevent injury to others Negligence means a breach of duty to take due care and caution The plaint therefore ought to state facts upon which the supposed duty is founded and the duty to the plaintiff with the breach of which the defendant is charged (*p*) Similarly it is not sufficient for the plaintiff to aver that the defendant did the act complained of wrongfully unlawfully and improperly or without any justification therefore or right so to do He must state the facts upon which he proposes to rely as showing that the act was done wrongfully or unlawfully Those epithets under the present system of pleading are useless and redundant They add nothing whatever to the plaintiff s case They are merely now epithets of abuse They were formerly in declarations essential because under that form of pleading *legal rights* were stated for facts but *facts* alone are stated now (*q*) Upon like principles it is not sufficient for the plaintiff to say Under and by virtue of a certain deed I am entitled etc He must state the facts which go to show his title (*r*) In like manner a plaintiff claiming under a *donatio mortis causa* must state the facts which according to him would constitute it a valid *donatio mortis causa* it is not sufficient to say that the deceased two days before his death made a good and valid *donatio mortis causa* to the

( ) *J Morgan Orr v Morgan* (188) 3 C D 49 496

(*o*) *Partridge v Strange* (1816) Plow 1 84

(*p*) *Gautret v Egerton* (1 6) L R C 1 3 ; 3 4 *West* ... *Gold* ... *g Co* v *Fox* [1905] 2 K B 391 400

(*q*) *P* Jessel M R in *Day v Brownrigg* (18 8) 10 C D 294 30

( ) *Fiddill v Earl of Strathmore* (188 3 Times L R 9

plaintiff of the property (s) Where a plaintiff claims by inheritance it is not sufficient to say I am the heir at law He must state the particulars showing the links of relationship on which he relies as constituting him such heir (t)

The same principles apply to a defendant s pleading A defendant may not in his written statement say merely I am not liable He must allege facts which show that he is not liable Thus a defendant who claims privilege in a suit for defamation must not plead merely that he published the words on a privileged occasion He must state the facts which give rise to the privilege (u)

II Every pleading must state material facts and material facts only—To begin with a party should set out in his pleading *all* material facts on which he relies for his claim or defence What particulars are to be stated must depend on the facts of each case But it is absolutely essential that the pleading not to be embarrassing to the defendant should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial (v) If a party omits to plead a material fact he will not be allowed to give evidence of that fact at the trial unless the Court gives him leave to amend his pleadings under r 17 below If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial as a fact on which they would have to rely in order to support their case any fact which is not stated in the pleadings (w) Thus if A sues B for specific performance of a contract alleged to have been signed by B s agent and the only fact stat d in B s written statement as a ground of defence is that the alleged agent was of unsound mind and therefore incompetent to contract B will not be allowed to prove at the hearing that the alleged agent *had in fact no authority to sign the contract* B ought to have pleaded want of authority in his written statement if he intended to rely upon it for his defence Nor will B be allowed to amend his written statement in such a case under rule 17 below for if a defendant were to be at lib rty to put in a defence inconsi t nt with the rules of pleading and then *at the trial* get the case to stand over in order to put in a *new defence* the consequences might be very pr judical (x)

Matters affecting damages—The present rule provides that every pleading should contain and contain only *material facts on which the party pleading relies for his claim or defence* as the case may b That is to say a plaint should contain only those material facts on which the plaintiff relies for his claim and a written statement should contain only those material facts on which the defendant relies for his defence Does this mean that the plaint should be confined to those facts only which constitute the plaintiff s *cause of action* and that the written statement should be confined to those facts only which constitute the defendant s *defence?* It has been held as regards a *plaintiff s claim* that the words material facts on which the party pleading relies for his claim are not confined to those facts which are essential to the plaintiff s cause of actions *but include any* fact which *the plaintiff is entitled to prove at the hearing* Thus facts which merely tend *to increase* the amount of damages are *not essential to the cause of action* but they certainly are facts which the plaintiff *is entitled to prove* at the hearing as matters in aggravation of damages Such facts are therefore material facts within the meaning of this rule and a plaintiff has to state them in his plaint (y) As observed by Brett L J in *Phillipps* v *Phillipps* ( ) the words of the rule are not the facts which will be necessary

( ) P P rton *Tor se d* v *Part n* (18) 30 W R 8 [I ng]

(t) *Palme* v *Palme* [189] 1 Q B 319

( ) *S mm nds* v *D e* (18 1) Ir R 5 C L 358

( ) *Per* Cotton L J in *Phill pps* v *Phill pps* (18 8) 4 Q B D 127 139

(w) *Phill pps* v *Phillipp* (18 8) 4 Q B D 1 7 133 *per* Brett L J *Brook* v *Brook* (1886) 1 P D 19 *Davis* v *James* (1884) 6 C D 7 8

(x) *Byrd* v *Nu n* (18) 7 C D 284

(y) *Millington* v *Lor g* (1880) 6 Q B D 190 194 *Whitney* v *Moignard* (1890) 4 Q B D 630

(z) (18 8) 4 Q B D 1 13

to *support the cause of action* they are the material facts *on which the party relies* for his claim In *Millington* v *Loring* (*a*) which was a suit for damages for breach of a contract to marry the plaint after alleging the promise to marry in the first paragraph and the breach thereof in the second went on to allege in the third paragraph that the plaintiff relying upon the said promise permitted the defendant to debauch and carnally know her whereby the defendant infected her with a venereal disease Analysing the above plaint it may be stated that the first and second paragraphs stated facts that were *essential to the cause of action* i e facts relating to the *making* of the contract and facts relating to the *breach* of the contract being facts which constitute the cause of action in a suit for damages for the breach of a contract But the facts stated in the third paragraph were not essential to the *cause of action* Nevertheless they were *material facts* within the meaning of the rule for the plaintiff *was entitled to prove them* as *matters in aggravation of damages* and it was held that they were properly set forth in the plaint Turning now to the *defence* in a suit for damages the rule laid down in *Wood* v *Durham* (*b*) is that a defendant is not in general entitled to plead in his defence *matters in mitigation of damages* The ground of the decision in that case is that such matters do not constitute any *defence* to an action and a defendant can under the rule allege only those material facts on which he relies for his *defence* As to *Millington* v *Loring* it was said that it was a case where there was a good cause of action of a *double character* stated there were damages claimed by reason of an alleged breach of promise of marriage but there was far more because *part of the cause of action* was that by reason of that the plaintiff had been ill through the seduction by the defendant who had ruined her character and has infected her with a bad disease One may be permitted to doubt whether illness through seduction and infection with disease *formed part of the cause of action* Moreover the decision in *Millington* v *Loring* has been followed in a case later than *Wood* v *Durham* where it could not be said that there was a cause of action of a double character (*c*) However this may be it is to be remarked that the decision in *Wood* v *Durham* turned not only on the construction of the corresponding English rule but on O 21 r 4 which provides in express terms that no denial or defence shall be necessary as to damages claimed or their amount but they shall be deemed to be put in issue in all cases unless expressly admitted O 21 r 4 of the English rules has not been reproduced in the Code Therefore just as the plaintiff may plead any matter in aggravation of damages as to which he could give evidence at the trial so the defendant may plead any matter in mitigation of damages as to which he could give evidence at the trial See notes to O 8 r 3 Except damages

Facts not yet material to a case—The pleadings should only contain such facts as are material at the *present* stage of the suit It is not proper to anticipate the answer of the adversary To do so is like leaping before one comes to the stile (*d*) It is no part of the statement of claim [plaint in our pleadings] to anticipate the defence and to state what the plaintiff would have to say in answer to it That would be a return to the old inconvenient system of pleading in Chancery, which ought certainly not to be encouraged when the plaintiff used to allege in his bill imaginary defences of the defendant and make charges in reply to them (*e*) Thus it is unnecessary in a suit upon a bond to allege that the defendant was of full age when he executed the bond For if he were a minor when he executed the bond it is for him to prove it it need not be denied by anticipation (*f*) Similarly a defendant should not plead to any matter which is not alleged against him Thus if a defendant is sued for slander the only way to meet the plaintiff s claim is to plead (1) that the words in question were not spoken and published

(*a*) (1880) 6 Q B D 190
(*b*) (1899) 1 Q B D 501 *Wood* v *Cox* (1888) 4 Times Rep 550
(*c*) *Whitney* v *Moignard* (1890) 4 Q B D 630
(*d*) *Sir Ralph Bovy's case* (1673) Vent. 217
(*e*) *Hall* v *Eve* (1876) 4 C D 341 34 *per* James L J
(*f*) *Walsingham's case* (1916) ? Plowd 64 *Sir Ralph Bovy's case* (1673) Vent. 217

2 or (2) that they were spoken and published and are true or (3) that they were spoken and published and are privileged. If instead of so doing he pleads that he did not say the words alleged in the plaint but that he said something else and that the something else which he said was true and spoken on a privileged occasion the defence will be struck out under r 16 below as one embarrassing the fair trial of the suit (g)

III Every pleading must state facts and not the evidence by which they are to be proved —Every pleading must contain a statement of the *material facts on which the party pleading relies but not the evidence* by which those facts are to be proved It is an elementary rule of pleading that when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it or the evidence sustaining the allegation (h) No doubt evidence also consists of facts but there is a convenient nomenclature to distinguish the two The material facts on which the party pleading relies for his claim or defence are called *facta probanda* The evidence or the facts by means of which they are to be proved are called *facta probantia* Every pleading should contain only *facta probanda* and not *facta probantia* The distinction is taken in the very rule itself between the facts on which the party relies and the evidence to prove those facts Erle C.J expressed it in this way He said there were facts that might be called the *allegata probanda* the facts which ought to be proved and they were different from the evidence which was adduced to prove those facts And it was upon that expression of opinion of Erle C.J that rule 4 [of the English rules corresponding to the present rule] was drawn. The facts which ought to be stated are the material facts on which the party pleading relies (i) Thus where a suit is brought against an Insurance Company on a policy on the life of *A* and one of the conditions of the policy is that it should be void if the insured committed suicide the Company should only plead if the defence is that *A* committed suicide that *A* died by his own hand It is wrong to state in the written statement that *A* had been melancholy for weeks that he bought a pistol and shot himself with it These facts are merely evidence (*facta probantia*) facts by means of which the *factum probandum* namely suicide is to be proved (j) Similarly it is wrong to set out in the pleading admissions made by the opponent for admissions are only evidence (k) Thus where a plaintiff alleged that certain windows of his were ancient and the defendant stated in his defence that the plaintiff had in a former action admitted that they were not ancient the allegation was struck out (l) Upon the same principle where the facts in a pedigree are facts to be relied upon as facts to establish the right or title they must be set out but where the pedigree is the means of proving the facts relied on as facts by which the right or title is to be established then the pedigree is *evidence* that need not be set out (m)

Rules 10 11 and 12 of this Order are special applications of the general principle laid down in this rule

IV Every pleading must state material facts in a concise form.—To attain this end the forms in Appendix A when applicable and where they are not applicable forms of the like character as nearly as may be should be used for all pleadings (see r 3 below) At the same time the rules given above under the head General rules of pleading should be borne in mind But the pleader should not sacrifice precision to conciseness. For as observed by Kay J although pleadings must now be concise they must also be precise (n) In fact rule 4 expressly required

(g) *Rassam v Budge* (1893) 1 Q B 571
(h) *Williams v Wilcox* (1838) 8 A & E. 314 331 per Lord Denman C.J
(i) *Philipps v Philipps* (1878) 4 Q B D 127 133 per Brett, L. J
(j) See *Borrodaile v Hunter* (1843) 5 Man and Gr 639
(k) *Davy v Garrett* (1878) 7 C D 473 485 *Williamson v L and N W Railway Co* (1879) 12 C D 787 793, *Spedding v Fitzpatrick* (1888) 38 C D 410 414 *Briton Medical Life Association v Britannia Fire Association* (1888) 59 L T 888.
(l) *Lumb v Beaumont* (1884) 49 L. T 772
(m) *Philipps v Philipps* (1878) 4 Q B D 127 134 per Brett, L. J
(n) *Townsend v Parton* (1887) 30 W R (Eng) 87

that in all cases in which particulars may be necessary beyond such as are exemplified in the forms [in Appendix A] particulars (with dates and items if necessary) shall be stated in the pleadings As to further information on this subject of certainty in pleadings see notes to rr 4 5 below

Alternative and inconsistent allegations—The rule now under consideration does not prohibit inconsistent pleadings A person may rely upon one set of facts if he can succeed in proving them and he may rely upon another set of facts if he can succeed in proving them and it appears to me to be far too strict a construction of this Order to say that he must make up his mind on which particular line he will put his case when perhaps he is very much in the dark (o) The rules as to joinder of defendants (O 1 r 3) and causes of action (O 2 r 3) as also the rules as to the reliefs that may be claimed by a plaintiff (O 7 rr 7 8) clearly show that either party may allege in his pleadings two or more inconsistent sets of material facts and claim relief thereunder in the alternative (p) A plaintiff may rely upon several different rights alternatively although they may be inconsistent (q) But then as to each of those he ought to set out the facts upon which he would have to rely as facts to maintain that right (r) So too a defendant may by his written statement raise as many distinct and separate and therefore inconsistent defences as he may think proper (s) But this is subject to the provision contained in rule 16 below which provides that the Court may strike out any matter in a plaint or written statement which may embarrass the fair trial of the suit (t) A pleading however is not embarrassing within the meaning of rule 16 *merely because* it sets up inconsistent sets of facts (u) Hence it cannot be struck out solely on that ground To go to the length of saying that no inconsistent pleading can be pleaded appears to me not warranted by the rules and contrary to the established practice of the Courts (v) It must however be noted that If alternative cases are alleged the facts ought not to be mixed up leaving the [other party] to pick out the facts applicable to each case but facts ought to be distinctly stated so as to show on what facts each alternative of the relief sought is founded (w) [See O 7 r 8] If the facts are so mixed up that they may *embarrass* the fair trial of the suit the Court may strike out matters which may embarrass the trial What the rules prohibit are not inconsistent pleadings but pleadings which set up inconsistent *and* embarrassing claims and inconsistent *and* embarrassing defences See notes to O 7 r 7 Alternative relief

A plea that a policy of fire insurance was not in existence at the time of the fire and that there was no contract of insurance at all coupled with an alternative plea that if there was a contract then by reason of certain conditions precedent to the attaching of the liability the insurance company would not be liable is not contrary *to the law of India (x)*

Forms of pleading

3 [*New* R S C O 19, r 5] The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings

(o) *Re Morgan Owen* v *Morgan* (1887) 35 C D 49 499 *per* Lindley L J
(p) See *Bagat* v *Easton* (1877) 7 C D 1
(q) *Phillipps* v *Phillipps* (18 S) 4 Q B D 1.7 134 *per* Brett, L J
(r) *Ib* See also O 7 r 8
(s) *Berdon* v *Greenwood* (18 8) 3 Ex D 251 55 *Re Morgan Owen* v *Morgan* (1887) 35 C D 49 496
(t) *Ib*
(u) (1887) 35 C D 492 *supra*.
( ) (1887) 3 C D 49 500 *per* Lindley L J
(w) *Davy* v *Garrett* (18 8) 7 C D 4 3 489, *per* Thesiger L J *Official Assignee* v *Bidyasundari* (1919) 4 C W N 145 148 54 I C 00 See also O 8 r
( ) *Hameed & Co* v *Universal Fire Insurance Co* (19 4) Rang 144 83 I C 593 (4) A R 31

4 [*New* R S C, O 19, r 6] In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading

Particulars to be given where necessary

Object of particulars— Although pleadings must now be concise they must also be precise (*y*) For this purpose all necessary particulars must be embodied in the pleadings Where a plaint contains sufficient averments and indicates with reasonable precision what the claim sued on is the suit should not fail by reason of the omission or incorrect description of any particular (*z*) If the particulars stated in the pleadings are not sufficiently specific the other party may apply for further and better particulars under the next rule The object of particulars is to prevent surprise at the trial by informing the opposite party what case he has to meet to define and narrow the issues to be tried and so save unnecessary expense (*a*) *Particulars supplement pleadings* which would otherwise be too vague and general and ensure a fair trial by giving notice of the case intended to be set up (*b*) What particulars are to be stated must depend upon the facts of each case (*c*) As a general rule it may be stated that as much certainty and particularity must be insisted on as is reasonable having regard to the circumstances and to the nature of the acts themselves To insist upon less would be to relax old and intelligible principles To insist upon more would be the vainest pedantry (*d*) At the same time the distinction between *particulars* and *evidence* must be steadily kept in view The Courts have uniformly endeavoured to prevent the plaintiff or the defendant as the case may be from prying into the brief of his opponent for finding out *what is to be the evidence which is to be produced at the trial* On the other hand the Courts have uniformly said that the plaintiff or the defendant is entitled to be told *any and every particular* which will *enable him properly to prepare his case for the trial* so that he may not be taken by surprise (*e*) That is to say whilst particulars may be ordered to prevent surprise and to inform the opposite party of the case he has to meet particulars are not ordered of the mode in which it may be proposed to prove the case set up in the pleading (*f*) To use the phraseology of r 2 above particulars will be ordered of the *material facts* on which the party pleading relies for his claim or defence but not of the *evidence* by which those facts are to be proved Thus a defendant is not entitled to know the names of the plaintiff s witnesses for that is to require particulars of the *evidence* by which the plaintiff s case is to be proved. But where the names of witnesses form part of the *material facts* constituting a party s case he is bound to state them in his pleading and if he does not an order may be made requiring him to disclose the names (*g*) If the particulars are those that he ought to give he cannot refuse to do so merely on the ground that his answer will disclose the names of the witnesses he proposes to call (*h*) This may be explained by an illustration *A* deals in drugs bearing the registered trade-mark Herbalin *B* uses the word *Herbaline* on drugs manufactured by him *A* sues *B* for infringement of his trade mark alleging in the plaint that the use of his trade

(*y*) *T w nd v Barto* (18) O W R (Eng) 87 *per* Kay J

(*z*) *Nam* v *M th Velappa* (18 9) 56 Mad L J 0 111 I C 887 (8) A M 940

(*a*) *Sp ld g* v *Gamage* (1888) 38 C D 410 413 *S nd rs* v *J es* (19) C D 43 431 *Thompson* v *Birkley* (1883) 31 W R 30 (Eng)

(*b*) *Milba k* v *Milba k* (1900) 1 Ch 3 6 33 35

( ) *Phipps* v *Phipps* (18 8) 4 Q B D 1 139

(*d*) *Patel ffe* v *Fra s* [189] Q B 5 4 55

(*e*) *Humphri s nd Co* v *The Taylor Drug Co* (1888) 30 C D 693 695

(*f*) *Duk* v *Wisden* (189) L T 6 68

(*g*) *Marriott* v *Chamberlain* (1886) 17 Q B D 154 161

(*h*) *Zierenberg* v *Labouchere* [1893] Q B 153 183

mark by *B* is calculated to induce and had in fact induced diverse persons to purchase *B*'s goods as and for *A*'s goods *B* applies for particulars of the names and addresses of the diverse persons *B* is entitled to the particulars for the names in this case form part of the *material facts* which constitutes *A*'s case The whole question in such a case is has the defendant induced *diverse persons* to buy his goods as and for those of the plaintiff (*i*)

Fraud and coercion —Where fraud is charged against the defendant it is an acknowledged rule of pleading that the plaintiff must set forth the *particulars* of the *fraud which he alleges It is not enough to use such general words as fraud deceit* or machinations General allegations however strong may be the words in which they are stated are insufficient even to amount to an averment of fraud of which any Court ought to take notice (*j*) Where a plaintiff seeks relief on the ground of fraud but no particulars of the fraud are given in the plaint the Court may allow the plaint to be amended or it may reject the plaint (*k*) [see O 6 r 17 and O 7 r 11] A charge of fraud must be substantially proved as laid and when one kind of fraud is charged another kind of fraud cannot upon failure of proof be substituted for it (*l*) Nor is it proper for the appellate Court to entertain a case of fraud other than the one specifically alleged in the pleadings (*m*) The same rules apply when *coercion* is charged in the plaint (*n*)

If the particulars of fraud stated in the plaint are not sufficiently specific the defendant may apply for further particulars under the next rule Thus where it is alleged by the plaintiffs that the defendants have made false entries in the plaintiff's books for the purpose of defrauding them the plaintiffs may be directed to furnish particulars specifying the entries charged to be false and the nature of their objection to each item (*o*) See notes to rule 5 below Discovery before particulars ill 1 and notes to O 6 r 17 Amendment by adding plea of fraud.

Misrepresentation —Where it is alleged in the plaint that the defendant represented to the plaintiff etc it should be stated whether the representation was verbal or in writing (*p*) It is not enough in an action to restrain infringement of a trade mark to allege that diverse persons were induced by the acts of the defendant to purchase his goods as and for those of the plaintiff The plaintiff should state in the plaint particulars of the names and addresses of those diverse persons (*q*)

Breach of trust —Where breach of trust is charged the pleading must specify the acts constituting the alleged breach of trust It is not enough to say that the defendant had in various ways misapplied rent and profits of leaseholds which he had received on behalf of the plaintiff and had committed breaches of trust (*r*)

Other cases in which particulars may be necessary —

Misconduct —Where the dismissal of a servant or an agent is justified on the ground of misconduct the party so justifying must specify the acts of misconduct (*s*)

Negligence —Where negligence or contributory negligence is charged full details must be given of the acts on which the party pleading relies as constituting negligence (*t*)

(*i*) *Humphries v The Taylor Drug Co* (1888) 39 C D 693 See also *Milbank v Milbank* [1900] 1 Ch 376

(*j*) *Wallingford v The Mutual Society* (1880) 5 App Ca 685 697 per Lord Selborne L C *Bal Gangadhar Tilak v Shrinivas Pandit* (191) 4 I A 13 151 39 Bom 441 46 I C 63

(*k*) ( ) *Na* v *Tul ekram* (1888) 15 Cal. 33 15 I A 119 *Lakshmi v Gangadhar* (190) 3 Bom 55 *Jyoti Prokash v Jhowm* (1903) 36 Cal 134 1 I C 84 *See K h* *v Ham* (1894) 18 Bom 144

(*l*) *Abdul Hossein v Turner* (188) 11 Bom 6 0 14 I A 111

(*m*) *Mahomed M* v *Savaran Vijaya* (1900) 3 Mad 37

( ) *Purushotam v Pandur g* (1914) 39 Bom. 149 8 I C 981

(*o*) *Newport Slipway &c Co v Paynter* (1886) 34 C D 88

(*p*) *Seligman v Young* (1884) W N 93

(*q*) *Humphries v Taylor Drug Co* (1888) 39 C D 693

( ) *Anstice In re* (1885) 54 L. J Ch 1104 (1885) 33 W R 5 [Eng]

( ) *Saunders v Jones* (1) C D 435

(*t*) (a t t v *Fg rton* (1 6) L. R C P 3 1 *Mart v M Taggart* [1906] I R 1 0

Agreement—Where an agreement is alleged the pleading should state the date of the agreement the names of the parties to it and whether it was in writing or verbal (u) If it is an implied agreement it should appear from what facts or circumstances it is to be implied (see r 12 below)

Defamation—In an action for slander the plaintiff must give particulars of the names of the persons to whom the alleged slander was made (v)

In an action for libel where the charge made against the plaintiff in the alleged libel is general in its nature a defendant who pleads a justification must state in his pleading the facts on which he relies in support of his justification (w) But where in an action of libel the defendant relies on the defence of fair comment and pleads it in the form now commonly known as the rolled up plea—i e In so far as the said words consist of allegations of fact the said words are in their nature and ordinary meaning true in substance and in fact and in so far as the said words consist of expression of opinion they are fair comment made in good faith and without malice for the benefit of the public upon the said facts which are a matter of public interest the Court will not order the defendant to specify which of the words complained of he relies on as being statements of facts and which as being expressions of opinion. Nor will the Court order him to give particulars of the facts on which he relies as being the basis of his comments if the plea (as above) limits those facts to the said facts for the plaintiff is thereby given all the information on the subject that he can require (x) *A* sends a book of which he is the author to *B* for a review *B* in reviewing the book prints and publishes among other statements the following *A* is *by his own confession* a most barefaced liar *A* sues *B* for damages for libel *B* justifies pleading the truth of the alleged libel *B* must specify in his pleading the passage in *A* s work on which he relies in support of the defence of justification (y)

Accounts—Where a plaintiff claims merely to have a general account taken he need not give particulars as to the items But it is otherwise if the plaintiff claims a *definite amount* instead of an account In the latter case the plaintiff must give particulars as to the items of which it is composed (z)

Where a lump sum is claimed—Where a plaintiff claims a lump sum the defendant is entitled to particulars of the items composing such sum (a) So also where a plaintiff gives credit for a lump sum and sues for the balance (b)

Particulars of defence—The general principles upon which the Courts act in requiring particulars to be given of allegations or matters stated in plaints are applicable equally to defences and the rules relating to the giving of particulars are in general applicable to all pleadings though from the nature of the case the occasion for particulars arises somewhat less frequently in regard to defences than in regard to claims. Thus where a defence consists of traverses or denials of allegations in the claim so that the defendant is not taking upon himself the *onus* of proving any substantive facts but is only denying or requiring proof of those alleged by the plaintiff the occasion for particulars does not arise but where he pleads *affirmatively* or sets up facts to be proved in answer to the plaintiff s case he may be and in general is as much under obligation to give particulars as if he were alleging such or similar matters in a plaint (c) For instance if a defendant sets up a defence of payments made he has to give particulars of

(u) *Turquand* v *Fearon* (1879) 48 L. J Q B 703
(v) *Roselle* v *Buchanan* (1886) 16 Q B D 656 *Davey* v *Bentinck* [1893] 1 Q B 185 188
(w) *Zierenberg* v *Labouchere* [1893] 2 Q B. 183 See also *Godman* v *Times Publishing Co* (1926) 2 K.B 273
(x) *Aga Khan* v *Times Publishing Co* (1924) 1 K B 675
(y) *Devereux* v *Clark & Co* [1891] 2 Q B 582.
(z) *Augustinus* v *Nerinckx* (1880) 16 C. D 13 *Flackle* v *Osmaston* (1884) 28 C D 119 *Kemp* v *Goldberg* (1887) 36 C D 505, 0
(a) *Philipps* v *Philipps* (1878) 4 Q B D 127 133
(b) *Godden* v *Corsten* (1879) 5 C. P D 17
(c) *Roberts* v *Owen* (1890) 6 Times L. R. 172 *James* v *Radnor County Council* (1890) 6 Times L. R. 240

th dates and amounts of such payments So if he justifies a libel he must state th facts fully in his pleadings or give particulars (*d*) Similarly where he alleges that he released from or exonerated and discharged from the performance of his contract h must in his written statement give sufficient information to his opponent as to how an when he was so released or discharged [Bullen and Leake *Precedents of Pleadings* 6th ed 532 533] But where the onus of e tabli hing a positive or negative allegation lies on th plaintiff the Court will not order the def ndant to give particulars of his traverse of tha allegation. Thus where the plaintiff alleged that the committee of the Stock Exchang in declining to re elect him as a member of the exchange did not act *bonâ fide* fairly reasonably or judicially in coming to the conclusion they did and the committee i their defence alleged that they acted *bonâ fide* and honestly it was held that the onu of proving that the committee had not acted *bonâ fid* being on the plaintiff he was no entitled to particulars of the facts or grounds upon which the committee based the decision (*e*)

Failure to give particulars after order—If the order directing a party t give particulars is not obeyed then if the plaintiff is in default he should have h action stayed and if the defendant is in default his defence should be struck out (*f*)

5 [*New* R S C O 19, r 7] A further and bette statement of the nature of the claim o defence, or further and better particular of any matter stated in any pleading may in all cases be ordered, upon such terms, as to cost and otherwise, as may be just

Further and better statement of particulars

Application for particulars— The object of particulars is to preven surprise at the trial and to limit the inquiry at the trial to the matters set out in th particulars So I think particulars ought to be encouraged They tend to *narrow th issues* (*g*) If a party does not state in his pleading all the particulars required b r 4 the other party may apply under this rule for further and better particulars I the English practice is to be followed here the application need not be supported b any affidavit except perhaps in a special case (*h*)

When application should be made—As a general rule a defendant wh claims particulars should apply for them with reasonable promptitude (*i*) and befor putting in his defence but he does not by putting in his defence waive his right to part culars (*j*) Indeed in a proper case the Court may order an application for particulars t stand over till a written statement has been put in to enable the Court to know what th points raised by the defence are as where the defendant is the plaintiff s agent and th particulars in question are all in the knowledge of the defendant but not in the know ledge of the plaintiff (*k*)

Discovery before particulars—The question oft n arises where a defen dant has applied for particulars whether the plaintiff should deliver particulars befor obtaining discovery and inspection of the defendant s books or whether discovery shoul

(*d*) *Zierenberg* v *Labouchere* [1893] 2 Q B 183
(*e*) *Weinberger* v *Inglis* [1918] 1 Ch 133
(*f*) *Gauri Shanker* v *Mt Mahadei Kunwar* (1923) 45 All 6 4 6 7, 74 I C 466 (1) A.A 17
(*g*) *Thompson* v *Birkley* (1883) 31 W.R [Eng] 230 *per* Watkin Williams, J
(*h*) *Thompson* v *Birkley* (1883) 31 W R. [Eng] 230 where the action was for seduction and the defendant applied for particulars of the alleged immoral intercourse, but the Court refused to make any orde unless he made an affidavit that he ha not seduced the girl —approved in *Sach* v *Speilman* (1887) 37 C D 295 30 But see *Kelly* v *Briggs* 65 L T Journal 73
(*i*) *Gourand* v *Fitzgerald* (1888) 37 W.R. [Eng 65
(*j*) *Sachs* v *Speilman* (1887) 37 C. D 295 30
(*k*) *Sachs* v *Speilman* (1887) 37 C D 295 30

be given before particulars are delivered. There is no hard and fast rule as to the class of cases in which particulars should precede discovery or discovery be ordered before particulars, but the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts and taking into account any special circumstances (*l*). The result of the authorities appears to be that where the party pleading does not know the facts necessary to enable him to give the particulars but his opponent knows them, the party applying for particulars may be ordered to give discovery before the party pleading is required to deliver particulars, and the application for particulars may be postponed till after discovery. It is good practice and good sense that where the defendant knows the facts and the plaintiffs do not the defendant should give discovery before the plaintiffs deliver particulars (*m*).

1. *Suit by principal against agent for accounts charging agent with fraud.*—A employs *B* to purchase goods as his agent at the lowest possible price. *A* sues *B* for an account alleging in the plaint that *B* had purchased goods at prices higher than the current prices and had secretly received commission from the vendor. The charges against *B* are stated *in general terms*, no particulars being given. *A* is unable to state the particulars of the fraud charged until he sees *B*'s books. *A* is entitled to inspection of *B*'s books before he can be called upon to deliver particulars of the fraud (*n*).

2. *Suit by a wife's executor against husband.*—*A*, who is the executor of *J*, sues *B*, *J*'s husband, to recover from him *all the furniture and other chattels* purchased by *J* with her separate income and included in an inventory of all the goods in *B*'s house made sometime before *J*'s death. *B* applies for particulars of the furniture. He is not entitled to the particulars until he declares by an affidavit which of the articles comprised in the inventory belonged to his wife. "Where the plaintiffs are executors who do not know and the defendant a person who does know, it is right that discovery should come first" (*o*).

3. *Suit by a colliery company against a colliery merchant.*—A colliery company sues *R*, a coal merchant, for damages for fraudulently passing off coal not gotten from the company's mines as coal gotten from the company's mines. The plaintiffs in their plaint give one specific instance of fraud and allege that "on divers other occasions" the defendant had taken orders from "divers other persons" for coal to be supplied from the company's mines and fraudulently sold coal not purchased from the plaintiff as coal gotten from the company's mines. *R* applies for particulars of the names and dates. The company then applies for inspection of *R*'s books. The company is entitled to discovery before delivering particulars. Chitty J. said: "Having regard to the circumstances that many of these alleged frauds are within the defendant's means of knowledge and are not within the knowledge of the plaintiffs I think discovery ought to precede particulars" (*p*).

The practice followed in the above cases was sought to be applied in a libel case where *A* sued *B* for calling him a "charity swindler" and "imposter" and *B* pleaded justification and, when called upon to give particulars of the charge, said that he could not unless he was allowed inspection of *A*'s books of account. The Court held that *B* was not entitled to discovery before he had delivered particulars. Kay L.J. said: "To apply this practice to the case of a libel would be to sanction the publication of a libel when the libeller knew no facts justifying the libellous statement because he believed he could by the process of discovery elicit such facts" (*q*).

(*l*) *Wynne Merthyr Co. v. Radford & Co.* [1896] 1 Ch. 29, 35.

(*m*) *Millar v. Harper* (1888) 38 C. D. 110, 11[illegible].

(*n*) *Whyte v. Ahrens* (1884) 26 C. D. 717; *Leitch v. Abbott* (1[illegible]6) 31 C. D. 374. See also *Sachs v. Speilman* (188[illegible]) 37 C. D. [illegible].

(*o*) *Millar v. Harper* (1888) 38 C. D. 110.

(*p*) *Wynne Merthyr Co. v. Radford & Co.* [1896] 1 Ch. [illegible]. See also *Maxim Nordenfelt & Co. v. Nordenfelt* [1[illegible]93] 3 Ch. 1[illegible].

(*q*) *Zierenberg v. Labouchere* [1893] [illegible] Q. B. 183.

Further particulars granted —For cases in which further and better particulars have been ordered see notes to r 4 above Other cases in which particulars may be necessary

Objections to particulars —

1 A applies for particulars from *B* under this rule It is a valid objection to the application that the particulars applied for by *A* relate to the *mode* in which *B* s case is to be proved and not to *material facts* constituting *B* s case See notes to r 4 above Object of particulars

2 Particulars will only be ordered of *material facts* constituting a party s case but not of any *immaterial* allegation (*r*)

3 Particulars will only be ordered of material facts *alleged* by a party in his pleading but not of those *denied* by him See notes to r 4 above Particulars of defence

4 A applies for particulars from *B* under this rule It is no objection to the application that *A* must know the true facts of the case better than *B* (*s*)

5 Where a party from whom particulars are sought is unable to give the particulars without laborious inquiry the practice is to make an order for the best particulars the party can give (*t*) This is usually the case where the party fills a representative character (*u*)

Upon such terms as to costs or otherwise —Thus an order may be made directing that unless particulars are delivered within a certain time the suit shall be dismissed (*v*)

Amending or delivering further particulars —Where a party who has delivered particulars under an order afterwards desires to amend them or to deliver further particulars the proper course for him is to obtain an order giving him leave to do so (*w*) And leave will in general be granted where the amendment will cause no injury to the opposite party except such as can be sufficiently compensated for by costs (*x*) Leave to amend may be refused where it is sought to introduce a new cause of action (*y*) or to add to the amount claimed after the defendant has paid into Court the full amount originally claimed ( ) An application to amend particulars will as a rule be refused if made at the *trial* of the suit (*a*) See s 153 and r 17 of this Order

6 [*New* R S C O 19, r 14] Any condition precedent, the performance or occurrence of which is intended to be contested shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be , and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading

Condition precedent

( ) *Ca e* *T rr* (1 6) 54 L T 51 *Gibbons* v *Norma* (1886) Tim L R 6 6
(*s*) *H bo d* *M k* (1) 3 L T 411
(*t*) *M hall* *I der-O* C C (1885) 1 Ti L R 331 *Hall* v *la* ... (1) 6 W R 1 *Ha bo d* v *M k* (18) 35 L T 411
( ) *H m* *W ele* (1 9) Tim L R 38
(*v*) *D* v *I* *n k* (1 93) 1 Q B 185
( ) ... (1 9) ... Q B 148 153 *Emdens* v *L* ... (1894) 10 Tim s L R 400
(*x*) *Cl* ... *C mmercial C* ... *Association* (1 3) 3 W R (E n) 6
(*y*) *Cockshutt* v *Metropolitan Coal Association* [1 31] 6 L T 4
( ) ... v *H* ... (1907) 23 Times L R 3
( ) *Mo s* v *M l n s* (1) 33 C D 603 (patent action)

Neither party need allege the performance of any condition precedent.—*A* agrees to build a house for *B* at certain rates specified in the contract. It is a condition of the agreement that payment to *A* should only be made upon a certificate signed by *B*'s architect as to the amount due. *A* demands payment upon completion of the building, but *B* refuses to pay. *A* sues *B* claiming Rs 5,000. Here the obtaining of the architect's certificate is a *condition precedent* to *A*'s right of action. Under the present rule it is not necessary for *A* expressly to aver in his plaint that he has obtained the architect's certificate. Such averment, the rule says, shall be *implied* in his pleading. The rule further provides that if *B* intends to contest the fulfilment of the condition precedent, he must distinctly specify the condition precedent in his written statement. He must plead that the architect has not certified the amount claimed in the suit. If *B* does not plead the non-performance of the condition, it will be presumed that the condition has been duly performed. If *B* pleads non-performance, the burden of *proving* due performance will be on *A*.

A condition precedent, it must be observed, *does not strictly speaking form part of the cause of action*. Thus in the case put above *A*'s cause of action consists of the *making* of the contract and of the *breach* thereof by *B*. The condition of obtaining the architect's certificate is but an additional formality introduced by the express agreement of the parties *suspending* *A*'s right to sue until the condition has been performed.

The Lahore High Court has held that in a suit for damages for breach of contract the plaintiff is dispensed by this rule from pleading his readiness and willingness to perform his part of the contract (*b*).

History of the rule.—This rule is a reproduction of O. 19, r. 14 of the English Rules. Before the year 1852 it was a recognized rule of English pleadings that the plaintiff should allege *expressly* the performance of *each* necessary condition precedent to the rights claimed. Then came the Common Law Procedure Act, 1852, which modified the earlier practice by enabling the plaintiff to aver performance of conditions precedent *generally*. For this purpose the form in use was: "all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said promise performed by the defendant and to maintain his action for the breach thereof hereinafter alleged." The present rule does away with the necessity of even a *general* averment of performance of condition precedent. A plaintiff need not now allege the performance of any condition precedent. It is for the *defendant* to object if he intends to dispute the performance of any condition precedent.

Distinctly.—This rule requires that where a party intends to contest the performance of any condition precedent, he must *distinctly* specify the condition precedent in his pleading. An allegation in general terms that there was an express condition ... is not enough. The pleading must state the terms of the condition, the names of the parties to it, and whether it was in writing or verbal (*c*).

Departure

7. [*New* R. S. C., O. 19, r. 16.] No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

Departure in pleading.—This rule provides against what is called "a departure in pleading." It is a reproduction of O. 19, r. 16 of the English Rules. Its

(*b*) Firm Kanwa Khan v. Firm Ganpat ... (1926) 7 Lah. 44, 94 I. C. 04, (1926) A. L. 218.

(*c*) Ables v. Matheson & Co., 104 L. T. Journal 68.

importance in this country is not likely to be so great as in England where the practice is for each party *in turn* to state his own case and answer that of his opponent before the hearing Not that the Code does not recognize *subsequent pleadings* (see O 8 r 9) but such pleadings are seldom resorted to in this country even in the Presidency towns The general principles on which the system of pleading in England is founded are as follows —

1 The plaintiff by his *statement of claim* alleges the material facts on which he relies in support of his case.

2 The defendant in answer thereto delivers a *defence* in which he may take all or any of the following courses —

first he may deny or refuse to admit the facts stated by the plaintiff

secondly he may confess or admit them and avoid their effect by answering fresh facts which afford an answer thereto

thirdly he may admit the facts stated by the plaintiff and may raise a question of law as to their legal effect

If the defendant adopts the first or third of these three courses a question of fact or of law is at once raised between the parties

3 If the defendant adopts the second of the three courses the plaintiff may *reply*—

first by denying the fresh facts alleged by the defendant or

secondly by admitting them and alleging other facts which avoid their effect or

thirdly by raising a question of law as to their effect.

4 If the plaintiff pleads a reply of the second kind, that is if he replies by way of confession and avoidance the defendant has the same courses open to him in pleading a *rejoinder* (d) A rejoinder is now seldom pleaded.

5 It is very seldom that further proceedings are taken, but there may be *sur rejoinders rebutters and surrebutters*

Under the Code a plaintiff commences his suit by presenting a *plaint* The defendant then puts in his *written statement* in answer to the plaintiff s claim. There is nothing corresponding to a *Reply* or *Rejoinder* in our system of pleadings But the plaintiff may with the leave of the Court tender a *written statement* and the defendant may with like leave tender an *additional written statement* (O 8 r 9) The Code of 1882 also contained a similar provision (e) but pleadings in this country seldom go beyond the defendant s written statement

The word pleading at the commencement of this rule refers to *subsequent pleadings* Thus in England a plaintiff may not raise in his *Reply* a ground of claim different from that raised in his *Statement of Claim* nor can he in his *Reply* set up facts inconsistent with those set up in his *Statement of Claim* A reply is not the proper place in which to rai e new claims A plaintiff who wi hes to add new claims can do so only by *amending* the Statement of Claim Similar remarks apply to a defendant s Rejoinder As a plaintiff s Reply must be con istent with his Statement of Claim so a defendant s Rejoinder must be consistent with his Defence Thus if a plaintiff alleges merely a *negligent* breach of trust in his Statement of Claim the Reply must not assert that the breach of trust was *fraudulent* (f) Similarly if the Defence alleges that the arbitrators

(d) Bullen and Leake Precedents on Pleadings, 6th ed pp 1 2

(e) See Code of 188 s 11*

(f) *Kingston* v *Corker* [189?] ?9 L. R Ir 361 5 7

did not make any award the Rejoinder must not assert that the award *was not tendered by the proper time* for it is one thing not to make an award, and another thing not to tender it when made (*g*) Upon the same principle a plaintiff who claims *rent* on the basis of a lease cannot claim the same sum in his Reply as *damages* for unlawfully holding over for by his Statement of Claim he treats the defendant as his tenant and he cannot turn round in his Reply and say If the defendant is not liable as a *tenant* he is liable as a trespasser (*h*)

Denial of contract

8 [*New* R S C, O 19, r 20] Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract

Denial of contract—All matters which go to show that the contract sued on is void or unlawful must be *specifically pleaded* If such matters are not expressly pleaded no evidence thereof can as a rule be given at the trial Thus if *A* sues *B* on a contract and *B* in his written statement *merely denies* the contract such denial will be taken to mean only that there was *in fact* no such contract as alleged it will not be construed as a denial of the *legality* of the contract The result is that if *A* proves the contract sued upon *B* will not be allowed to contend at the hearing that the contract was a *wagering contract* and therefore void *B* ought to have specifically pleaded in his written statement that the contract was a wagering contract (*i*) But where at the hearing of a suit *the plaintiff s case discloses* that the transaction which is the basis of his claim is *illegal* the Court cannot properly ignore the illegality *even if the illegality be not pleaded or relied on by the defendant* (*j*) No Court ought to enforce an *illegal* contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality It matters not whether the defendant has pleaded the illegality or whether he has not *If the evidence adduced by the plaintiff proves the illegality* the Court ought not to assist him (*k*) Note that an agreement by way of wager is void but not illegal [see Indian Contract Act 1872 ss 23 and 30] See O 8 r 2

Effect of document to be stated

9 [*New* R S C O 19 r 21] Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material

Effect of document to be stated—This rule directs what should be the proper method of pleading where a material fact (r 2) is evidenced by a document (*l*) The intention expressed by the first part of the rule seems clearly to be that where a

(*g*) *Robert* v *Marr tt* (1871) ? Wms Saund 188
(*h*) *Duck orth* v *McCleland* (1878) L P Ir 5 7
(*i*) *Colborne* v *Stockdale* (1795) 1 Str 493 *Gr wood* v *Blane* (1851) 11 C B 5 6 *Wilts* v *Lorick* (1901) 2 K B 195 *Bull* v *Clapman* (18 3) 8 Ex 444
(*j*) *Cedge* v *Roy l Exchange As rance Corporation* [1900] 2 Q B 214 *Alice Mary Hill* v *Clarke* (1904) 27 All 66
(*k*) *Sc tt* v *Broun D ring Co* [189] 2 Q B 7 4 9
(*l*) *D byshire* v *La gh* [1896] 1 Q B 554 57

document is material it shall not be necessary to set it out at length but only to state the legal effect of it the object apparently being to prevent long pleadings (m) Thus it is sufficient if a plaintiff in a suit for the recovery of immovable property under a will states in his plaint the *effect* of the will under which he claims He is not bound to set out the precise words of the will although a question has arisen as to the true construction of those words (n) At the same time it is not enough for a plaintiff to say that under and by virtue of a certain deed he is entitled to the property claimed by him He must state the *effect* of the document on which he relies (o)

Precise words —In an action of libel or slander it is always necessary to set out the *exact* words alleged to be libellous (p)

10 [*New* R S C, O 19, r 22] Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred

Malice knowledge &c

Condition of mind —Rules 10 11 and 12 are no more than practical applications of the general principle laid down in r 2 above Malice fraudulent intention knowledge etc constitute in some cases the *material facts* of a party's case they must therefore be alleged in the party's pleading But the circumstances from which they are to be inferred need not be stated in the pleading

Malice —Malice is a necessary part of the cause of action in suits for slander of title and for malicious prosecution It must therefore be alleged by the plaintiff in his plaint Similarly where a defendant in an action of libel claims privilege alleging that the words complained of were used on a privileged occasion the plaintiff may allege and prove malice that is improper motive

Fraudulent intention —See notes to r 4 above Fraud and coercion

Knowledge —In a suit by a servant against his master for injury caused by the dangerous condition of a building where he is employed the plaint must not only affirm the master's knowledge of the danger but must also negative the servant's knowledge of it (q) To support an action for damages for the bite of a dog the plaintiff must allege and prove that the dog had to the defendant's *knowledge* bitten or attempted to bite some person before it bit the plaintiff (r)

11 [*New* R S C O 19, r 23] Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material

Notice

Notice as part of cause of action —Notice where it forms part of the cause of action must be pleaded as a fact *e g* notice of suit proposed to be brought against the Secretary of State for India [see s 80] or against a Railway Company (s) or against a Municipality notice of dishonour of a bill of exchange notice to a tenant to quit etc It is not necessary to set out the notice *verbatim* in the plaint

(m) *Darbyshire v Leigh* [1896] 1 Q B 554 p 558
(n) [1896] 1 Q B 554 *supra*
(o) *Philipps v Philipps* (1878) 4 Q B D 127
(p) *Harris v Warre* (1879) 4 C P D 125
(q) *Griffiths v London and St Katharine Dock & Co* (1884) 13 Q B D 259
(r) *Thomas v Morgan* (1835) 4 Dowl 223; *Osborne v Chocqueel* [1896] 2 Q B 109
(s) Indian Railways Act 1890 ss. 77 140

12 [*New* R S C, O 19, r 24] Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative

Implied contract or relation

Implied contract —A contract may be expressed in one document or it may have to be implied from a series of documents or conversations or from a number of other circumstances Rule 9 applies in the former case the present rule in the latter case Circumstances in the conduct of two parties may establish a binding contract between them although the agreement reduced into writing as a draft has not been formally executed by either (t) As regards contracts to be implied from a series of letters it is to be noted that where a Court has to find a contract in a correspondence and not in one particular note or memorandum formally signed the whole of that which has passed between the parties must be taken into consideration (u)

13 [*New* R S C, O 19, r 25] Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied (*e g*, consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim)

Presumption of law

Presumptions of law —A plaintiff need not in his plaint allege the consideration for which a bill of exchange was given to him when he sues *only on the bill* for it will be presumed in his favour that the bill was made for consideration (v) It will be for the defendant to plead that there was no consideration for the bill But if the plaintiff sues *on the consideration* as a substantive ground of claim he must allege the consideration specifically

14 [Ss 51, 115] Every pleading shall be signed by the party and his pleader (if any) provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf

Pleading to be signed

(t) *Brogden* v *Metropolitan Railway Co* (1877) 2 App Cas 666

(u) *Hussey* v *Horne Payne* (18 9) 4 App Cas 311

(v) See Negotiable Instruments Act 6 of 1881 s 118

Omission to sign plaint—The signing of plaints is merely a matter of procedure (w) If a plaint is not signed by the plaintiff or by a person duly authorised by him in that behalf and the defect is discovered at any time before judgment the Court may allow the plaintiff to amend the plaint by signing the same If the defect is not discovered until the case comes on for hearing before an appellate Court the appellate Court may order the amendment to be made in that Court The appellate Court ought not to dismiss the suit or interfere with the decree of the lower Court merely because the plaint has not been signed The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court (x) see s 99

15 [Ss 51 52 115] (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case

Verification of pleadings

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed

Verification of plaint.—The verification of a plaint is not evidence on which a suit can be decreed even if the defendant does not appear (y)

Omission to verify pleading—A pleading which is not verified in the manner required by this rule may be verified at a later stage of the suit even after the expiry of the limitation period The omission to verify a pleading is a mere irregularity within the meaning of s 99 of the Code (z) See notes to r 14 above

16 [*New* R S C O 19, r 27] The Court may, at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit

Striking out pleadings

Amending your opponent's pleading—This rule deals with amendments which a party desires to be made *in his opponent's pleading* The next rule deals with amendments which a party desires to make *in his own pleading*

(w) *Bishe ha Nath the matt of* (1918) 40 All 147 44 I C [illegible]
(x) *L[illegible] leo v Smult* (1900) [illegible] All 5 *Moh[illegible] v Bun[illegible]* (1[illegible]) 17 Cal 580 (P C) *Ma Ngwe v Ma Him* (19[illegible]3) 1 Rang [illegible] 74 I C 10[illegible] ([illegible]3) A I [illegible]
(y) [illegible] v S[illegible]n (1916) 43 C 1 10[illegible]1

1010 101[illegible] 34 I C [illegible]
(z) *Sh[illegible]b Deo v I[illegible]m Prasad* (1[illegible] [illegible] 640 67 I C 9[illegible] ([illegible]) [illegible] *I[illegible]m [illegible]ha[illegible] sa* (1[illegible]) [illegible] *Chand [illegible] M[illegible] Lo[illegible]* [illegible] *Ram[illegible]pal [illegible]* [illegible] S[illegible]0 1[illegible] I C [illegible]

16 **Striking out and amending pleadings** — It seems to me said Bowen, L J in *Knowles* v *Roberts* (a) that the rule that the Court is not to dictate to parties how they should frame their case is one that ought always to be preserved sacred But that rule is of course subject to this modification and limitation that the parties must not offend against the rules of pleading which have been laid down by the law and if a party introduces a pleading which is unnecessary and it tends to prejudice embarrass and delay the trial of the action it then becomes a pleading which is beyond his right It is a recognized principle that a defendant may claim *ex debito justitiae to have the plaintiff s case presented in an intelligible form so that he may not be embarrassed* in meeting it and the Court ought to be strict even to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the Court of Chancery (b)

Unnecessary —This rule has been reproduced verbatim from O 19 r 27 of the English Rules According to the English practice the mere fact that a pleading contains matters which are unnecessary is no ground for striking out those matters (c) It only affects the costs of the pleading (d) An allegation in a pleading will not be struck out merely because it is unnecessary unless it is scandalous or tends to prejudice embarrass or delay the fair trial of the action Thus where in a suit against a Local Board the plaint alleged that a member of the Board had used his influence with the Board *for his own private interest* and that in consequence thereof the Board had declined to meet the just demands of the plaintiffs the allegations were ordered to be struck out (e) In such a case the allegations are not only unnecessary but they are scandalous For the same reason *unnecessary* allegations of *dishonest conduct* made against the defendant will be struck out under this rule (f) In an action to enforce a compromise of a former action it is *unnecessary and embarrassing* to set out in the plaint the original disputes between the parties such allegations will therefore be struck out (g) Where a statement of claim contained immaterial facts and set out at great length documents which could not be material except as evidence by way of admission so that the defendant could not know what case he had to meet it was held that the whole statement of claim should be struck out as being unnecessarily prolix and embarrassing (h) In a action for slander it is *unnecessary and embarrassing* for the defendant to state in his defence that he did not say the words alleged in the plaint but that he said somethingelse and that the something else which he said was true such statements will therefore be struck out (i)

Scandalous —Every Court has an inherent power quite independently of this rule to strike out scandalous matter in any record or proceedings The Court has a duty to discharge towards the public and the suitors in taking care that its record are kept free from irrelevant and scandalous matter (j) Scandal is calculated to do great and permanent *injury to all persons whom it affects by making the record* of the Court the means of perpetuating libellous and malignant slanders and the Court in aid of the public morals is bound to interfere to suppress such indecencies which may stain the reputation and wound the feelings of the parties and their relatives and friends (k) Thus where an application for bail to the High Court contained defamatory allegations against the trying Magistrate which were all irrelevant the High Court of Bombay refused to allow the application to be filed and ordered it to be returned (l) Similarly where a memorandum of appeal alleged partiality against the Judge whose decree was in question the High Court of Madras ordered the objectionable passages to be

(a) (1888) 38 C D 26 at pp 270 271
(b) *Davy* v *Garrett* (1878) 7 C D 473 486
(c) *Rock* v *Russell* 84 L T Jo 45 *Heap* v *Marris* (1876) 2 Q B D 630 633
(d) *Brymoth* v *Ritchel* (1885) 1 Times Rep 600
(e) *Murray* v *Epsom Local Board* [1897] 1 Ch 35
(f) *Brooking* v *Maudslay* (1886) 55 L T 343
(g) *Knowles* v *Roberts* (1888) 38 C D 63
(h) *Davy* v *Garrett* (1878) 7 C D 473 *Fernandez* v *Mauzer Ali* (1909) 7 All L J 456
(i) *Bassam* v *Bridge* [1893] 1 Q B 571
(j) *Christie* v *Christie* (1873) L R 8 Ch 499 507 per Selborne L C
(k) Story s Equity Pleading 10th Ed sec 270
(l) *Clive Durant In re* (1891) 1 Bom 488

expunged (*m*). It must however be noted that *nothing can be scandalous which is relevant* (*n*). Thus matters in aggravation of damages are relevant; they will not therefore be struck out though scandalous (*o*). Similarly allegations of dishonesty or fraud or conspiracy will not be struck out as scandalous if they are relevant to the facts in issue. They will be struck out only if they are irrelevant (*p*). An application to strike out scandalous matter may be made by any person whether or not he is a party to the suit or personally affected by the scandalous matter (*q*).

Tend to prejudice, embarrass or delay the fair trial of the suit.—In considering the question whether a pleading tends to prejudice, embarrass or delay the fair trial of the suit, a liberal interpretation should be given to the words "trial of the suit". Hence not only a pleading which tends to prejudice or embarrass a party *at the actual trial* of a suit but a pleading which tends to prejudice or embarrass a party *at any stage of the proceedings* in the suit would be within this rule (*r*).

A pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial (*s*). But a pleading is not embarrassing merely because it is prolix (*t*). Nor is a pleading embarrassing merely because it contains allegations that are inconsistent or stated in the alternative (*u*). See notes to r. 2 above "Alternative and inconsistent allegations". See also notes above "Unnecessary".

The power of the Court under this rule should be exercised with great care and caution. Where a defendant sets up a contemporaneous oral agreement, the Court should not strike out his pleading on the ground that evidence of such agreement is inadmissible under s. 92 of the Indian Evidence Act, 1872, and that the pleading is therefore embarrassing. Whether an oral agreement contemporaneous with a written document is admissible in evidence depends to some extent as to how the case is presented at the trial (*v*).

At any stage of the proceedings.—The application under this rule should be made with reasonable promptitude, and as a rule before the close of the pleadings. If it is not so made, the Court *may* in its discretion refuse to make the order, though the rule expressly states that an order may be made "at any stage of the proceeding". The reason is that the power to make the order under this rule is *discretionary* (*w*). Leave to amend has been refused in second appeal (*x*).

Appeal.—An order refusing to strike out pleadings as scandalous is not appealable as a judgment under the Letters Patent (*y*).

Practice.—The Court may under this rule order the whole pleading to be struck out as was done in the undermentioned cases ( ) where the statement of claim consisted partly of unintelligible matters, partly of irrelevant matters and the rest of scandalous matter; or it may order the objectionable matter only to be struck out which appears

(*m*) *Zamindar of Tu[illegible] v. Ber[illegible]ayya* (1899) [illegible] Mad 155.

(*n*) *F[illegible]h v. Owen* (18[illegible]8) 8 C D 645, 653, per Cotton L J.

(*o*) *M[illegible]gton v. Lom[illegible]* (1880) 6 Q B D 190; *Wh[illegible]ney v. M[illegible]g[illegible]* (1890) 24 Q B D 630.

(*p*) *Christie v. Christie* (1[illegible]3) L R 8 Ch 499 (allegation of fraud struck out); *[illegible]bery v. Grant* (18[illegible]) I R 13 I q 443 (allegation of fraud struck out); *Cash v. Cadock* (18[illegible]6) 3 C D 3[illegible]6 (conspiracy alleged—whole statement of claim struck out as a tirade containing scandalous and irrelevant matters; it was unintelligible); *F[illegible]ook[illegible] v. M[illegible]lay* (18[illegible]6) 5 L T 343 (allegation of dishonesty struck out); *W[illegible] v. Epsom Local Board* [18[illegible]] 1 Ch [illegible] (allegation of bad faith struck out).

(*q*) *Cro[illegible]l[illegible] v. J[illegible]n* (15[illegible]9) 11 C D 1[illegible]13; *Fright v. M[illegible]mer* (18[illegible]) W N 211, where the application was made by a co-defendant.

(*r*) *Berdan v. Gr[illegible]wood* (18[illegible]) 3 Ex D [illegible] 256.

(*s*) *Br[illegible]h La[illegible]d Associat[illegible]n v. [illegible]* (1[illegible]) 4 Times R p 5[illegible]; *[illegible] v. [illegible]* (1[illegible]) 4 C I D [illegible].

(*t*) *He[illegible]p v. Marr[illegible]s* (18[illegible]) [illegible] Q B D [illegible].

(*u*) *C[illegible]ll v. [illegible]te[illegible]* (18[illegible]) [illegible]; *Morgan Owe[illegible] v. Morg[illegible]* (1[illegible]) [illegible] 43[illegible].

( ) *A[illegible]lerson v. Walter* (19[illegible]) [illegible]; 63 I C 43 ([illegible]) A I [illegible].

(*w*) *Cross v. Howe* (1[illegible]) [illegible] L J [illegible].

( ) *[illegible]* 9 Lah [illegible]31, 11 [illegible].

(*y*) *D[illegible] v. [illegible]* [illegible] L J 63, 91 [illegible].

( ) *Ca[illegible] v. [illegible]* [illegible]; [illegible] v. Garrett (1[illegible]) [illegible].

to be the usual practice (*a*) Where the defect can be remedied by amendment the
7 Court may give leave to amend (*b*) Where a pleading is not so specific as it ought to be the Court may direct the party to amend his pleading or give further particulars (*c*)

17 [*New* R S C O 28, r 1] The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties

Amendment of pleadings

Different kinds of amendment —The occasion for amendment arises in five different ways, namely —

1 S 152 [amendment of clerical and arithmetical mistakes in judgments decrees and orders]

2 S 153 [*amendment of proceedings in a suit by the Court whether moved* thereto by the parties or not for the purpose of determining the real question or issue between the parties]

3 O 1 r 10 sub r (2) [striking out or adding parties]

4 O 6 r 16 [amending your opponent s pleading compulsory amendment]

5 O 6 r 17 [amending your own pleading *voluntary* amendment].

Amending your own pleading —The preceding rule deals with amendments which a party desires to be made in *his opponent s pleading* as where the pleading contains irrelevant and scandalous matter or where it may tend to prejudice embarrass or delay the fair trial of the suit. The present rule deals with amendments which a party desires to make in *his own pleading*

LEAVE TO AMEND WHEN GIVEN

As a general rule leave to amend will be granted so as to enable the *real question in issue* between the parties to be raised on the pleadings where the amendment will occasion *no injury to the opposite party except such* as can be sufficiently compensated for by costs or other terms to be imposed by the order (*d*) I have had much to do in Chambers said Bramwell L J with applications for leave to amend and I may perhaps be allowed to say that this humble branch of learning is very familiar to me My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide* or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise (*e*) It does not matter that the original omission arose from negligence or carelessness However negligent or careless may have been the first omission and however late the proposed amendment the amendment should be allowed if it can be made without injustice to the other side *There is no injustice if the other side can be compensated by costs* (*f*) I have found in my experience said Bowen L.J that there is one panacea which heals every sore in litigation and that is costs (*g*) It is immaterial whether the error sought

( ) *Christ v Christie* (1873) L. P 8 Ch 499 *I b ry v Gra t* (1872) L R 13 Eq 443 *Brooking v Maud lay* (1886) 55 L. T 343 *Murray v Epsom Local Boa d* (189) 1 Ch 3 *Ras am v Budge* [1893] 1 Q B 5 1

(*b*) *K owles v Roberts* (1888) 38 C.D 63 69

(*c*) *In e Morg n Owen v Morgan* (188?) 35 C D 49 500

(*d*) *T ld ley v H rper* (18 8) 10 C D 393

Steward v North Met politan Tramways Co (1885) 16 Q B D 1 8 180 and C A p 559 *A st lian Steam Na igation Co v Smith* (1889) 154 App Ca 318 3 0 *Kis ndas v Ruchappa* (1909) 33 Bom 644 655 4 I C 7 6

(*e*) *Tild ley v Harper* (1878) 10 C D 393

(*f*) *Claraped v Commercial U ion Associati n* (1883) 3 W R [H g] 6 .63 *U n Ne l* (1887) 19 Q B D 394 396

(*g*) *Croppe v Smith* (1884) 26 C D 00 11

to be amended was accidental or not There is no rule limiting amendment to accidental errors The rule says all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy There is no kind of error or mistake which if not fraudulent or intended to overreach the Court ought not to correct if it can be done without injustice to the other party (h) Thus a plaintiff in a suit for debt may be allowed to amend the plaint by setting out an acknowledgment passed to him by the defendant even after the defendant has filed his written statement raising the plea of limitation (i) Even an admission made by mistake may be allowed to be withdrawn and the pleading amended accordingly (j) Misdescription of immovable property in a plaint may be corrected even in appeal (k) The party applying however must not be acting *mala fide* the application to amend must be *bona fide* and made in good faith (l) Where in a suit on a breach of contract the plaintiff sues for the difference between the contract price and the price realized on re sale but it transpires at the hearing that the property in the goods had not passed to the defendant the plaintiff may be allowed to amend the plaint and to claim damages for the breach being the difference between the contract price and the market price on the date of the breach The Calcutta High Court has held that the plaintiff is not entitled to damages unless the plaint is amended (m) The High Court of Bombay has held that the plaintiff is entitled to damages without amendment of the plaint (n) If a plaintiff who by his plaint has claimed pursuant to sec 19 of the Specific Relief Act 1877 specific performance of a contract and compensation in addition or in substitution subsequently gives notice abandoning his claim for compensation he cannot recover damages for breach of the contract without amending his plaint since relief under sec 29 of that Act can be decreed only where the plaintiff is ready and willing to perform the contract and it is therefore still subsisting (o)

LEAVE TO AMEND WHEN REFUSED

It follows from what has been stated above that leave to amend should be refused—

(1) Where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties as where it is—

(i) merely technical or

(ii) useless and of no substance

(2) Where the plaintiff's suit would be wholly displaced by the proposed amendment

(3) Where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time

(4) Where the amendment would introduce a totally different new and inconsistent case and the application is made at a late stage of the proceedings

(5) Where the application for amendment is not made in good faith

1 **Leave to amend will be refused where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties** —This happens where the amendment is merely (1) technical or (2) of no substance

Where the amendment is merely technical —If after the evidence for the plaintiff has been taken the defendant applies for an amendment merely for the purpose of enabling him to raise a purely technical objection to the plaintiff's right to sue the

(h) (1884) 6 C D 700 10 11 *supra*

(i) *Gun aji v M lanji* (1910) 34 Bom 250 3 I C 159

(j) See *Holl v Purton* [189] 3 Ch 226 230

(k) *H gratha v Ch dra* (192) 20 All L J 150 66 I C 208 ( ) A 4 81

(l) *Fild ley v Harper* (18 8) 10 C D 383 39

(m) *t a ll a and C v S on d Co* (191) 39 Cal 568 13 I C 0

(n) *Nars gj Ma ulad n g Co v P Jan sak b* (19 4) Bom L R 5 3 80 I C 4 0 (4) A R 390

(o) *Mama v Sassoon* (192) 5 I A 0 5 Bom 597 111 I C 417 (3) A PC 0 8

17 application should be refused (*p*) *B* and *C* wrongfully remove *A* s furniture *A* sues *B* for damages and recovers judgment against him [*B* and *C* being joint wrong doers the judgment against *B* according to English law precludes *A* from suing *C* for the same wrong] *A* afterwards sues *C* for damages for the same wrong *C* does not plead the judgment against *B* in his defence but after the evidence for *A* has been taken applies for leave to amend his written statement by pleading that the judgment against *B* is a bar to the suit against him The application must be refused (*q*) for the amendment is not necessary to bring out the real questions between the parties but purposes merely to enable *C* to avail himself of a technical rule of law (*r*)

Where the amendment is useless and of no substance —As the object of the present rule to enable the real questions in dispute to be raised on the pleadings leave to amend should be refused to the *plaintiff* where the proposed amendment would not help him in substantiating his claim (*s*) and to the *defendant* where the proposed amendment would not help him in supporting his *defence* (*t*) Thus where *A* sued *B* and finding that the suit against *B* would fail applied to join *C* as a defendant the application was refused on the ground that even if the plaint were amended by adding *C* as a party the nature of the case precluded *A* from claiming relief even against *C* In refusing leave to amend Vaughan Williams L J said *One good reason for our not doing so is that looking* at the case that he [plaintiff] tells us he would wish to present that case if presented by amendment would in my judgment also fail so that there is nothing to be gained by amendment (*u*) Similarly where *A* sued *B* for a libel and *B* pleaded justification and *B* afterwards applied to amend his defence by adding a paragraph which virtually contained a plea *in mitigation of damages* but was no *answer to the action* the application was refused (*v*) See notes to r 2 above Matters affecting damages

2 **Leave to amend will be refused if the plaintiff s suit would be wholly displaced by the proposed amendment.**—In *Steward v The North Metropolitan Tramways Co* (*w*) the plaintiff sued a tramway company for damages caused by their negligence in allowing their tramway to be in a defective condition By their defence the company denied negligence It was no part of the defence that the company were not the proper parties to be sued More than six months after the delivery of the defence the company applied for leave to amend the defence by adding an allegation that by a contract between the company and the local authority of the district the liability to maintain the roadway had been transferred to the local authority and that the company had ceased to be responsible for the roadway At the date of the application the plaintiff s remedy against the local authority had become barred by limitation If the agreement had been pleaded earlier the plaintiff could have maintained an action against the board Under these circumstances the application was refused It is clear from the above facts that if the amendment were allowed the plaintiff might fail against the company as they were not the proper defendants and if he brought an action against the local authority it would be too late That would be an injury to the plaintiff such as could not be compensated for by any costs that the Court might order the company to pay to the plaintiff The test as to whether the amendment should be allowed, said Pollock B is whether or not the defendant can amend without placing the plaintiff in such a position that he cannot be recouped as it were by any allowance of costs or otherwise Here the action would be wholly displaced by the proposed amendment and I think it ought not to be allowed.

(*p*) *Colette v Good* (18 8) 7 C D 84 847

(*q*) *Eder in v Cohen* (1889) 43 C D 18 in app from 41 C D 563

(*r*) (1889) 43 C D 187 190 *supra*

(*s*) *Morel Brothers and Co Ltd v Westmoreland* [1903] 1 K B 64 77 [1904] A C 11 *Snel r v James* (1894) 3 Ch 5 4 557 *La crance v Lord Norreys* (1893) 30 C D 13 235

(*t*) *Machado v Fontes* [1897] 2 Q B 31

(*u*) *Jones v Hughes* [1905] 1 Ch 180 187 *Ganesha Singh v Mundi Forest Co* (1899) 21 All 316 319

(*v*) *Wood v E lof Du h m* (1888) 21 Q B D 501

(*w*) (1886) 16 Q B D 178

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3 Except in very special cases—Leave to amend will be refused where the effect of the proposed amendment is to take away from the defendant a legal right which has accrued to him by lapse of time (x)—The leading English case on the subject is *Weldon v Neal* (y) The facts of that case may be stated in the form of an illustration *A* sues *B* for damages for slander *A* afterwards applies for leave to amend the plaint by adding fresh claims in respect of assault and false imprisonment These claims are at the date of the application *barred by limitation* although they were not barred at the date of the suit The application should be refused for the effect of allowing it would be to take away from *B* the defence under the law of limitation and therefore unjustly to prejudice him We must act said Lord Esher M P on the settled rule of practice which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments Under very peculiar circumstances the Court might perhaps have power to allow such an amendment but certainly as a general rule it will not do so In *Charan Das* v *Amir Khan* ( ) their Lordships of the Privy Council said Though [the power of a Court to amend the plaint] should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time yet there are cases where such considerations are out weighed by the special circumstances of a case *Charan Das s case* was such an exceptional case and their Lordships having regard to special circumstances upheld an amendment of the plaint allowed by the Judicial Commissioner of the North West Frontier Province in second appeal In that case the plaintiffs sued for a declaration of their right of pre emption over certain land but omitted to ask for consequential relief namely possession as required by s 42 of the Specific Relief Act 1877 The trial Judge and the first appellate Court refused to allow the plaint to be amended by claiming possession on pre emption since the time had expired for bringing a suit to enforce that right Upon a second appeal the Court allowed the amendment to be made and this was confirmed by the Privy Council There was no ground for suspecting that the plaintiffs had not acted in good faith all that happened was that the plaintiffs through some blundering attempted to assert rights that they undoubtedly possessed under the statute *in a form* which the statute did not permit The case of *Kisandas* v *Rachappa* (a) decided by the High Court of Bombay is another instance in which such an amendment was allowed on the ground that the circumstances of the case were so peculiar that it should properly be excepted from the general rule The facts of the case may be stated in the form of an illustration *A* alleging that he had brought in Rs 4 000 as capital under a partnership agreement between him and *B* sues *B* for dissolution of partnership and for accounts *It is clear from the proceedings before the Court of first instance that though the suit was in form one for dissolution and accounts A intended from the first to sue only for the recovery of his money and B had actually pleaded to the money claim on which an issue had been framed and evidence taken* The lower Court finds as a fact that *the sum was due* but dismisses *A* s suit on the technical ground that the agreement set up by *A* did not constitute a partnership between *A* and *B* *A* appeals from the decree and applies for the first time in appeal for leave to amend the plaint *by adding a prayer for the recovery of* Rs 4 000 At this date the claim for

(x) *Ch ra Das* v *A r Kian* (19 0) 4 I A 2 48 Cal 110 57 I C 606

(y) (1880) 19 Q B D 334 followed in *J rdhan Sh h Pe sh d* (1916) 43 Cal 0 3 I C 1 9 *E ll n* v *G m* (1915) 36 All 3 4 I C 55 *Kal D s* v *Draupadi* (191) Cal W N 104 43 I C 83 *I bal* v *Ha ish Cha dra* (1919) 24 Cal W N 49 51 58 I C 665 *Gyanendra* v *Pare h Nath* (19 1) 6 Cal W N 73 65 I C 39 ( ) A C 55 *N ranka Atul* (19 1) 8 Cal W N 1003 10 4 83 I C 110 ( ) A C 67 *B ij e Derr j & Co* v *Maung yun* (19 4) I a 414 84 I C ( ) A I 49 *S endhar* v *Ku l* (19 1) 41 Mad L J 25 I C 0

(z) (19 0) 4 I A 2 48 Cal 110 I C 606

(a) (1909) 33 Bom 644 4 I C 7 6 *Muhammad* v *Abd l M jid* (1911) 33 All 616 10 I C 476 *Jalal Din* v *Q m D* (1914) Punj Rec no 6 p 11 5 I C 43 *Satchid nanda* v *Nrity Nath* (19 3) 50 Cal. 873 891 9 I C 257 (4) A C 436 *Bhog L l* v *Jethalal* (19 8) 30 Bom. L R 15 114 I C 6 (9) A B 51

17 money is barred by limitation. The amendment must however be allowed for the point of limitation could not have been taken if the pleading had not been defective No fresh claim was set up as in *Weldon* v *Neal* and *B* knew all along what *A* s claim was, though the suit was wrongly framed Similarly where the plaintiff sued in the first instance for possession of the books of accounts of his shop from the defendants who he alleged were his servants and stated in the plaint that he would bring a separate suit for the money due by them but subsequently applied for leave to amend the plaint by adding a further relief namely recovery of money it was held that the amendment should be allowed even though the money claim was barred by limitation between the date of the plaint and the date of the application for amendment (*b*)

4 Leave to amend will be refused where the amendment would introduce a totally different new and inconsistent case—In *Ma Shwe Mya* v *Moung Mo Hnaung* (*c*) their Lordships of the Privy Council said All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose so that full powers of amendment must be enjoyed and should always be liberally exercised *but none the less no power has yet been given to enable one distinct cause of action to be substituted for another nor to change by means of amendment the subject matter of the suit* This proposition follows directly from r 17 The object of r 17 is to allow an amendment *for the purpose of determining the real questions in dispute between the parties* That being the purpose for which an amendment is allowed, no amendment should be allowed which would introduce a totally new and different case (*d*) Thus where a suit is brought against the members of a joint Hindu family for specific performance of an agreement for the sale of family property alleged to have been made by the karta or for damages namely the earnest money with interest and the karta dies pending the suit and the suit title is amended by adding as his heirs his sons and grandsons who are already parties it is not permissible by amendment to change the suit into one for money had and received or a one to recover a debt (*e*) The result of the English cases is thus summed up in Bullen and Leake s Precedents of Pleadings (*f*)

Leave to amend may be refused where at the trial or hearing the party seeks to alter the whole nature of his case by an unexpected amendment which may require further evidence to be adduced by his opponent

The above proposition may be split into two parts —

A Leave to amend a *plaint* should not be granted if the amendment would convert the suit into another of a different and inconsistent character

B Leave to amend a *written statement* should not be granted, if the amendment would convert the defence into another of a different and inconsistent character

We shall deal with these propositions in order

A *Leave to amend a plaint should not be granted if the amendment would convert the suit into another of a different and inconsistent character*—*A* institutes a suit against *B* *B* files his written statement At the hearing of the suit *A* finds that his case as laid in the plaint must fail and that he can only succeed on a different case He then applies for leave to amend the plaint Should the leave be granted? It has been

(*b*) *Serugam* v *Krishna* (1913) 36 Mad 378 13 I C 268

(*c*) (1921) 48 I A 214 216 217 48 Cal. 832, 835 63 I C 914

(*d*) *Laird* v *Briggs* (1880) 16 C D 440 446 *Newby* v *Sharpe* (1876) 8 C D 39 *Upendra* v *Jan k Nath* (1918) 45 Cal. 305 317 318 47 I C 1 9 *Padma* v *Girish Chandra* (1919) 46 Cal 168 171 172 45 I C 241 *Mohesh Chandra* v *Radha Kurore* (1908) 12 Cal W N 28 36 37 *Maung Ba Thein* v *Ma Than Myint* (1926) 3 Rang 483 9 I C 253, (26) A R 49, *Radhawa* v *Partap* (1923) 10 Lah L J 534 (28) A L. 933 *Sitaram* v *Chima das* (1928) 52 Bom 640 (28) A B 516

(*e*) *Ramsaran Mand r* v *Mahabir Sahu* (1927) 54 I A 5 6 Pat 3 3 100 I C 56 (27) A PC 18

(*f*) 6th Ed p 16

held under the corresponding English rule that no amendment should be allowed if it would introduce an entirely different case from that which the defendant came to meet (g) or to put it in another form if it would change one action into another of a substantially different character (h) Section 53 of the Code of 1882 which dealt with amendment of plaints expressly provided that a plaint shall not be amended so as to convert a suit of one character into a suit of another and inconsistent character That section has been omitted in this Code and the present rule (which is a reproduction of O 28 r 1 of the English Rules) now takes its place But the decisions under the old section on the point now under consideration are still good law and should be considered

It must be observed at the outset that a plaintiff must in general be limited to the case which he puts forward in his plaint There are however cases in which by some mistake or misapprehension the plaintiff has failed to state his case correctly and properly in the plaint In such cases the Court may allow the plaint to be amended (i) for if the amendment is refused the plaintiff may have to bring another suit and the object of the rule allowing amendment of plaints is to avoid multiplicity of suits (j) But the Court cannot allow an amendment if the suit is premature (k) and ought not to allow an amendment if it would convert the suit into another of a different and inconsistent character We cannot countenance the notion said Straight J that a plaintiff coming into Court with one case and hopelessly failing to prove it should be permitted to succeed upon another and that directly in antagonism with his primary allegation (l) The law prohibits every amendment that would change *the fundamental character* of the suit (m) It is not however to be supposed that if the fundamental character of the suit is not altered a plaintiff is entitled as of right to amend the plaint As stated by the High Court of Bombay the power to get a plaint amended is subject to the *discretion* of the judge and is *not claimable as a right of the suitor* in all circumstances (n)

Rules — The general rule is that any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid and that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from This is the rule laid down by their Lordships of the Judicial Committee in the case of *Eshen Chunder Singh* v *Shama Churn Bhutto* (o) and this rule has been followed in numerous decisions of our Courts (p)

From the general rule stated above we deduce the following three rules each of which is borne out by the cases cited under it —

Rule I —Where a plaintiff bases his claim upon a *specific legal relation* alleged to exist between him and the defendant he may not be allowed to amend the plaint so as to base it on a different legal relation.

Note —Even if the legal relation between the plaintiff and the defendant remains unchanged the plaint will not be allowed to be amended if it completely alters the cause of action [ill! (7)]

Rule II —Where a plaintiff bases his claim on a *specific title* he may not be allowed to amend the plaint so as to base it on a different title But this is subject to Rule I and when the title by which the plaintiff claims remains unaltered the plaint will not be allowed to be amended if it completely alters the cause of action

(g) *Ell s* v *M he t C r j C* (1876) ... C 1 D 1 16 *H pj a e C* (1885) 78 (D 3 8 361 *Ne b* v *Sharpe* (18 8) 8 C D 39 49 *Clark* v *Wray* (188) 31 C D 68

(h) *Faleigh* v *Co len* [1898] 1 Ch 3 81

(i) *Lal hmib* v *H n* (15) 9 B H C 1 *Khyro* v *Lell ce* (18 1) 16 W R 1 3 *Hunooma per aud* v *Mus mat Koo weree* (18 6) 6 M I.A 393 410

(j) *S ral Chand* v *Mohun Bibi* (1898) Cal 3 1

(k) *J gil h h* v *C l* (19) 49 All 599 101 I C 507 ( ) A I 451

(l) *Ham lt n* v *Th La l M rtn g E k f India* (1883) All 436 4 0

(m) *Ka in th* v *adi r* (1 43) 3 Cal 83

( ) *T pl m* v *Sadu* (1 9) 1 Bom 73

( ) (1 60) 11 M I A *My apo* v *I n lay* (1) 14 Cal 01 14 I A 1 8

( ) *M thd* v *I m Ch* (1) 8 Cal 5 1 *H n* v *Land Mortgage Bank* (1) 5 All 4 6

17 *Rule III* —When one kind of fraud is charged another kind of fraud cannot upon failure of proof be substituted for it

Illustrations of Rule I

1 *A* alleging that *B* hired cargo boats from him and that a balance of Rs 3 000 is due to him on that account sues *B* for the amount It is proved at the hearing that *B* did not himself hire the boats but that he was merely *A* s agent to let the boats on hire *A* then applies to amend his plaint by claiming an account from *B* on the footing that *B* was *A* s agent The amendment should not be allowed because in the one case the legal relation between *A* and *B* is that of *letter and hire* and in the other that of *Principal and agent* *Shibkristo* v *Abdool* (1880) 5 Cal 602

2 *A* sues *B* for the *rent* of a house alleged to have been let by *A* to *B* *B* denies the lease and contends that he is the owner of the house *A* will not be allowed to amend the plaint by converting the suit into one for a *declaration of ownership* *Bai Shri Majirajba* v *Maganlal* (1895) 19 Bom 303

3 *A* sues *B* for *damages for wrongful occupation* of his land and for injury done to his land After the issues are framed *A* applies to amend the plaint by claiming from *B rent* for the land on the basis of a subsisting *tenancy* The amendment should not be allowed because it will convert a claim based on *trespass* into a claim on the basis of a *subsisting lease* *Narayan* v *Hari* (1889) 13 Bom 664 *Jhari Singh* v *Pirthi Nath* (1917) 2 Pat L J 69 38 I C 191 (*q*) See ill (5) below

4 A suit for possession on the footing of a *subsisting lease* cannot be converted at a late stage of the proceedings into a suit for *ejectment* *Newby* v *Sharp* (1878) 8 C D 39 49 *Laird* v *Briggs* (1880) 16 C D 440

5 *A suit for rent will not be allowed to be converted at the hearing into a suit for use and occupation* —*A* sues *B* to recover Rs 1 000 alleged to be the *rent* due under a lease executed by *B* The Court finds that *B* was in occupation of the premises during the period for which the rent is claimed but that the alleged lease was not executed by *B* At this stage *A* applies to amend his plaint by alleging that though the lease was not executed by *B* he is entitled to recover the amount for *use and occupation* of the premises The amendment will not be allowed (*r*)

6 A suit for possession will not be allowed to be converted into a suit for redemption In the former case the plaintiff sues as *owner* of the land in the latter as *mortgagor* *Laxmishankar* v *Hamjabhai* (1920) 44 Bom 515 57 I C 426

7 *A* who is *P* s agent to manage certain property belonging to *P* appoints *S* to act as a sub agent for *P* and gives him Rs 1 000 belonging to *P* for the payment of Government revenue and other purposes *S* fails to account for the money *P* sues *A* to recover the amount paid by *A* to *S* claiming the same on the ground that *S* was appointed sub agent without *P* s authority It is found at the hearing that *S* was appointed sub agent with *P* s authority *P* will not be allowed to amend the plaint so as to base his claim on the ground that *A* had *not exercised ordinary prudence* in selecting *S* as a sub agent for *P* *Hamilton* v *Land and Mortgage Bank* (1883) 5 All 406 [This is an illustration of the proposition that rule II is subject to *Rule* I If the amendment were allowed the legal relation between the plaintiff and the defendant which is that of principal and agent would no doubt remain unchanged but the cause of action would be completely changed]

(*q*) See also *G* [illegible] (1934) 18 Bom 611 *Lmchand* [illegible] (1886) 10 Bo 451 (1 9) [illegible] 73 [illegible] *Upendra* (1900) 7 Cal 39 [illegible] [illegible] (19 7) 5 [illegible] LJ

(*r*) *Lukhee* [illegible] (18 1) 13 W R 13 *Lakshm ba* v *Ha* (18) 9 B H C [illegible] 333 93 I C 9 7 ([illegible]) A.I [illegible] Distinguished *Jalm* [illegible] *Dal* (19[illegible]) 5 All 493

Illustrations of Rule II

1 *A* alleging that *B* was the adopted son of *C* and that he (*A*) is the *heir of B* sues *D* to recover certain property forming part of the estate of *B* The Court finds that the adoption of *B* was not valid *A* then contends for the first time in appeal to the Privy Council that even if the adoption was not valid he is entitled to recover the property *as the heir of C* This is a totally new case and *A* cannot be permitted in appeal to set up an entirely new case *Gopee Lal* v *Chundraolee* (1872) 19 W P 12 I A Sup Vol 131

2 *A* obtains a decree against X and after the death of the latter attaches certain immovable property in execution of the decree *B* and *C* sons of X sue *A* for a declaration that the property is joint family property and it is not liable to be attached and sold in execution of the decree against the father on the ground that the debts contracted by their father were for immoral purposes It is proved that the debts were not incurred for immoral purposes Thereupon *B* and *C* apply to amend the plaint by alleging that they had *separated* from their father before the date of the decree and that they were not therefore liable to pay the amount of the decree The amendment cannot be allowed because the plaintiff s claim as originally laid was on the footing that there was *no partition* between them and their father *Narayanrao* v *Jathertahu* (1888) 12 Bom 431

3 *A* a Hindu, claiming as the heir of his uncle sues the executors of his uncle s widow for possession of property left by the widow alleging that the same belonged to the estate of his uncle and that the widow *had no power* to dispose of it by will The Court holds that the widow had power to will away the property *A* will not be allowed to amend the plaint by adding that even if the widow *had the power* to dispose of the property by her will he was entitled to the residue as his uncle s heir as the same was left to charitable objects of an unspecified and general character and could not therefore be legally applied to charity *Damodar* v *Purmanandas* (1883) 7 Bom 155 [This is an illustration of Rule 11 being subject to Rule 1 If the amendment were allowed the title by which the plaintiff claims namely as his uncle s heir would no doubt remain unchanged but the cause of action would be completely altered]

4 A suit founded on a kittima adoption cannot be allowed to be converted into one based on a appathitta adoption *Maung Ba Than* v *Ma Than Myint* (1925) 3 Rang 483 92 I C 253 (25) A P 49

Illustration of Rule III

A the official assignee of the estate of a deceased insolvent sues *B* to recover Rs 1 50 000 alleged in the plaint to be unlawfully withheld from the estate in consequence of a payment fraudulently concealed from *A* s predecessor in office It is proved that *A* s predecessor was aware of the payment *A* applies to amend the plaint by alleging that though his predecessor consented to the payment such consent was illegal as being a fraud though of a different kind upon the Court The amendment cannot be allowed because to allege fraud of one kind and to substitute fraud of another kind is to convert the suit into one of an inconsistent character *Abdul Hoosein* v *Turner* (1887) 11 Bom 620 14 I A 111 See Notes to O 6 r 4 Fraud and coercion p 483 above

B *Leave to amend a written statement should not be granted if the amendment would convert the defence into another of a different and inconsistent character* —As in the case of a plaint so in the case of a written statement the Court will not allow an amendment that would involve a complete change of front in the defence (*s*)

A agrees to grant a lease of a brickfield to *B* No lease is executed but *B* enters into possession under the agreement *B* then sues *A* for specific performance of the agreement alleging that *A* though frequently asked to do so had neglected and refused

(s) *Laird* v *Briggs* (1880) 16 C D 440 446

17 to grant the lease *A* denies that he was asked to grant the lease and expresses his readiness to execute the lease *A* also counter claims for Rs. 1 500 by way of rent After the suit is set down for trial *A* applies for leave to amend his defence and counter claim and to join therewith a claim for possession of the land. The application must be refu ed. To allow *A* to amend would be to allow him to present a totally distinct new and inconsistent case *Clark* v *Wray* (1886) 31 C D 68

5 **Leave to amend will be refused where the application for amendment is not made in good faith**—Leave to amend will not be given if the party applying is acting *mala fide* (*t*) as where there is no substantial ground for the case proposed to be set up by the amendment (*u*) Want of *bona fides* may be inferred from a great delay in making the application (*v*)

Amendment of plaint by adding new reliefs—The amendment of a plaint by adding a new prayer may or may not convert the suit into another of a different and in consistent character If the amendment converts the suit into another of a different and inconsistent character it will not be allowed If the amendment does not convert the suit into another of a different and inconsistent character it may or may not be allowed at the discretion of the Court In the exercise of this discretion the Court will not allow an amendment if the application for amendment is made at such a late stage of the proceedings that if allowed it would necessitate practically trying the case de novo (*w*) otherwise the amendment may be allowed (*x*) Thus a mortgagee suing for *sale* of the mortgaged property may be allowed to amend the plaint by asking merely for a *simple money decree* against the mortgagor In such a case the character of the suit is not fundamentally altered, nor could the defendant be possibly taken by surprise (*y*) Similarly a purchaser suing for *specific performance* may be allowed to amend his plaint by asking in the alternative for a *refund* of the earnest money (*z*) Where a plaintiff has framed his suit bona fide believing that consequential relief is not open to him and that he is entitled to a declaration the plaint may be allowed to be amended even in appeal by adding a prayer for possession (*a*) But leave will be refused if the frame of the plaint was a device to avoid payment of Court Fee (*b*) See also note above Leave to amend will be refused where the effect of the proposed amendment is *to take away from the defendant*

Amendment by adding a plea of fraud—It is the universal practice except in the most exceptional circumstances not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance (*c*). Where facts supporting the charge of fraud were *disclosed in the cross examination of the defendant* leave was given to amend by adding a plea of fraud (*d*) Similarly where the plaintiff sued on a mortgage and the defendant in his written statement alleged that he was a minor at the date of the mortgage leave was given to the plaintiff to amend the plaint by raising an alternative case that the loan was obtained by the defendant *by the* fraudulent representation that he had attained majority at the time (*e*) See Notes to O 6 r 4 Fraud and coercion

Suit for specific performance and compensation in addition or in substitution.—The Court even at the trial has power to allow the necessary amendment but

(*t*) *Tildesley* v *Harper* (1878) 10 C D 393 396-397
(*u*) *Lawrence* v *Norreys* (1888) 39 C. D 213 235
(*v*) *Krishna* v *Pachaiyappa* (19 4) 47 Mad L J 540 8_ I C 49 ('24) A.N 883
(*w*) *Na yana* v *Shankunni* (189) 15 Mad ? 5 *P ma adan* v *P likutti* (1898) 21 Mad _88
(*x*) *Kash ath* v *S dash o* (1893) _0 Cal. 805 *S khdeo* v *Lachman* (190) 24 All 456
(*y*) *Sukhdeo* v *Lachm n* (190) 24 All. 456 *P M Chettyar* v *Ma Shwe Pon* (1927) 5 Rang 115 101 I C 6_8 ('27) A R 154
(*z*) *Ibrahimbhai* v *Fletcher* (1897) 21 Bom 8
(*a*) *Sheopujan* v *Maharaja* (19 3) 2 Pat. 919 76 I C 317 (24) A 1 310
(*b*) *Hakim Lal* v *Firm Ishar* (1927) 8 Lah 531 10 I C 46 ('27) A L 499
(*c*) *Bentley* v *Black* (1893) 9 Times Rep 580
(*d*) *Riding* v *Hawkins* (1889) 14 P D 56
(*e*) *Saqal Chand* v *Mohun Bibi* (1898) 2 C W N 201

that power must be exerci ed most carefully and jealously and with due regard to the position of both the plaintiff and the defendant An amendment should not be allowed when the suit has been pending as one for specific performance for a long period during which the defendant has been prevented by sec 27 (b) of the Specific Relief Act 1877 from dealing with the property An amendment which leaves standing an averment that the plaintiff is ready and willing to perform the contract and the claim to specific performance does not make the plaint appropriate to a suit for damages for its breach (*f*)

AT ANY STAGE OF THE PROCEEDINGS

Leave to amend may be granted at any stage of the proceedings It may be granted on appeal [s 107 sub s (2)] (*g*) or even on second appeal (s 108) In the under mentioned case (*h*) the plaintiff was allowed to amend his plaint in appeal before the Privy Council In a later case where the suit was brought upon a mortgage of the property of a joint Hindu family and the suit was dismissed on appeal to the High Court on the ground that necessity was not proved the Privy Council refused to entertain a new contention raised before them for the first time that the plaintiff was at least entitled to a decree against the mortgagor manager upon his personal consent on the ground that it involved a radical amendment of the plaint *Gajadhar* v *Ambika Prasad* (1925) 47 All. 459 P C 87 I C 292 (25) A PC 169 The appellate Court may allow an amendment whether leave to amend was asked for in the Court below or not It may al o allow an amendment even if the Court below offered leave to amend but the offer was declined (*i*)

Mere delay is not a ground for refusing an amendment As a general rule however late the amendment is sought to be made it should be allowed except in the five cases mentioned above (*j*) Before the hearing there is as a rule little difficulty in ordinary cases in a party obtaining leave to amend on payment of the costs of and occasioned by the amendment and the application (*k*) Leave to amend may also be given at the hearing on proper terms as to the costs and the postponement of the hearing if necessary except again in the five cases mentioned above Thus leave to amend has been granted at the trial where there was a defect in the parties and it became necessary to amend the proceedings in the suit (*l*) It would also be granted where both parties knew what the case was and there was no surprise (*m*) In a recent Rangoon case *A* sued *B* on a promissory note for Rs 175 *B* denied execution of the note but admitted receipt of Rs 100 only No alternative cause of action on the original consideration was pleaded *A* failed to prove execution of the note It was held that the plaint could be amended at any stage of the proceedings by the addition of the alternative plea and a decree passed for the plaintiff for the Rs 100 after the plaint was amended (*n*)

Revision —See notes to s 115 Interlocutory orders.

Appeal —No appeal lies under cl 15 of the Letters Patent from an order amending the title of a plaint by omitting the word Summary before the word Suit and transferring the case to the Short Causes List (*o*)

(*f*) *Mama* v *Sassoon* (19 8) 5 I A 360 5? Bom 597 111 I C 413 (8 A I C 08

(*g*) *S cretary f Stat* v *Maha t* (19 0) 1 Luck 33 91 I C 9 7 (6) A O 98

(*h*) *Moh mmud Zahoor Ali Khan* v *Rutta Koer* (1867) 11 M I A 468 486

(*i*) *Eckl n* v *Little* (1887) 10 Q B D 391 *Kisandas* v *Rachappa* (1909) 33 Bom 644 4 I C 7 6

(*j*) *Clarapede* v *Commercial U ion Association* (1883) 3 W R 6? [Eng]

(*k*) *Steward* v *North Metropolitan Tramways Co* (1886) 16 Q B D 5 6

(*l*) *Lydall* v *Marti nson* (1877) 5 C D 780 *Dowdeswell* v *Do deswell* (1878) 9 C. D 91 , *Bowden s Patents Syndicate Ltd* v *Herbert Smith & Co* [1904] ? Ch 86

(*m*) *Gree* v *Serin* (1879) 13 C D 589 595. See also *Nobl s Expl n es C* v *Jones & Co* (1880) 17 C. D 7 1 [cause of action allowed to be added after evidence of d fendant]

( ) *Maung Shw Myat* v *Maung Po Sin* (192) 3 Rang 153 89 I C 4 5 ('2) A. R. 2 ? [F B]

(*o*) *Manilal* v *Manilal* (1925) ?7 Bom L. R. 99 66 I C. 100 ('25) A B 159

8 Failure to amend after order

18 [*New* R S C, O 28, r 7] If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court

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ORDER VII

Plaint

Particulars to be contained in plaint

1 [S 50 para 1] The plaint shall contain the following particulars —

(a) the name of the Court in which the suit is brought,

(b) the name, description and place of residence of the plaintiff,

(c) the name, description and place of residence of the defendant, so far as they can be ascertained,

(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect,

(e) the facts constituting the cause of action and when it arose,

(f) the facts showing that the Court has jurisdiction,

(g) the relief which the plaintiff claims,

(h) where the plaintiff has allowed a set off or relinquished a portion of his claim, the amount so allowed or relinquished, and

(i) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of Court fees, so far as the case admits

Facts constituting the cause of action —As to the meaning of cause of action, see notes to s 20 Cause of action See also notes to O 6 r 2

Facts showing that the Court has jurisdiction —See ss. 16 19 and 20 and cl 12 of the Charter set forth in Appendix II

Relief which the plaintiff claims —See r 7 below and notes thereto

Relinquished a portion of his claim —See O 2 r 2 sub r (2)

Statement of value —See notes to s 15 Where the subject matter of a suit does not admit of being satisfactorily valued

2 [S 50 paras 2, 3] Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed

In money suits

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for

Suit for mesne profits or accounts —See notes to s 6 Pecuniary jurisdiction in passing decrees

3 [*New*] Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers

Where the subject matter of the suit is immovable property

4 [S 50, para 4] Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it

When plaintiff sues as representative

Where the plaintiff sues in a representative character —Where a person dies leaving a will the *executor* named in the will may obtain *probate* of the will Where a person dies intestate his *heirs* may apply for *letters of administration* The person to whom letters of administration are granted is called *administrator* The executor or administrator as the case may be of a deceased person is his *legal representative* for all purposes and all the property of the deceased vests in him as such A suit by a person as executor or administrator of a deceased person is a suit by him in a *representative* character There are some cases in which the law requires *probate or letters of administration* as the case may be to entitle a person suing in a representative character to a decree in respect of the estate of the deceased In a large number of cases however it is not necessary to obtain probate or letters of administration to entitle a plaintiff suing in a representative character to a decree in respect of the estate of the deceased This will appear from the following statement of the law on the subject —

1 *Europeans Parsis Jews and Armenians governed by the provisions of the Indian Succession Act 39 of 19*[illegible] —In this class of cases no right as executor or legatee can be established in any Court unless probate has been obtained and no right to any part of the property of a person who has died intestate can be established in any Court unless

letters of administration have first been granted by a Court of competent jurisdiction (p) See Indian Succession Act 1925 ss 212 and 213

2 *Hindu Wills* —Probate is necessary in the case of Hindu wills where such wills are of the class specified in s 57 (1) of the Indian Succession Act 1925 These are wills made by Hindus *within* the territories which on 1st September 1870 were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of Madras and Bombay *and* wills made outside those territories and limits so far as relates to *immovable* property situate within those territories or limits No probate is necessary in the case of other wills See Indian Succession Act 19 5 s 213 (2)

No letters of administration are necessary where a Hindu dies intestate see Indian Succession Act 1925 s 212 (2) But if a suit is brought to recover a *debt* due to the estate of a deceased Hindu no decree can be passed against the debtor except on production of a probate or letters of administration or a succession certificate see Indian Succession Act 1925 s 214

3 *Mahomedans* —Neither a probate nor letters of administration are necessary in the case of Mahomedans see Indian Succession Act 1925 ss 212 213 But if a suit is brought to recover a *debt* due to the estate of a deceased Mahomedan no decree can be passed against the debtor except on production of a probate or letters of administration or a succession certificate see Indian Succession Act 1925 s 214

4 *Indian Christians* —Up to the year 1901 Indian Christians were governed by the provisions of the Indian Succession Act 1865 Hence it was necessary where the deceased left a will that the executor should obtain *probate* before he could establish any right as such to the property of the deceased [Indian Succession Act 1865 s 187], and if the deceased died intestate it was necessary to obtain *letters of administration* before any right could be established to any part of the property of the deceased in a Court of law [Indian Succession Act 1865 s 190] In 1901 an Act was passed called the Native Christian Administration of Estates Act (VII of 1901) declaring inter alia that the provisions of section 190 of the Succession Act 1865 shall not apply to any part of the property of an Indian Christian who has died intestate with the result that in case of *intestacy* letters of administration were no longer necessary Those Acts have now been repealed by the Indian Succession Act 1925 but provisions similar to those above are reproduced in ss 212 and 213 Under s 213 a probate is necessary where the deceased has left a will Under s 212 no letters of administration are necessary where the deceased has died intestate But if a suit is brought to recover a *debt* due to the estate of a deceased Indian Christian, no decree can be passed against the debtor except on production of a probate or letters of administration or a succession certificate see Indian Succession Act 1925 s 214

Has taken the steps —In those cases where a probate is necessary and those are cases specified in s 213 of the Indian Succession Act 39 of 1925 it has been held by the Privy Council that the grant of probate is not a condition precedent to the institution of the suit and that the executor or legatee may institute the suit without obtaining a probate but that he will not be entitled to a decree until he obtains a probate (q)

If the deceased has left no will and the case is one governed by s 212 of the Indian Succession Act 1925 so that letters of administration are necessary to establish a right

(p) See in this connection *F mj* v *Adarji* (1893) 18 Bom 337 and *Ratanbai* v *Narayandas* (19 7) 51 Bom 771 104 I C 94 ('27) A B 474

(q) *Chand a Kishore* v *Pra na Kumari* (1911) 38 Cal 3?7 38 I A 7 9 I C 122 [a case under the Hindu Wills Act 1870] *Jamshedji* v *Hirjibhai* (1913) 37 Bom 158 19 I C 406 [a case under the Indian Succession Act 186] *Meyappa* v *Subramanian* (1916) 43 I A 113 118 119 35 I C 3?3 [a case from Singapore decided with reference to the English law] The contrary view expressed by the High Court of Madras is not it I submitted correct *Bala Krishnudu* v *Narayanaswamy* (1914) 37 Mad 175 180 ? I C 85?

to the property of the deceased in a Court of law the question arises whether it is necessary that letters of administration to the estate of the deceased should be obtained before the institution of the suit or whether it is sufficient if they are obtained before the decree is passed. The High Court of Bombay has held that if letters of administration are not obtained before the institution of the suit and the plaint does not show that the plaintiff has obtained letters of administration the plaint should be rejected on presentation but if the plaint is not rejected and the hearing has been allowed to proceed there is nothing to prevent the Court from passing a decree for the plaintiff if letters of administration are obtained before the decree (r) The English law on the subject may thus be stated in the language of the Judicial Committee in *Meyappa* v *Subramanian* (s) An administrator derives title solely under his grant and cannot therefore institute an action as administrator before he gets his grant The law on the point is well settled see Comyn s Digest Administration B 9 and 10 *Thompson* v *Reynolds* (t) *Woolley* v *Clark* (u)

Title of suit —See Appendix A (2) Description of Parties in Particular Cases the last two forms See also r 9 (2) below

Defendant s interest and liability to be shown

5 [S 50, para 5] The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand

Grounds of exemption from limitation law

6 [S 50 para 6] Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed

Grounds of exemption from limitation law —These grounds are set forth in section 12 to 20 of the Limitation Act 1908 If no ground of exemption is shown in the plaint and the suit appears from the statement in the plaint to be barred by limitation, the plaint shall be rejected [see r 11 cl (d) below] But a plaint should not be rejected merely because the exemption is not claimed *specifically* All that the rule requires is that the *plaint shall show the ground of exemption* (v) If a plaint does not show any ground of exemption the Court of first instance should allow the plaint to be amended save under very exceptional circumstances (w) But a plaintiff should not be allowed to rely upon a ground of exemption from the law of limitation for the first time in appeal (x) See notes to O 41 r 2 below

The High Court of Bombay has held that when a plaintiff does satisfy the requirements of this rule by stating what is in his opinion the ground upon which he intends to get over the bar of limitation he ought not to be precluded from taking another and not inconsistent ground should he be later advised that the latter is the true ground (y)

(r) *Sethna* v *Hemingway* (1914) 38 Bom 618 23 I C 114 *Adm Gen of Bengal* v *Lalit* (1908) 1 C. W N 738

(s) (1916) 43 I A 113 119 35 I C 3 3

(t) 3 C & P 1 3

(u) 5 B & Ald 744

(v) *Raghu Nath* v *Syed Samad* (1908) 1[?] C.W N 617

(w) *Ram S kh Das* v *Ghulam* (1918) Punj Rec. no 10[?] p 33 46 I C. 495 *Cunnali* v *Makanji* (1909) 34 Bom 250 3 I C. 159

(x) *Gobinda M l* v *Santa* (1914) Punj Rec. no 83 p 293 26 I C. 441 *Uttam Chand* v *Mst Thakur* (19[?]) 3 Lah 33 69 I C. 419 ('22) A L. 39

(y) *Yakub Ebrahim* v *Bai Fakmabai* (1908) 10 Bom L R 348

According to the Calcutta ( ) and Lahore (a) rulings a plaintiff who has stated one ground of exemption may be allowed to take another and inconsistent ground

Relief to be specifically stated

7 [*New* R S C, O 20, r 6] Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for And the same rule shall apply to any relief claimed by the defendant in his written statement

Relief —Every plaint must state specifically the relief which the plaintiff claims whether it be damages or specific performance or an injunction or a declaration or an account or the appointment of a receiver or possession of land or relief of any other kind A plaintiff who omits except with the leave of the Court to sue for all the reliefs to which he may be entitled in respect of the same cause of action will not afterwards be allowed to sue for any relief so omitted [O 2 r 2 sub r (3)] But it is not necessary to ask for general or other relief

Where a relief is claimed upon a specific ground the Court may grant it upon a ground different from that on which it is claimed in the plaint if the ground is dis closed by the allegations in the plaint and the evidence in the case (b) Thus in a case in which a plaintiff claimed an easement by *prescription* and it was found that he was not entitled to the easement by prescription their Lordships of the Privy Council deal ing with the case as a special appeal decreed the claim on the *presumption of title arising from a grant* (c)

Where a plaint *asks for more* than what the plaintiff is entitled to the Court may give him only as much relief as he is entitled to but the suit must not be dismissed (d) Where a plaint *asks for less* than what the plaintiff must be entitled to the Court cannot give him relief in excess of the plaint unless the plaint is amended before judg ment Thus if a suit is brought upon a balance of accounts or for mesne profits and the plaintiff instead of claiming whatever may be found due on the taking of accounts and stating an approximate amount [O 7 r 2] states a specific sum as the amount claimed the Court cannot without an amendment of the plaint [O 6 r 17] pass a decree for more than what is claimed (e)

General or other relief —Under the system of pleadings hitherto followed in India it was usual to add in the plaint a prayer for general relief called g neral prayer which ran thus The plaintiff claims *such further or other relief* as the nature of the case may require Under the present rule it is no longer necessary specifically to ask for such relief Such relief may now always be given to the same extent as if it had been asked for provided it is not inconsistent with that specifically claimed and with the case raised by the pleading (f) In order however to entitle a plaintiff to a relief

(z) *Hingu* v *Her mba* (1911) 13 Cal L J 130 8 I C 81 *G gadhar* v *Khaja* (1909) 14 C W N 1 8 2 I C 77 explaining *Jogeshwar Roy* v *Raj Narain* (1904) 31 Cal 19

(a) *Parmeshri Das* v *Fak ria* (19 1) Lah 13 60 I C 77

(b) *Rasul Jehan* v *Ram Surun* (1895) Cal 589 *Haji Khan* v *Baldeo Das* (190) 24 All 90

(c) *Rajrup* v *Abdul* (1891) 8 Cal 394 7 I A 240 *Achul* v *Raj n* (1891) 6 Cal 812 *Secretary of State* v *Mathurabha* (1890) 14 Bom 213 0

(d) *I mbur* v *Ra Joy* (1867) 7 W R 93 *Lakshm n* v *Ha i* (1880) 4 Bom 584 *lamada* v *Iaruthu* (1838) 11 Mad 94 97

(e) *Soorah* *w* v *Colaghery* (1833) M I A 114 *eri al* v *Collector of Chittagong* (1903) 30 Cal 516 519 But see *K* v *ya* v *enkata* (1917) 40 Mad 1 7-8 39 I C 439

(f) *Cargill* v *Lower* (1878) 10 C D 50 505

under the claim for general relief it is necessary that the ground for such relief should be disclosed by the allegations in the plaint (*g*) A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings (*h*) Thus where a plaintiff sues for a declaration of title to certain property *under a deed of sale* he cannot be allowed to succeed on the basis of title *by adverse possession* (*i*)

With regard to the *nature* of the general or other relief which a plaintiff may have the rule is that if the plaint contains allegations offering issues on facts that are material the plaintiff is entitled to the relief which those facts will sustain but he cannot desert the specific relief claimed and under the claim for general relief ask for specific relief of *another description* unless the facts and circumstances alleged on the pleadings will consistently with the rules of the Court maintain that relief (*j*)

Where a suit is brought by a reversioner against a Hindu widow (1) for an injunction restraining her from waste (2) for appointment of a receiver and (3) for further relief the plaintiff if he fails in the substantial heads of his claim is not entitled under cover of a request for further relief to obtain a declaration that he is the next reversionary heir (*k*)

In a suit by a mortgagee for *sale* of the mortgaged property the mortgagee may relinquish his claim for *sale* and ask for a *simple money* decree though such relief is not specifically claimed This he may do under the claim for general relief The Court has the power to grant that relief provided the mortgage contains a *personal* covenant to pay the mortgage debt (*l*) The Court may also under this rule award interest on a balance of account from the date of the institution of the suit although interest is not specifically asked for in the plaint (*m*) But the Court has no power under a claim for general relief to grant to a *pro forma* plaintiff the relief claimed by the active plaintiff if it turns out that the *pro forma* plaintiff and not the active plaintiff is entitled to the relief claimed This may be explained by an illustration *P* sells his interest in certain property in the possession of *C* to *A* *A* and *B* then sue *C* to recover possession of the property *B* makes no claim and he is joined merely as a *formal* party to the suit The Court finds the sale to *A* void as champertous (Contract Act s 23) On these facts no decree can be passed in favour of *A* for possession Nor should any decree be passed in favour of *B* awarding possession of the property to him under the claim for general relief though the Court find that *C* is in wrongful possession of the property and that the person really entitled to the property is *B* *B* must bring a separate suit against *C* to recover possession (*n*)

Alternative relief —A plaintiff may rely upon several different rights alternatively although they may be inconsistent (*o*) provided that his pleading is not thereby rendered embarrassing A pleading is not embarrassing within the meaning of O 6 r 16 because it contains inconsistent sets of facts (*p*) Thus a plaintiff may in the same suit claim to have a partnership agreement with the defendant cancelled on the ground that he was induced to enter into it by the fraud of the defendant or in the alternative for a dissolution of partnership and accounts (*q*) Similarly a plaintiff may claim over the same plot of land a right of *ownership* or in the alternative a right

(*g*) *J .. l Kasso .. v Kart .. Ch ..* (1894) 1 Cal 116 1 0 1 *Mohan Lal* v *M ya Lal* (19) 4 Lah L J 393

(*h*) *M h .. n .. Z hoor* v *Tulta Koer* (1867) 11 M I A 468 474

( ) *S .. daru* v *Iadwel ..* (1908) 31 Mad 531

(*j*) *Hern* v *M H* (1806) 13 Ves 119 per Lord Eldon *Cockerell* v *Dickens* (1840) .. M I A 353 3 .. see also *K .. mal* v *.. lats .. g* (19) 7 Bom L R 87 I C 481 (5) A B 48 *Rai Gharib* v *.. nka* (19) 0 All L J 15 65 I C .. (..) .. 5

(*k*) *Janaki* v *Na .. vana .. m* (1916) 43 I A 07 39 M .. 1 634 37 I C 161

(*l*) *Sukhle* v *Lachma* (19) .. All 4 6 *Abbakke* v *K .. nhiamma* (1906) 29 Mad 491 *Su .. endra Mohan* v *H .. ri Pra ad* (19 6) 5 .. 418 .. 13 91 I C 1033 (..) .. PC .. 0

(*m*) *Iup I am* v *Harph l* (19 1) Lah 56 64 I C 898 (.. 1) .. 1 1 5

( ) *Deb Day l* v *Ihan Iertap* (1904) 31 Cal 4 3

(*o*) *Ihil pps* v *Ihil pps* (18) 4 Q B D 1 134 per Brett L J

(*p*) *Re Morgan Owen* v *Morgan* (1) 35 C D 49..

(*q*) *P got* v *Laston* (18 ..) C D 1

of *easement* (r) A plaintiff may in a suit for pre emption base his claim in the alternative on contract or on custom or on Mahomedan law (s) He may also in such a suit set up an alternative claim *as owner* (t)

In *Mahomed Buksh* v *Hosseini Bibi* (u) the Judicial Committee observed that where a plaintiff sues alleging that a deed purporting to be executed by herself is a forgery the Court ought not to admit the *inconsistent* issue whether it was executed *under undue influence* *These observations were explained away in an Allahabad case* where it was held that a plaintiff may sue for the cancellation of a bond on the ground that it was a forgery or in the alternative that it was void for want of consideration (v) But quære whether the allegations of forgery and want of consideration are not *inconsistent and embarrassing* The High Court of Calcutta has held that a plaintiff may sue to set aside a deed of gift on the ground that she executed it under a fraudulent representation that it was a power of attorney or in the alternative on the ground that it was obtained by undue influence (w)

A plaintiff in a suit for specific performance may claim in the alternative that if the contract cannot be enforced it should be rescinded and delivered up for cancellation (x) A purchaser in a suit for specific performance may claim in the alternative a return of the earnest money and he may at the hearing give up his prayer for specific performance and ask for a return of the earnest money and the Court may direct the defendant to return the earnest money (y) In England in a case under the old practice it was held that a suit to set aside a transaction for fraud or in the alternative for specific performance of a compromise could not be sustained (z) It seems probable that the same conclusion would still be arrived at on the ground that the claims were *inconsistent and embarrassing* (a)

For a fuller discussion of this subject see notes to O 6 r 2 Alternative and inconsistent allegations

Relief not founded on pleadings—See notes under the same head to O 14 r 1

Events happening after institution of suit—Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution *But where it is shown that the original relief claimed has by reason of subsequent* change of circumstances become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made (b) Leave to amend may be granted under O 6 r 17 for this purpose (c)

8 [*New* R S C O 20 r 7] Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds they shall be stated as far as may be separately and distinctly

Relief founded on separate grounds

See notes to O 6 r 2 Alternative and inconsistent allegation

(r) Narendra v Abhoy Charan (1907) 34 Cal 51

(s) M[illegible]ad v Shams-un Nissa (1914) 36 All 456 24 I C 4 5

(t) Ih g t l v Jarm sh r (1914) 36 All 4 6 I C 293

(u) (188) 15 I A 81 86 15 Cal 684 See also Ly ppa v Rama Lakshmamma (1890) 13 Mad 549

(v) J no v Manon (1896) 18 All 1 5

(w) Official Assignee v Bidjanu dari (1910) 4 Cal W N 145 148 54 I C 00

(x) See s 37 of the Specific Relief Act 1877 which is based on Mosley v Virgin (1796) 3 Ves 184 Stapylton v Scott (1805) 11 Ves 4

(y) K sonda v Chhotalal (19 1) 48 Bom 20 71 I C 7 (4) A B 119

(z) Cowley v Forde H t M 50

(a) Fry on Specific Performance 6th ed para 10 4 p 494

(b) Narain as v Ambica (1917) 44 Cal 47 55 34 I C 869

(c) Valluri v Ka namm (19 6) 49 Mad L J 479 90 I C 891 (926) A M 6

9 [S 58] (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and, if the plaint is admitted shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made or of the relief claimed in the suit in which case he shall present such statements

Procedure on admitting plaint

Concise statements

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct

Sub rule (2) representative capacity—It is not necessary to state in the title of the suit the representative capacity in which the plaintiff or the defendant sues or is sued although no doubt that is a convenient place to make such a statement It is enough if the pleading shows that the plaintiff or the defendant sues or is sued in a representative capacity (*d*) See O 7 r 4 and Appendix A (2) Description of Parties in Particular Cases the last two forms

10 [S 57] (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted

Return of plaint

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it

Procedure on returning plaint

Return of plaint.—Where a suit filed in a Revenue Court is not triable by that Court the Court should not dismiss the suit but return the plaint to be presented

(*d*) *Kuarmo* v *Hanif Ali* (1915) 19 C W N 1193 28 I C 818 *Bidhu* ... (1919) 46 Cal ... 50 I C 5 5 ; *Sonachalam* v *Kumaravel* (19.5) 54 Mad L J 587 109 I C 193 (28) A M 445

to the proper Court (e) A suit against two defendants cognizable by a Civil Court as against the first and by a Revenue Court as against the second was filed in a Civil Court The Patna High Court directed the plaint to be returned for presentation to the Revenue Court and that a copy of it should be retained on the record for trial of the suit as against the second defendant (f)

At any stage of the suit. —These words are new They have been added to give effect to the undermentioned decision (g) in which it was held that a plaint may be returned to be presented to the proper Court at any stage of the suit even after the trial has begun and concluded But a plaint should not be returned unless the Court finds that it has no jurisdiction (h)

Court fee —Where a plaint is returned by a Court to be presented to the proper Court the latter Court is bound to give credit for the fee levied by the former Court (i)

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (1)]

Appeal —An appeal lies from an order returning a plaint to be presented to the proper Court whether the order is made by the Court of first instance [O 43 r 1 cl (a)] or by the Court of first appeal in the exercise of powers conferred upon it by s 107 (j) But no second appeal lies from the order of the first appellate Court (k) [see s 104 (2)]

A files his plaint in a District Munsif s Court The Munsif returns the plaint for presentation to the proper Court holding that the suit is beyond his pecuniary juris diction On the plaint being presented to a Subordinate Judge s Court it is again returned by that Court on the ground that the Munsif s Court had jurisdiction. Is *A* entitled to appeal to the District Court from the order of the District Munsif having regard to the fact that he in obedience to that order filed the plaint in the Subordinate Judge s Court? No according to a Calcutta decision the reason given being that by electing to file the plaint in the Subordinate Judge s Court he forfeited his right of appeal (l) Yes according to the Madras High Court (m)

The merits of an order refusing leave under s 20 cl (b) cannot be attacked in an appeal from an order returning a plaint to be presented to the proper Court (n)

Rejection of plaint

11 [S 54] The plaint shall be rejected in the following cases —

(a) where it does not disclose a cause of action,

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so

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(e) *Ram J s v Babu* (19) 44 All 686 70 I C 93 ( ) A A 4 4

(f) *Secretary of State v Natabar* (19 7) 6 P t 553 103 I C 43 (7) A P 254

(g) *Prabhat Bhat v Vishwambhar* (1884) 8 Bom 313 [F B] See *Ka uram v Jag thambal* (1918) 41 Mad 701 08 46 I C 65

(h) *Bushetha v Raghuln* (19 6) 48 All 168 90 I C 3 3 (6) A A 58

(i) *Tum ar a v Na r* (191) 3 Mad 567 10 I C 01 [F B] *Lane k v Tatya* (19) 1 Bom 36 101 I C 343 ( ) A B 57

(j) *B Abdullah v Kanhaya Lal* (1903) All 174 *Dalip S gh v Kundan Singh* (1914) 36 All 58 I C 614 *Nand Kishore Abd r R hm n* (19 0) 4 All 74 5 I C 801 *ao Bux v Brij Lal* (1920) Cal 7 *Ch asn v Ka pr* (1) 1 Mad 34

(k) *Nall th v Pal a t* (19 3) 7 Bom L R 63 89 I C 53 (5) A B 431

(l) *Pem Madh b v Jole ira* (190) 5 Cal L J 580 doubted 1 *Baiku t Nath v Nawab I mulla* (190) 6 Cal L J 517 536

(m) *N v a v Cherla* (1919) 41 Mad 7 1 43 I C 89

(n) *Allen Brother v Arora M I* (192) Lah L J 66 84 I C 46 ( ) A L 338

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so,

(d) where the suit appears from the statement in the plaint to be barred by any law

Change of law—Clause (a) is new See notes below Clause (a)

Chartered High Courts—Clauses (b) and (c) of this rule do not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction See O 49 r 3 (1)

Duty of Court to examine plaint—It is the duty of the Court under O 7 to examine a plaint before issuing summonses and to ascertain whether any cause of action has been pleaded and whether any relief has been claimed against the defendants and to determine whether the plaint should be rejected or returned for amendment (o)

Shall be rejected—This rule may be applied at any stage of a suit Therefore a plaint may be rejected under this rule even after it has been numbered and registered as a suit (p)

The provision contained in this rule that the plaint shall be rejected in the four cases mentioned in the rule is mandatory In a case therefore where the relief claimed was properly valued but the plaint was written upon paper insufficiently stamped and the plaintiff on being required by the Court to supply the requisite stamp paper failed to do so it was held that the plaintiff should not be allowed to amend the plaint by omitting the prayer in respect of which the extra court fee was directed to be paid and that the plaint should be rejected (q)

Rejection of plaint in part—This rule does not justify the rejection of any particular portion of a plaint (r)

Clause (a) where plaint does not disclose cause of action—Under the Code of 1882 s 53 it was not obligatory upon the Court to reject a plaint if it did not disclose cause of action Under the present rule the Court is bound to reject a plaint if it does not disclose a cause of action As to the meaning of cause of action see notes to s 20 Cause of Action on p 103 above

Clause (b) Where the relief claimed is undervalued—Even if the correct valuation would render the Court incompetent to entertain the suit the Court should in the first instance require the plaintiff to pay the proper court fee If the plaintiff does not pay the additional court fee the Court should not proceed under O 7 r 10 but it should reject the plaint If the plaintiff pays the requisite court fee and the Court finds that the value of the subject matter exceeds its jurisdiction it should return the plaint under O 7 r 10 (s)

(o) [illegible] v Dh[illegible] (19[illegible]8) 55 Cal 590 ([illegible]) A [illegible]

(p) Kishore v S[illegible] (1890) 1[illegible] All 553 Venkatesa v Ramasam (18[illegible]) 18 Mad 338 Nanak Chand v J[illegible] Mal (1914) Punj Rec no 35 p 1[illegible] I C 435

(q) Mulnap[illegible] Zamindary Co v Secretary of State (191[illegible]) 44 Cal 35 40 I C [illegible]

(r) P[illegible] v Jyot[illegible] Swarupa (190[illegible]) [illegible] All 3[illegible]

(s) Kandasami v Su[illegible] (19[illegible]) 46 Mad L J 545 [illegible] I C 731 ([illegible]) A [illegible] M 646 G[illegible] v T[illegible] (19[illegible]) 51 Bom 236 101 I C 545 ([illegible]) A B [illegible]

11 Clause (c) Where a plaint is written upon paper insufficiently stamped—The following points are to be noted in connection with this clause —

1 Where a plaint is written upon paper insufficiently stamped, the Court *is bound* to give the plaintiff time to make good the deficiency This follows from the terms of cl (c) itself (*t*)

2 If the plaintiff fails to supply the requisite stamp paper within the period fixed by the Court the plaint may be rejected under this rule even after it has been numbered and registered as a suit The reason is that the power to reject a plaint under this rule is not exhausted when the plaint has been admitted and registered (*u*) See notes above Shall be rejected

3 A plaint is presented on the last day allowed by the law of limitation. It is written upon paper insufficiently stamped The plaintiff is ordered to supply the requisite stamp paper within a week The order is complied with on the fourth day after the date of presentation of the plaint This would necessarily be *after the expiration* of the period of limitation prescribed for the institution of the suit Can the plaint be admitted under these circumstances ? Under this Code it can be [see s 149] Under the Code of 1882 there was a conflict of decisions on the point The High Courts of Calcutta (*v*) Madras (*w*) and Bombay (*x*) holding that the Court had power to admit the plaint while the Allahabad High Court held that the Court had no such power (*y*) The view taken by the Calcutta Madras and Bombay High Courts was that *the Court* had power under s 54 of that Code at any time and without any regard to limitation to fix a time within which the requisite stamp paper should be supplied and if the stamp was made good within the period fixed by the Court the suit was to be deemed to be *instituted* when the plaint was *first presented* and not when the requisite stamp paper was supplied On the other hand the view taken by the Allahabad High Court was that, though the Court had the power to give time to a plaintiff within which to supply the requisite stamp paper it must be a time within limitation and that s 54 did not give any power to the Court to extend the period of limitation This conflict has now been set at rest by the provisions of s 149 of this Code That section gives effect to the Calcutta, Madras and Bombay decisions The Allahabad decisions are no longer law (*z*) S 149 empowers the Court *at any stage* to allow a plaintiff to make up the deficiency of court fees, and provides in effect that when the deficiency has been made up the plaint is as valid as if it had been properly stamped when presented It follows from the provisions of s 149 that where a plaint written upon paper insufficiently stamped is presented to the Court on the last day allowed by the law of limitation and the Judge to whom the plaint is presented directs extra court fee to be paid *but fixes no time for payment* and the plaintiff pays the extra court fee though it be *after the expiration* of the period of limitation and the Court accepts it the plaint should be treated as if the full fee had been paid in the first instance and the suit cannot be held to be barred by limitation (*a*) In a recent Patna case the plaintiff was given a week s time in which to make up the deficiency Before the expiry of the week the Court closed for the vacation The amount in deficit was tendered two days *after the re opening* of the Court and accepted and *the plaint* was registered The period of limitation for the claim had expired prior to the date of the

(*t*) *Ach t* v *Nagappa* (1914) 38 Bom 41 43 21 I C 337 *Ram Sah y* v *Kumar Lachmi* (1917) 2 Pat. L. J 74 76 39 I C 9 0 *Ladli* *Kant* v *Debendra* (19) 40 Cal 890 0 I C 101 (2) A C 506
(*u*) *Prahmomoni Dasi* v *A di S* (1900) 2 Cal 3 6 *Ladman d Si g* v *Ana t Lal* (1907) 34 Cal 20
(*v*) *Mot Sah* v *Chhatri Das* (18) 19 Cal 80 *H ri Moh n* v *Na muddi* (1893) 20 Cal 41 *R jkishori K orr* v *Madan Moh S gh* (1904) 31 Cal 5
(*w*) *A sa* v *Pathumma* (1890) 2 Mad 494 *Gavara ga* v *Bolo K sh a* (1909) 3 Mad 30, 4 I C 503
(*x*) *Dhond am* v *Taba Saradan* (1903) Bom 3 0
(*y*) *Jaini Prasad* v *Bach S ngh* (1893) 15 All 65 *D rga S gh* v *Bishe ha Dayal* (19) 4 All 18
(*z*) *P m Dayal* v *Sher S gh* (1923) 45 All 514 I C 3 9 (3) A A 538
(*a*) *G va* v *Awadh* (1916) 1 Pat L J 420 3 I C 07 *S dra Pras d* v *Atabuddi* (1921) 26 Cal W N 391 70 I C 43 ( ) A C 234

acceptance of the deficit It was held that the acceptance of the fee although tendered late and the subsequent registration of the plaint amounted to an exercise by the Court of its discretion to allow the deficiency to be paid on the day when it was tendered and therefore the suit was not barred by limitation (*b*)

The procedure prescribed by the present rule is not applicable to a case in which an appellate Court acts under s 12 of the Court Fees Act 1870 (*c*)

Memorandum of appeal insufficiently stamped—See notes to s 149 Appeals and Applications for review of judgment

Clause (d) —Suit barred by any law—Where a suit appears from statements in the plaint to be barred by the law of limitation but the plaint is not rejected when presented the Court may in a proper case allow the plaint to be amended at the hearing (*d*) Where a suit is brought against the Secretary of State without giving the notice required by s 80 the plaint should be rejected under this clause (*e*)

Enlargement of time—The Court may *enlarge* the time fixed under cls (b) and (c) See s 148

Appeal—An order rejecting a plaint is a decree [s 2 (2)] and appealable as such (*f*)

Where a plaint is rejected under cl (b) the order rejecting the plaint is not appealable when the order is based on a question of valuation *pure and simple* But if the order necessarily involves a decision of the category or class under which a suit falls even though it incidentally decides a question of valuation the order is appealable (*g*) These decisions turn on on s 12 of the Court Fees Act 1870

Revision—In a suit by A against *B* *B* raises the objection that the relief claimed is under valued The Court may in such a case either uphold the objection and require *A* to pay additional court fee or it may hold that *A* s valuation is correct Is *this decision* open to revision? It has been held by the Chief Court of the Punjab that an *order* directing a plaintiff to make up the deficiency in Court fee is not open to revision The reason given is that if the plaintiff believing the order to be wrong does not comply with it it will under this rule result in the rejection of his plaint from which he has a right of appeal for an order rejecting a plaint is appealable as a decree (*h*) In a recent Calcutta case the Court of first instance held, on an objection raised by the defendant that the valuation put by the plaintiff on his claim was correct The defendant applied for revision The High Court held that the decision was not open to revision on the ground that the case did not fall under any of the three clauses of s 115 and also on the ground that the decision could be challenged in appeal from the final decree (*i*) The High Court of Patna has held that an order demanding an additional court fee *involving the jurisdiction of the Court to try the suit* is open to revision and that the plaintiff is not bound to wait until his plaint is rejected for non payment of the additional court fee (*j*)

Review—An order rejecting a plaint under cl (c) of this section is open to review (*k*) So also in a proper case an order rejecting a plaint under cl. (b) of the section (*l*)

(*b*) *[illegible] v [illegible]* (19[illegible]) 4 Pat 190 5 I C 17 (5) A P [illegible]

(*c*) *[illegible] v [illegible]* (1919) 4 Pat L J 03 56 I C 316

(*d*) *[illegible] v [illegible]* (1910) 34 Bom [illegible] I C 159

(*e*) *[illegible] v Secretary of State* (1903) [illegible] All 18

(*f*) *[illegible] v [illegible] Singh* (1914) Punj Rec no 80 p [illegible] 5 I C 565 *Chand [illegible] v [illegible]* (1919) 4 Pat L J 5 [illegible] 49 I C 44 *Dada v [illegible]* (1899) 3 Bom 486 *[illegible] v [illegible]* (1901) [illegible] Cal 334 *Kanara v Komappan* (1891) 14 Mad 169

(*g*) *Nawab v [illegible] Chand* (191) Punj Rec no 69 p 65 16 I C 47

(*h*) *Faltner v [illegible]* (19[illegible]) [illegible] Cal [illegible] 6 86 I C 8 3 ( ) A C 814

(*i*) *[illegible] v Durga Prasad* (19[illegible]) 3 Pat. 930 80 I C. 66 ( ) ( ) A P 763

(*j*) *Rameshwardhari v [illegible]* (19[illegible]3) 2 Pat. 504 I C. 6[illegible] (23) A P 3[illegible]

(*l*) *Adu Prasad v Ramharakh* (192[illegible]) 4 Pat. 1[illegible]0 185 91 I C 13 ( ) A P 433

12 [S 55] Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order

Procedure on rejecting plaint

Procedure on rejecting memorandum of appeal—The same procedure is to be followed when a memorandum of appeal is rejected (*m*)

13 [S 56] The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action

Where rejection of plaint does not preclude presentation of fresh plaint

Documents relied on in plaint

14 [S 59] (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented and shall at the same time deliver the document or a copy thereof to be filed with the plaint

Production of document on which plaintiff sues

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint

List of other documents

Production of documents relied upon—A horoscope does not require to be entered in the list of documents mentioned in sub r (2) The reason is that it is not a document to be relied upon as a probative document in itself but it is a record made by the maker of the horoscope to which he is entitled to refer for the purpose of refreshing his memory in the witness box (*n*)

Failure to produce documents—The penalty for not producing the documents referred to in this rule is that prescribed in r 18 below and not the rejection of the plaint (*o*)

Loss of document after production—Where a promissory note sued upon was produced and delivered to the Court as required by this rule but subsequently disappeared from the file the Judicial Committee held that the plaintiff was entitled to give secondary evidence under s 65 (2) of the Evidence Act 1872 without showing *how it disappeared* (*p*)

15 [S 60] Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is

Statement in case of document not in his possession or power

(*m*) *P* *l* *P* *a* *t* v *Fatl* ... *th* (1893) 15 All 67
( ) *I* ... *n* *Lal* v *M* ... *k* (1918) 45 I A 284 ... 41 All 63 ... 49 I C 10

(*o*) *G* *pal* v *Luk* ... (1 9) 2 I m 9 1 ... Bom
(*p*) *T* *l* *Ram* v *Ram* *Saran* *Das* (192) ... L R ... 86 I C 55 (...) A ... 60

16 [S 61] Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint

Suits on lost negotiable instrument

17 [S 62] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop book or other account in his possession or power the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies

Production of shop book

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification, and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so, and return the book to the plaintiff and cause the copy to be filed

Original entry to be marked and returned

Bankers Books Evidence Act 18 of 1891—The Bankers Books Evidence Act provides a special mode of proof of entries in bankers books by dispensing with the production of the books S 4 of the Act provides that a *certified copy* of any entry in a banker s book is to be received as *prima facie* evidence of the existence of such entry and that it should be admitted as evidence of the matter contained therein to the same extent as the *original* entry

18 [S 63] *(1) A document which ought to be produced* in Court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit

Inadmissibility of document not produced when plaint filed

(2) Nothing in this rule applies to documents produced for cross examination of the defendant s witnesses or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory

18 **In what cases leave may be granted under this rule**—The object of rr 14 and 18 is to provide against false documents being set up after the institution of a suit In those cases therefore where there is no doubt of the existence of a document at the date of the suit the Court should as a general rule admit the document in evidence though it was not produced with the plaint or entered in the list of documents annexed to the plaint as required by r 14 (q) But the Court may even in such a case refuse to receive it in evidence if it is produced at a very late stage of the proceedings e g ten years after the date of the suit and a day before the judgment was delivered as was done in the undermentioned case (r)

ORDER VIII

Written Statement and Set off

2 **1** [S 110] The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence

Written statement

Written statement—The written statement must contain and contain only a statement in a concise form of the material facts on which the party pleading relies for his defence but not the evidence by which those facts are to be proved (O 6 r 2) A defendant may by his written statement raise as many distinct and separate and therefore inconsistent defences as he may think proper provided the pleading is not embarrassing (s) A written statement is not embarrassing within the meaning of O 6 r 16 merely because it sets up inconsistent defences (t) But where the defendant relies upon several distinct grounds of defence they must be stated separately and distinctly (r 7 below) See notes to O 6 r 2 Alternate and inconsistent allegations

2 [*New* R S C, O 19, r 15] The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality

New facts must be specially pleaded

Fraud—See notes to O 6 r 4 Fraud and coercion

Facts showing illegality—When a plaintiff sues upon a bond and the defence is that there was no consideration, the Court should not entertain the plea that the consideration was unlawful e g stifling a criminal prosecution if it is raised for the first time in the argument of counsel at the close of the hearing The illegality of the consideration must be specifically pleaded (u) See notes to O 6 r 8

(q) *Devidas* v *Pirjada Begam* (1884) 8 Bom 3

(r) *G[illegible]gadha* v *Krishnaj* (1900) 44 Bom 6[illegible]5 6 I C 594

(s) *Berla* v *Greenwood* (18[illegible]6) 3 Ex D [illegible]51

(t) *Re Morgan* *Iowen* v *Morgan* (18[illegible]) [illegible] 5 (D 49

(u) *Nur Ilahi* v *Mawa Khan* (19[illegible]) 7 Lah L J 86 86 I C 683 ( ) A I [illegible]

Limitation —In India a suit instituted after the expiry of the period of limitation *shall* be dismissed although limitation has not been set up as a defence Limitation Act 1908 s 3 In England limitation must be specifically set up as a defence

Claim against joint contractors for breach —Where in a suit against joint contractors separate defences are put in a successful defence pleaded and proved by one only ennures for the benefit of all (t)

3 [*New* R S C, O 19, r 17] It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth except damages

Denial to be specific

Deal specifically with each allegation of fact —The defendant must take each fact which is alleged against him separately and say that he admits it or denies it or does not admit it It is not merely denial which is meant but the rule covers non admission for [the defendant] is to *deal specifically* with every allegation of fact of which he does not admit the truth (w) Every allegation of fact in the plaint will be taken to be admitted if it is not denied specifically or by necessary implication or stated to be not admitted (r 5)

A defendant ought not to deny by his written statement plain and acknowledged facts which it is neither to his interest nor in his power to disprove (x) nor should he plead to any matter which is not alleged against him (y) See notes to O 6 r 2 Facts not yet material to a case

Except damages —It is not necessary for a defendant in a suit for damages to deny specifically the damages it is quite sufficient if he pleads generally to the damages (z) See notes to O 6 r 2 Matters affecting damages

4 [*New* R S C, O 19 r 21] Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof or else set out how much he received And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances

Evasive denial

Evasive denial —Where the plaintiff sets up an agreement and the defendant denies that the terms of the agreement between himself and the plaintiff were *definitely* agreed upon as alleged the denial is evasive He [defendant] is bound to deny that any

(t) *Pirie* v *Richardson* (19 7) 1 K B 448
(w) *Thorp* v *Holdsworth* (1876) 3 C D 63 640 per Jessel M R
(x) *Lee Conservancy Board* v *Button* (18 9) 1 C D 383 affirmed (1881) 6 App Cas 685
(y) *Pa sam* v *Budge* [1893] 1 Q B 5 1
( ) *Ross & Co* v *Scriven* (1916) 43 Cal 1001 1010, 34 I C 35

agreement or any terms of arrangement were ever come to if that is what he means if he does not mean that he should say that there were no terms of arrangement come to except the following terms and then state what the terms were otherwise there is no specific denial at all (a) Similarly where the plaint alleges that the defendant offered to the plaintiff s agent a bribe of Rs 500 on 17th July 1908 at the defendant s office it is an evasive traverse for the defendant to plead the defendant did not offer to the plaintiff s agent a bribe of Rs 500 on 17th July 1908 at his office for the defendant might have offered any other sum on another day and in another place Here the *point of substance* is that a bribe was offered The details as to the amount time and place are only *circumstances* The defendant should plead that he never offered a bribe of Rs 500 or any other sum (b) Where a denial is evasive leave to amend may be given under O 6 r 17 unless the Court is satisfied that the defendant was acting *mala fide* (c)

5 [*New* R S C, O 19, r 13] Every allegation of fact in the plaint, if not denied specifically or by *necessary implication*, or *stated to* be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability

Specific denial

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission

Admissions of fact in pleadings —The first paragraph of this rule states what amounts to admissions of fact in a pleading Rule 3 requires that the defendant must deal specifically with each allegation of fact of which he does not admit the truth. The present rule provides that every allegation of fact in the plaint if not denied in the written statement shall be taken to be admitted by the defendant (d) In *Rutter* v *Tregent* (e) the statement of claim stated (paragraphs 1 2 and 3) the original mortgage and the assignment by the mortgagees to the plaintiff in which the mortgagor had joined (paragraphs 4 and 5) the charges created by the mortgagor subsequent to the assignment to the plaintiff of the first mortgage and (paragraph 6) the amount of principal money with interest due to the plaintiff By their statement of defence the defendants stated that they did not admit the correctness of the statements set forth in paragraphs 1 2 3 and 6 of the plaintiff s statement of claim and required proof thereof Defendant the mortgagor admitted that the subsequent charges were made as stated in paragraphs 4 and 5 of the statement of claim Upon a motion for judgment as upon admission of facts in the pleadings it was held that there was no sufficient denial of the facts alleged by the plaintiff and that the plaintiff was entitled to judgment for foreclosure Bacon, V C said The defendants did not admit the correctness of the statements contained in the statement of claim but they ought to state in what respect they disputed them Similarly where a defendant simply puts the plaintiff to proof of the several allegations in the plaint he will be deemed to have admitted the facts alleged in the plaint (f) Where in a suit for the recovery of money the plaintiff relies in his plaint upon a letter written by the defendant to save the bar of limitation and all that the defendant says in his written statement as to the letter is the suit is not

(a) *Thorp* v *Holdsworth* (18 6) 3 C D 637

(b) *Tildesley* v *Harper* (18 8) 10 C.D 403

(c) *Tildesley* v *Harper* (18 8) 10 C D 393

(d) *Amir Beg* v *Ghulam Nabi* (191) Punj Rec no 1 p 1 39 I C 330

(e) (1879) 1 C D 758

(f) *Harris* v *Gamble* (18 8) 7 C D 8 7

saved by the letter put in from the bar of limitation the letter must be taken as admitted and it need not be proved by the plaintiff (g) But where in a suit by the reversioner of a deceased Hindu to recover possession of properties alienated by the widow of the deceased the defendants pleaded that they did not admit that the widow died on the date stated in the plaint and further stated that the suit was barred by limitation and an issue was framed as to the date of the widow's death it was held that there was no admission by the defendants of the date of the widow's death merely because they did not state in their written statement the date on which according to their case the widow died (h)

A plaintiff who claims a decree must prove all the material facts on which he relies in support of his claim The importance of the present rule lies in this that since facts which have been admitted need not be proved it is not necessary for the plaintiff to prove facts which have been expressly admitted by the defendant or which must be taken to have been admitted by him within the meaning of this rule (see Evidence Act 1872 s 58) The admission itself being a proof no other proof is necessary In the case however of facts which may be *taken to be admitted* by the defendant within the meaning of this rule the Court may in its discretion require any facts so admitted to be proved otherwise than by such admission That is to say the Court may require the plaintiff to adduce such proof of the fact as it would have been necessary for him to adduce if no such admission had been made This power which has been conferred upon the Court by the proviso to the rule is not new The matter it will be seen is one of evidence and a similar power is contained in the Indian Evidence Act I of 1872 The proviso to the rule in fact is a reproduction of the proviso to section 58 of the Evidence Act That section runs as follows —

> No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings *Provided that the Court may in its discretion require the facts admitted to be proved otherwise than by such admissions*

The proviso to section 58 as well as the proviso to the present rule indicates the intention of the Legislature that pleadings in India ought not to be construed with the same strictness as in England. Upon this principle the defendant has been allowed *under special circumstances* to traverse at the hearing allegations in the plaint which he had omitted to traverse in his written statement (i) The rule of pleadings in England is very stringent According to that rule a defendant who omits to traverse in his defence any allegation of fact in the statement of claim is not allowed to traverse that fact at the hearing The fact will be taken to be admitted by him and the Court has no power to require the plaintiff to prove it in any case Strike out the proviso to the present rule and you have the rule of English law In fact the first paragraph of this rule is a reproduction of O 19 r 13 of the English Rules made under the Judicature Acts The proviso has been added to modify the rigour of that rule

But though pleadings in India are not to be construed as strictly as in England neither party will be allowed to set up at the hearing an entirely new and inconsistent case The plaintiff must be held to the state of facts alleged in his plaint or consistent therewith (j) Similarly the defendant must be held to the state of facts alleged in his written statement or consistent therewith (k)

(g) *Laxminarayan v Chandiram* (1917) 41 Bom 60 38 I C 14

(h) *Rajagopala Iyer v Thashi Ammal* (19 4) 47 Mad L J 5 0 8 I C 534 (' 1) A M 638

(i) *Madho Persad v Gajudhar* (1885) 11 Cal 111 11 I A 186 *Lindmove v Sheo Chunder* (1 6) 9 M I A 301 *Natha Singh v Jodha Singh* (1884) 6 All 406 *Isar Singh v Phola Singh* (19 4) 6 Lah L J 358, 8 I C 617 (' 4) A L 744

(j) *Eshen Chunder v Shama Churn* (1866) 11 M I A 7

(k) *Chota v Isa* (18 6) 1 Bom 209 *Muncherjee v New Dharmsey Co* (1880) 4 Bom 5 6

Omission to file written statement.—This rule applies only where a pleading *has been put* in by the defendant. Omission to file a written statement does not amount to an admission of the facts stated in the plaint (*l*).

6 [S 111] (1) Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off.

Particulars of set-off to be given in written statement

(2) The written statement shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Effect of set-off

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set off.

Illustrations

(a) *A* bequeaths Rs 2 000 to *B* and appoints *C* his executor and residuary legatee. *B* dies and *D* takes out administration to *B*'s effects. *C* pays Rs 1 000 as surety for *D*; then *D* sues *C* for the legacy. *C* cannot set off the debt of Rs 1 000 against the legacy, for neither *C* or *D* fills the same character with respect to the legacy as they fill with respect to the payment of the Rs 1 000.

(b) *A* dies intestate and in debt to *B*. *C* takes out administration to *A*'s effects and *B* buys part of the effects from *C*. In a suit for the purchase money by *C* against *B* the latter cannot set off the debt against the price, for C fills two different characters, one as the vendor to *B*, in which he sues *B*, and the other as representative to *A*.

(c) *A* sues *B* on a bill of exchange. *B* alleges that *A* has wrongfully neglected to insure *B*'s goods and is liable to him in compensation which he claims to set off. The amount not being ascertained cannot be set off.

(d) *A* sues *B* on a bill of exchange for Rs. 500. *B* holds a judgment against *A* for Rs 1 000. The two claims being both definite pecuniary demands may be set off.

(e) *A* sues *B* for compensation on account of trespass. *B* holds a promissory note for Rs 1 000 from *A* and claims to set off that amount against any sum that *A* may recover in the suit. *B* may do so, for as soon as *A* recovers both sums are definite pecuniary demands.

(*l*) *Ross & Co* v *Sen* [illegible] (1916) 43 Cal 1001, 1009, 1010, 34 I C 35; [illegible] (19?3) 10 Lah. L.J 339 [illegible] A L. 69

(f) *A* and *B* sue *C* for Rs 1 000 *C* cannot set off a debt due to him by *A* alo

(g) *A* sues *B* and *C* for Rs 1 000 *B* cannot set off a debt due to him alone by

(h) *A* owes the partnership firm of *B* and *C* Rs 1 000 *B* dies leaving *C* surviv *A* sues *C* for a debt of Rs 1 500 due in his separate character *C* may set off the debt Rs 1 000

Changes in the rule —Sub rule (3) is new See r 9 below

Conditions of applicability of the rule —A defendant may claim a set *under this rule* if the following conditions are satisfied but not otherwise —

I The suit must be one for the recovery of *money*

II As regards the amount claimed to be set off—

(a) it must be an *ascertained* sum of money [see ills (c) (d) and (e) above]

(b) such sum must be *legally* recoverable

(c) it must be recoverable by *the defendant* or by *all the defendants* if mo than one [see ill (g)]

(d) it must be recoverable by the defendant from *the plaintiff* or *all the plainti* if more than one [see ill (f)]

(e) it must *not exceed the pecuniary limits of the jurisdiction* of the Court which the suit is brought and

(f) both parties must fill in the *defendant s claim to set off* the *same charac* as they fill in the *plaintiff suit* [see ills (a) (b) and (h)]

The suit must be one for the recovery of money —In *Nan Karay* v *Htau* (m) their Lordships of the Privy Council observed that it was doubtful wheth a suit for an *account* was a suit for *money* In a subsequent Allahabad case it w held that a suit for a dissolution of partnership and for partnership accounts with a pray that such *balance* as may found due to the plaintiff upon taking the partnersh accounts may be paid to him was a suit for *money* and that a plea of set off mig therefore be raised by the defendant in such suit (*n*)

The amount claimed to be set off must be an ascertained sum money and not unliquidated damages —The expression ascertained sum does not mean a sum admitted by the plaintiff It is used in contradistinction to unliquidated damages (*o*) In ills (d) and (e) the claim is for an ascertained sum not so ill (c) where the amount claimed to be set off is for unliquidated damages In the ca mentioned in ill (c) the defendant may bring a cross suit against the plaintiff In ill (the amount claimed to be set off by *B* is the amount of a decree and this may be set c against *A* s claim It is not necessary that *B* should have taken any steps to enforc the decree (*p*)

A a clerk sues *B* his employer for arrears of wages due to him *B* alleges th *A* left his employment without notice and that *A* is therefore liable to pay damages whic he claims to set off The amount not being ascertained cannot be set off (*q*) Se ill (3) on the next page

Equitable set off —There are cases in which the defendant may be allowed set off even in respect of an unascertained sum which sounds in damages These ar cases where the cross demands arise out of *the same transaction* or are so connected i their nature and circumstances that they can be looked upon as part of one transactio

(m) (1886) 13 Cal 1 4 13 I A 48

(n) *Ramjiwan* v *Chand Mal* (1888) 10 All 58

(o) *Edward* v *I md* (1909) 14 C W N 1 0 5 I C 6 *Ha Prasad* v *Ram S rup* (19 4) ° All L J 844 8 I C 340 (4) A A 8

(p) *Bha* ... v *R* ... (1903) 30 Cal 106 See also *Gobind Ram* v *K* ... (1924) 46 All 93 (24) A A 341 83 I C 403 a case under the Agra Tenancy Ac of 1901

(q) *Victoria Mills Co Ld* v *Brij Mohan L* (1912) 34 All 36 35 I C 03

In such cases Courts of Equity in England have held that it would be inequitable to drive the defendant to a separate cross suit and that he may be allowed to plead a set off though the amount may be *unascertained*. Such a set off is called an *equitable* set off as it is allowed by Courts of *Equity* as distinguished from a *legal* set off which is allowed by Courts of *Common Law* in respect only of an *ascertained* sum. It will thus be seen that the present rule is restricted to a *legal* set off for it requires that the amount to be set off shall be an *ascertained* sum. The question therefore arises whether an *equitable* set off can be pleaded in Indian Courts in other words if the defendant's claim is for an *unascertained* sum but has arisen from the *same transaction* as the plaintiff's claim the defendant can set off such demand against the plaintiff's claim? It has been held that he can do so not under the provisions of the present rule which is limited to a *legal* set off but in the exercise of the general right of a defendant to plead a set off whether it is legal or equitable. The provisions of the Code regulate *procedure* only and they have not the effect of taking away any *right* of set off which a defendant may have independently of its provisions. O 20 r 19 (3) recognizes an equitable set off. The leading case on the subject is *Clark* v *Ruthnavaloo* (r). But this right of set off does not exist when the cross demand relates to a *different* transaction (s).

Illustrations

1 *A* sues *B* to recover Rs 6 000 due under a contract. *B* admits *A*'s claim but claims to set off several sums of money alleged to be damages sustained by him by reason of *A*'s breach of some of the terms of the *same* contract. *B* is entitled to claim the set off for the claim arises from the *same transaction*. *Kistnasamy* v *Municipal Commissioner for Madras* (1868) 4 Mad H C 120; *Pragi Lal* v *Maxwell* (1885) 7 All. 284.

2 *A* agrees to sell and *B* agrees to purchase 200 bales of wool. *B* takes delivery of 170 bales and is ready and willing to take delivery of the remaining 30 bales but *A* fails to deliver them. *A* sues *B* for the price of the 170 bales. *B* claims to set off the damages sustained by him by reason of *A*'s failure to deliver the remaining bales. *B* is entitled to claim the set off as the claim arises out of the *same transaction*. *Kishorchand* v *Madhowji* (1880) 4 Bom 407; *Nia* v *Durga* (1893) 15 All 9; *Nand Ram* v *Ram Prasad* (1905) 27 All 145.

3 *A* sues *B* his master for Rs 800 being arrears of salary. *B* claims to set off Rs 6?? being the loss sustained by him by reason of neglect and misconduct on the part of *A* as his servant. *B* is entitled to claim the set off as his claim arises out of the *same relation* from which *A*'s claim arose namely that of master and servant. *Chisholm* v *Gopal Chander* (1889) 16 Cal 711. But see *Victoria Mills Co Ltd* v *Brij Mohan Lal* (1917) 39 All 362, 38 I C 203.

4 *A* (mortgagee) sues *B* (mortgagor) to recover the principal and interest due on a usufructuary mortgage. *B* claims to set off the loss alleged to have been occasioned by *A*'s failure as mortgagee in possession to make repairs to the mortgaged property. *B is entitled to claim the set off*. *Shiva* v *Jaru* (1892) 15 Mad 290.

5 A washerman sues his employer for his wages. The employer may set off the value of articles short returned to him against the wages. *Maiden* v *Bhondu* (1910) Punj Rec no 77 p 226, 7 I C 1006.

6 *A* sues a limited company to recover the amount of dividends payable to him as a shareholder. The company is not entitled to set off damages claimed by the company against *A* for breach of a contract to sell and deliver cotton to the company. *Vithaldas* v *The Hyderabad Spinning and Weaving Co Ltd* (1923) 47 Bom 18?, (1923) A B 24, 7? I C 326.

(r) (1865) 2 Mad H C 296; *Kishorchand* v *Madhowji* (1880) 4 Bom 407; *Bhagbat* v *Land?b* (1885) 11 Cal 55. For other cases see the illustrations.

(s) *I?a?dro* v *Pokhiram* (1894) 21 Cal 419; *Dobson* v *The ?al Sp? g C?* (1 ?) 1 Lon 1 6; *Dhundiraj* v *Ganesh* (1894) 18 Bom 1?.

The amount claimed to be set off must be legally recoverable— O [illegible]
The amount claimed by way of set off under this rule must be legally recoverable It follows from this that if the defendant's claim is barred by the law of limitation *at the date of the suit* it cannot be pleaded by way of set off under this rule (*t*) But this rule relates only to a *legal* set off The question arises whether a claim by way of *equitable* set off can be allowed if it is barred by limitation *at the date of the suit* It has been laid down that in cases where the plaintiff's claim and the defendant's claim relate both to the same estate or there is a fiduciary relationship between the parties the defendant's claim to set off *though barred by limitation at the date of the suit* may be entertained as an *equitable* set off It has thus been held that in a suit by an heir against his co heirs for his one sixth share of the estate of the deceased the latter are entitled to set off one sixth of the Government revenue paid by them in respect of the estate though a separate suit by them to recover from the plaintiff the proportionate part of the revenue payable by him would be barred by limitation (*u*) Similarly in mortgage suits sums are allowed to be set off in taking accounts of the mortgage even though barred by limitation (*v*) Upon the same principle it has been held that a trustee in possession of the trust estate is entitled to set up his right to be indemnified out of the trust estate when called upon for an account although his right to sue for the amount claimed by him by way of indemnity is barred by limitation (*w*) In a recent case (*x*) the High Court of Madras held that in a suit by a lessor for rent it is not open to the lessee to claim by way of equitable set off an unliquidated claim for damages which was *barred at the date of the suit* Seshagiri Ayyar J said An exception to this rule [namely that a time barred claim cannot be pleaded by way of set off] has been recognized in some cases Where there is a fiduciary relationship between the parties as in the case of trustee and *cestui que trust* and there is accountability even barred claims may be taken into account in passing the final accounts This exception has been extended in some of the decided cases in India to mortgages presumably on the ground that there is accountability between the parties See *Parasurama Pattar* v *Venkatachallam Pattar* (*y*) *Chidambara Mudalia* v *Krishnaswami Pillai* ( ) and *Ramdhari Singh* v *Permanund Singh* (*a*) It is not necessary to say now whether these cases have been rightly decided I see no reason for extending the exception to suits between a lessor and a lessee

In a Madras case (*b*) an agent sued his principal to recover money that might be found due to him on the taking of agency accounts The defendant pleaded in his written statement that money would be found due to him on taking accounts and he asked for a decree for such sum as might be found due to him The defendant's claim was *not barred at the date of the suit* but it was barred at the date of the *written statement* It was held that the defendant's claim should be allowed as an *equitable* set off to the extent of the plaintiff's claim but that the defendant was not entitled to a decree for the balance found due to him as his claim was barred at the date of the written statement To pass a decree for the balance would be it was said to enable the defendant to evade the law of limitation The same view has been taken by the High Court of Bombay (*c*) In an Allahabad case (*d*) Oldfield J expressed the opinion that the set off if not barred at the date of the suit should be allowed in full and not merely to the extent of the

(*t*) *Walker* v *Clements* (1850) 15 Q B 1046 [illegible] (1913) 3 All 39 18 I C 63 [illegible] barred according to lex fori but not according to lex loci contractus]
( ) *Ramdhari Singh* v *Permanund* (1913) 19 C W N 1153 [illegible] I C 16
(*v*) [illegible] (1913) M L J 561 [illegible] I C 01 [illegible] (1905) 3 [illegible] (1908) 14 C W N [illegible]
(*w*) *Chidambara* v *Krishnaswami* (1915) [illegible] M L J [illegible] 28 I C [illegible]
(*x*) [illegible] v *Srinath* (1916) 39 Mad 9[illegible] 3 I C 80
(*y*) (1913) M L J 561 [illegible] I C 01
(*z*) (1915) [illegible] M L J [illegible] I C [illegible]
(*a*) (1913) 19 C W N 11 3 [illegible] I C 16
(*b*) [illegible] v *Zamindar of* [illegible] (1919) [illegible] M [illegible] 3 53 I C 34
( ) [illegible] v [illegible] (192[illegible]) [illegible] I C 943 [illegible] A I 113
(*d*) [illegible] *Lal* v *M* [illegible] (18[illegible]) All 2[illegible] See [illegible] v [illegible] (1910) 3 All [illegible] 6 I C 16

plaintiff's claim even if it was barred at the date of the written statement See notes to O 20 r 19 Decree in case of set off

Costs awarded to a tenant in a suit brought against him by the benamidar of the landlord cannot be set off by the tenant in a subsequent suit for rent brought against him by the landlord The costs having been awarded against the *benamidar* they are not *legally* recoverable from the *landlord* (*e*)

A separate debt cannot be set off against a joint and several debt — Thus in ill. (g) *B* cannot set off the debt due to him *alone* by *A* for it is a separate debt while the suit is to recover a *joint* and *several* debt It has similarly been held that in a suit by a company against its directors no individual director is entitled to set off the amount due to him alone from the company (*f*)

The amount claimed to be set off must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought — The valuation of a set off for the purpose of jurisdiction must be taken as relating to the whole amount pleaded as a set off and without reference to any portion of the plaintiff's claim admitted by the defendant *A* sues *B* in a Presidency Small Cause Court for Rs 1 000 *B* claims to set off a sum of Rs 2 700 and claims judgment for Rs 1 700 after giving *A* credit for Rs 1 000 admitted by *B* to be due to *A* The Small Cause Court has no jurisdiction to try the claim as to set off the value of the *amount claimed* as *set off* being above Rs 2 000 (*g*)

A plea of payment is distinct from a plea of set off *A* sues *B* to recover Rs 1 500 in a Court of which the pecuniary jurisdiction is limited to Rs 2 000 *B* alleges that he has paid Rs 1 000 to *A* on account and admits his liability for the balance of Rs 500 but he claims a set off of Rs 1 700 being the amount due on a promissory note passed to him by *A* and asks for a decree for Rs 1 200 The amount claimed to be set off is not Rs 1 000 *plus* Rs 1 700=Rs 2 700 but Rs 1 700 only and it is therefore within the jurisdiction of the Court (*h*)

Not only the amount but also the nature of the set off must be within the cognizance of the Court in which the suit is brought Hence a Court cannot entertain a claim to a set off unless such claim if made the subject of a suit would fall within its jurisdiction (*i*)

Same character — Ills (a) and (b) are cases in which the parties do *not* fill the same character (*j*)

A suit is brought by a Hindu son as the heir and representative of his father to recover from *B* a debt due by *B* to the father *B* claims to set off a debt due to him by *A*'s father *B* may do so for both the parties fill the same character as they fill in the plaintiff's suit (*k*) Similarly in a suit by *A* against *B* for an account for goods supplied by *A* to *B* *B* may claim a set off of the amount due to him from *A* in respect of wages as *A*'s gumasta (*l*)

Court fee — A written statement containing a claim of set off must be regarded as a plaint in regard to such set off and must be stamped accordingly (*m*)

(*e*) *Tilak Chandra* v *Jasoda Kumar* (1906) 11 C W N 215

(*f*) *New Fleming Co* v *Kessowji* (188) 19 Bom 373 403-404 [where set-off was claimed]

(*g*) *L jendra* v *Budge Budge Jute Mill Co* (1893) 20 Cal 5 7 *Abraham & Co* v *Ebrahim* (19 4) 2 Rang 46 84 I C 971 (25) A R 6

(*h*) *Hoe Moe* v *Seed t* (19 4) 2 Rang 349 84 I C 9 6 (25) A R 2

(*i*) *Beni Madho* v *G ja* (1893) 15 All 404

(*j*) See also *Abul Hasan* v *Zohra* (1883) 5 All 299 *Lakshuman* v *Vath e* (1 31) 15 Bom 186 *Madharrao* v *Rama* (1915) 39 Bom 131 2 I C 3 0

(*k*) *Chennappa* v *Ragh nath* (18) 15 Mad 2

(*l*) *P jhar Ira* v *Jalgurad* (1917) 41 Bom 163 39 I C 17

(*m*) (18) 15 Mad 29 *supra*

Set off in winding up proceedings—Though a director has no right to set off a debt due to him from the company against a claim made against him by the liquidator under s 214 of the Indian Companies Act 188_ [Ind Cos Act 1913 s 23_] which provides a *summary* remedy (*n*) he is entitled to set off the amount due to him if a regular *suit* is brought against him by the company in respect of that claim (*o*) In a suit by a liquidator against a debtor of the company the debtor is entitled to set off the amount of a fixed deposit made by him with the company provided the deposit had matured at the date of the suit though it had not matured at the date of the order for winding up the company (*p*) but he cannot set off a deposit in the name of a firm of which he is a partner (*q*)

Set off in insolvency—See Presidency Towns Insolvency Act 1909 s 47 (*r*) and Provincial Insolvency Act 1907 s 30 now Act 5 of 19_0 s 45

Solicitor s lien for costs—Before the year 1832 the Courts in England had a discretionary power as regards set off and a discretion as to the terms upon which they would allow it (*s*) This discretion was taken away under the General Rules of 1832 and the General Rules of 18_3 Rule 93 of the General Rules of 1832 was in these words No set off of damages or costs between parties shall be allowed to the prejudice of the attorney s lien for costs in the particular suit against which the set off is sought provided nevertheless that interlocutory co ts in the same suit awarded to the adverse party may be deducted This rule was reproduced in identical terms in 18_3 That state of things continued until the Judicature Act 1873 came into force O 65 r 14 made under that Act was directly contrary to the previous rule The previous rule allowed no set off O 65 r 14 says that a set off may be allowed. The result is that in England the Courts under O 6_ r 14 exercise now in matters of set off the discretion which was taken away by the General Rules of 1832 (*t*)

Sec 111 of the Code of 1877 provided that the Court may pronounce a final judgment in the same suit both on the original and on the cross claim but it *shall not affect the lien* upon the amount decreed of any pleader in respect of the costs payable to him under the decree This provision was reproduced in sec 111 of the Code of 1882 and it is reproduced in the present rule also It is clear from the language of this rule that the Courts of this country have no discretion in the matter of a solicitor s lien in cases falling within this rule

A solicitor has at common law a lien for his costs over property recovered or preserved or the proceeds of any judgments obtained for the client by his exertions (*u*) The lien attaches to property of every description such as for instance money payable to the client under a judgment including costs ordered to be paid to the client or the proceeds of an execution in the hands of a Sheriff money paid into Court whether as security for costs or by way of defence or otherwise and money received by way of compromise (*v*) The lien does not extend to general costs for all business done by a solicitor for his client but only to costs of the suit in which the property has been acquired or preserved by his exertions (*w*) Where there are assets of a partnership in the hands

(*n*) *Ex parte Pelly* (188) 1 Ch D 49 50 507 *Flitcroft s case* (188) 1 Ch D 5_9 535 *C mge S pply Association in r* (1884) 7 Ch D 3

(*o*) *Ahmedabad Advance Spg and Wg Co* v *Lakshmishankar* (1000) 30 Bom 1 3 194

(*p*) *Mehr Chand* v *Amritsa Bank* (1915) Punj Rec no 63 p 75 8 I C 9 5

(*q*) *Alliance Bank* v *Moh n Lal* (19) 8 Lah 10 101 I C 6 ( ) A L _8

(*r*) See *Muller* v *Nat on l Ba k f India* (189_) 19 Cal 146

(*s*) *Puddephatt* v *Leith* (No) (1916) 2 Ch 168 1 8

(*t*) *Reid* v *Cupper* (1915) _ K B 14 pp 149 150

(*u*) *Ex parte Morrison* (1860) L R 4 Q B 153 156 *Bozon* v *Bolla d* (1839) 4 My & C I 4 *Rhod s* v *Sudgen* (1886) 34 Ch D 155

(*v*) *Tyabji Dayabhai & Co* v *Jetha Devji & Co* (19 7) 51 Bom 8_ 105 I C _3 ( ) A B 54 Halsbury vol 6 s 1343 p 8 1

(*w*) *Sadanand* v *Parashram* (192) 5 Bom 3_6 108 I C 0_ (2_) A B 108 *Narayanaswami* v *Chelapati* (1910) 33 Mad _5 4 I. C. 538.

6 of a receiver appointed in a partnership suit the solicitors engaged in that suit are entitled to a lien on those assets in priority to the creditors of the partnership But a solicitor's lien does not prevail against the claim of a mortgagee who advances money to the client to enable him to pay off prior encumbrances on the property in suit (x)

It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law prevailing in English Courts before the passing of 23 and 24 Vict ch 127 by which that lien was very much extended (y) At common law a solicitor had no lien on *realty* Lien on realty was first conferred by the above statute The High Court of Calcutta has held that in India an attorney is entitled to a lien on immovable property recovered for his client in the suit ( ) The High Court of Bombay has held otherwise (a) and this view seems to be correct

A solicitor's lien for his costs extends to all the moneys of his client *which are lying in Court* It makes no difference that the moneys are brought into Court by attachment at the instance of a decree holder The lien however does not exist when moneys are once distributed to the creditors of the client So long as the moneys are in Court the Court has power to direct payment to the solicitor of his costs out of the moneys (b) A obtains a decree against *B* C who has obtained a decree against *A* attaches the amount of the decree obtained by *A* against *B* in *B*'s hands A's attorney is entitled to a lien for his costs on the sum so attached but the only order that can be made in such a case is an order to the defendant *not to pay* the sum attached to any one without notice to the attorney (c)

Parties to an action may *compromise* without the intervention of solicitor but there must be no intention to deprive the solicitor of his charges and the Courts will exercise its equitable interference to enable a solicitor to proceed in the action for his costs though no notice of his lien has been given in cases where it is made out that there is an intention to cheat the solicitor but unless there has been notice or collusion the solicitor if the client has compromised can look only to his client for his costs (d)

Although the High Courts possess a summary jurisdiction to enforce a solicitor's lien upon the fruits of his exertion it will not do so when the circumstances would make it unfair to any of the parties or compel the Courts to go into complicated questions of fact especially when charges of fraud or collusion are made or where a solicitor has deliberately taken additional fresh security for the purpose of securing his costs and has not relied on his lien under the summary jurisdiction In such a case the Court will refer the solicitor to a *regular suit* (e)

On an application by a solicitor made in a suit in which costs have been awarded to his client against the opposite party the Court has jurisdiction to enforce in a proper case the solicitor's lien by making *a direct order* for payment to the solicitor by the opposite party of such costs Thus a case where the original client was dead and it appeared that his legal representatives were not men of substance and that they were unable to pay was held by the High Court of Calcutta to be a proper one for the Court in the exercise of its discretion to make a direct order for payment of costs to the solicitors by the opposite party (f)

(x) S ... d v I ... ash am (19 8) ... Bom 336 108 I C ... (8) A I R ... 108

(y) *Deek bai v Jaffer* (18 6) 10 Bom 48

( ) *K m ... Krish a v H ... Naru* (1916) 43 Cal 6 6 33 I C 0

( ) *ad ... and v P ... ashram* (1928) 5 Bom 336 108 I C 0 (8) A I R 108

(b) *Ted v Hagl & C* (19) 49 Bom 50 88 I C 81 ( ) A I R 5 (see also S b m ... v ... v *Harry* (188) 14 Cal 3 4

( ) *Narb ... m v Heeral ...* (18 3) 10 I ng L R 441

(d) *I m ... th v M ... e* (18 1) 1 ng L R 110 ... *II ... I ... (1906) 30 I m ... Khett r ... K I* (1 98) ... Cal 8 ... (1 1) 50 L J Q B 6 ... *Th ... H p* (1883) 8 I D 144 *Col v E ...* (18) ... Q B 1 0

(e) *In re Tyn ...* I C (190) 7 Bom L R 54 5 6 *I m ... yal v ...* (1900) ... Cal ... *Mahom ... mal Z ... bil ... v Mahom ... md* (18) ... Cal 8

(f) *H ... na ... Goot ram* (1919) 46 Cal 10 0 54 I C 631

By a decree passed in a suit for redemption of a mortgage brought by A against B A is directed to pay the mortgage debt to B but B is directed to pay to A the costs of the suit The High Court of Calcutta held that the suit being one for redemption B's attorney is not entitled to a lien for his costs on the whole of the mortgage money but to the mortgage money *less* the costs payable by B to A which costs A is entitled to set off against the mortgage money (g) See O 20 r 19 and O 21 r 19

It has been held by the High Court of Calcutta that where A obtains a decree against B for Rs 1451 and B subsequently obtains a decree against A for Rs 1000 A is entitled to have satisfaction of B's decree entered notwithstanding the lien of B's attorney for his costs Reliance was placed in the judgment on the fact that B's attorney had not stated that there was no chance of recovering his costs from his client [B] and that the decree which B had against A was the only property out of which his claim could be satisfied (h) There is no reference in the judgment to the provisions of O 8 r 6 (2)

Appeal —Unless the whole suit is disposed of an appeal does not lie from an order disposing of a defendant's claim to set off made under this rule even though the question as to that claim may have been tried as a preliminary issue Such an order is not a preliminary decree See O 20 r 19 which shows that there should be only one decree drawn up in a suit in which a set off is claimed (i)

Res judicata —A defendant is under no obligation to claim a set off His omission therefore to do so does not preclude him from bringing a separate suit in respect thereof (j)

Counterclaim —Though the Code does not provide for counterclaim there is nothing to prevent a Court from treating the counterclaim as a plaint in a cross suit and hearing the two suits together provided that the requisite court fee on the counterclaim has been paid (k)

Defence or set off founded on separate grounds

7 [*New* R S C, O 20 r 7] Where the defendant relies upon several distinct grounds of defence or set off founded upon separate and distinct facts, they shall be stated as far as may be, separately and distinctly

See notes to rule 1 above Compare O 7 r 8

New ground of defence

8 [*New*] Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set off may be raised by the defendant or plaintiff, as the case may be, in his written statement

See r 9 below

Subsequent pleadings

9 [S 112] No pleading subsequent to the written statement of a defendant other than by way of defence to a set off shall be presented except by the leave of the Court and upon such

(g) *Troylukhnath v J... ...th* (18 9) 4 Cal 4
(h) *Jhupendra Nath v Sassoon & Co* (1916) 43 Cal 93 34 I C 30
(i) *Sheo Parshad v Indore-Malwa United Mill Ltd* (191) Pun Rec no 6 p 0 3J I C 508
(j) *Amritsar National Banking Co Ltd v Fazl Ilahi* (1919) Punj Rec no 4 p 1 I 5 I C 851
(k) *Saya Lya v Maung Kyaw ...n* (19..) .. Rang 6 & I C I (..) ... 346

terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same

Additional written statement—The additional written statement should not set up a totally new case or state facts at direct variance with the original written statement so as completely to change the issue in the case (l) See O 6 r 7 and notes

Procedure when party fails to present written statement called for by Court

10 [S 113] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit

Decree against defendant where no written statement filed—This rule enables the Court to pronounce judgment against the defendant on failure to file a written statement such as is required by r 9 Failure to file a written statement in other cases does not come within this rule (m) and the Court cannot in those cases pass a decree against the defendant unless the plaintiff proves his case (n) In a Bombay case the defendant was served with a summons which required him to file his written statement within four weeks from the date of service The date fixed for the hearing was 27th November 1907 The defendant failed to file his written statement within four weeks. It was held that the plaintiff was not entitled to apply for and obtain an ex parte decree before the returnable date of the summons namely 27th November 1907 (o)

Appeal—An appeal lies from an order under this rule pronouncing judgment against a party [O 43 r 1 cl. (b)]

ORDER IX

Appearance of Parties and Consequence of Non appearance

Parties to appear on day fixed in summons for defendant to appear and answer

1 [S 96] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs

2 [S 97] Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (*if any*) chargeable for such service, the Court may make an order that the suit be dismissed

(l) *Douglas v Collector of Benares* (1851) 5 M I A 1 290

(m) *Moopan v Karupanan* (1928) 6 Rang. 466 11 I C. 433 ('28) A R '61

(n) *Ross & Co v Sorren* (1916) 43 Cal 1001 1009 1010 34 I C 233 Nar d Singh v K g (19 8) 10 Lah L. J 339 ('28) A L. 69

(o) *Dhirajlal v H rmusj* (1908) 3 Bom 531 See also *J ya til l v Nagnath* (1913) 15 Bom L. R. 1 6 19 I C. 9

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent

Defendant —The expression defendant in this rule does not include the guardian ad litem of a minor defendant (*p*)

Appeal —The order or dismissal under this rule is a form of dismissal for default It is not a decree [s 2 (2)] and no appeal lies from it The plaintiff s remedy is under r 4 of this Order (*q*)

Revision —The Court has no power under this rule to dismiss the suit in a case where the plaintiff has paid the requisite Court fee for the service of the summons but the office does not issue the summons in time If the Court dismisses the suit in such a case the High Court has power to set aside the order in revision (*r*)

3 [S 98] Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed

Where neither party appears suit to be dismissed

Where neither party appears —A sues *B* and *C* *A* and *C* do not appear when the suit is called on for hearing but *B* appears The Court makes an order dismissing the suit As between *A* and *B* the order is one under r 8 so as to attract the applicability of r 9 But as between *A* and *C* the order is one under the present rule so that r 4 applies and not r 9 (*s*)

If the plaintiff appears on the date fixed for the hearing but the defendant does not appear and the suit is dismissed owing to failure on the part of the plaintiff to adduce evidence in support of his claim the dismissal is on the merits and not under this rule (*t*)

This rule does not apply after a preliminary decree has been passed and a suit cannot be dismissed for default of appearance on an application for a final mortgage decree (*u*)

May make an order that the suit be dismissed —These words have been substituted for the words the suit shall be dismissed [Code of 1882 s 98] to make it clear that the dismissal under this rule is not a decree but an order See s 2 (2)

4 [S 99] Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the Court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non appearance, as the case may be the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit

Plaintiff may bring fresh suit or Court may restore suit to file

(*p*) *Gobind Ram* v *M ha nm d* (191) Punj Rec no 35 p 115 11 I C 31

(*q*) *La hmi Narain* v *Darbari Lal* (1916) 38 All 8 7 33 I C 37 *Lucky Churn* v *Bud rr u nissa* (1883) 9 Cal 6 7

( ) *Kalla Ram* v *I J* (192) 4 Lah L J 1 6 1 C 945 (") A L 63

(*s*) *Dam* v *Vakrya* (19 0) 44 Bom "6 6 I C 455

(*t*) *H ma S ngh* v *Jhum Singh* (1918) 40 All 590 46 I C 390

(*u*) *Chandra* v *Ami* (19") 49 All 9" 101 I C 6 6, ( ) A A 439 Cf *Lachm Nara n* v *Balmukund* (19 4) 51 I A 3 1 4 Pat. 61 81 I C 74 (" 4) A Pt 195

Sufficient excuse for plaintiff s non appearance—A *bona fide* mistake which is not unreasonable is a sufficient excuse within the meaning of this rule (v)

Whether this rule applies to proceedings in execution—See notes to r 9 below under the same head

5 [S 99A] (1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant unless the plaintiff has within the said period satisfied the Court that—

Dismissal of suit where plaintiff after summons returned unserved fails for three months to apply for fresh summons

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time

in which case the Court may extend the time for making such application for such period as it thinks fit

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit

Amendment of sub rule (1)—Sub rule (1) was substituted for the original sub rule by Act 24 of 1920 the material changes being the substitution of three months for one year shall make an order for may make an order and the addition of cl (c)

Period of three months from date of return—The period of three months is to be calculated *from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officer* The words italicized were first added by the Code of 1908 In the absence of these words in the corresponding section of the Code of 1882 the question arose whether the period was to be calculated from the date of the return made by the *serving officer* or from the date of return made by the *officer whose duty it is to certify to the Court returns made by the serving officer* It was held that the period was to be calculated from the date of return made by the latter officer and not that made by the serving officer (w) The words italicized above were added to give effect to that decision The procedure is this after the writ of summons is issued it is delivered to an officer of the Court for service on the defendant The officer then delivers the summons to the serving officer whose duty it is to serve summonses After effecting service the serving officer has to endorse on the original summons a return stating

(v) H... v Victoria Finance and Bullion Association (1866) 3 B H C O C 60

(w) Pa... v Abdul (1889) 13 Bom 500

the manner in which the summons was served If for any reason the summons cannot be served upon the defendant the serving officer has to make a return to that effect This return is *countersigned* by the officer to whom the summons was delivered by the Court and the summons is then returned by him to the Court It is from the date of the *countersignature* that the period of three months is to be calculated and not from the date of the return made by the serving officer

Make an order that the suit be dismissed —These words were substituted in the Code of 1908 for the words may dismiss the suit which occurred in s 99 A of the Code of 1882 in order to make it clear that a dismissal under this rule is not a decree but an order See s 2 (2)

Appeals —This rule does not apply to appeals (x)

6 [S 100] (1) Where the plaintiff appears and defendant does not appear when the suit is called on for hearing, then—

Procedure when only plaintiff appears

(a) If it is proved that the summons was duly served the Court may proceed ex parte,

When summons duly served

(b) if it is not proved that the summons was duly served the Court shall direct a second summons to be issued and served on the defendant,

When summons not duly served

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant

When summons served but not in due time

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement

Ex parte decree —If the defendant does not appear and it is proved that the summons was duly served upon him the Court may proceed ex parte If the plaintiff makes out a prima facie case the Court may pass a decree for the plaintiff If the plaintiff fails to make out a prima facie case the Court may dismiss the plaintiff's suit Every Judge in dealing with an ex parte case should take good care to see that the plaintiff's case is at least prima facie proved The mere absence of the defendant does not of itself justify the presumption that the plaintiff's case is true (y) The Court has no jurisdiction to pass an ex parte decree without any evidence being given by or on behalf of the plaintiff (z) and the provisions of O 8 r 10 only apply when the

(x) *Jabanna* v *I ... rara* (19 6) 50 Bom 815 100 I C 14 (...) A I R 68
(y) *Amrit Nath* v *... Dh... put* (18 1) 15 W R 503 *... dyendra Nath* v *... endra* (19 1) 39 Cal L J 9, 81 I C 86 (...4) A I C 806 *M... matha* v *Jasada Lal* (19..3) ... Cal W N 300 I C 511 (...4) A I C 64
(z) *I... & C...* v *Sen ...* (1916) 43 Cal 10... I 34 I C ...3

Sufficient excuse for plaintiff's non appearance — A *bona fide* mistake which is not unreasonable is a sufficient excuse within the meaning of this rule (t)

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(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process or

(c) there is any other sufficient cause for extending the time,

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(t) *Hardaint v Victoria Finance and B H Association* (1866) 3 B H C O C 60 | (w) *Pa olam v Abd l* (1889) 13 Bom 500

the manner in which the summons was served If for any reason the summons cannot be served upon the defendant the serving officer has to make a return to that effect This return is *countersigned* by the officer to whom the summons was delivered by the Court and the summons is then returned by him to the Court It is from the date of the *countersignature* that the period of three months is to be calculated and not from the date of the return made by the serving officer

Make an order that the suit be dismissed —These words were substituted in the Code of 1908 for the words may dismiss the suit which occurred in s 99 A of the Code of 1882 in order to make it clear that a dismissal under this rule is not a decree but an order See s 2 (2)

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Procedure when only plaintiff appears

(a) If it is proved that the summons was duly served, the Court may proceed ex parte

When summons duly served

(b) if it is not proved that the summons was duly served the Court shall direct a second summons to be issued and served on the defendant,

When summons not duly served

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant

When summons served but not in due time

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time the Court shall order the plaintiff to pay the costs occasioned by the postponement

Ex parte decree —If the defendant does not appear and it is proved that the summons was duly served upon him the Court may proceed ex parte If the plaintiff makes out a prima facie case the Court may pass a decree for the plaintiff If the plaintiff fails to make out a prima facie case the Court may dismiss the plaintiff s suit Every Judge in dealing with an ex parte case should take good care to see that the plaintiff s case is at least prima facie proved The mere absence of the defendant does not of itself justify the presumption that the plaintiff s case is true (*y*) The Court has no jurisdiction to pass an ex parte decree without any evidence being given by or on behalf of the plaintiff ( ) and the provisions of O 8 r 10 only apply when the

(*x*) *B ha na* v *Jarara* (19 6) 50 Bom 815 100 I C 14 ( ) A B 68

(*y*) *Im rt* v *Uk v I y Dh put* (18 1) 15 W I 503 *Hyendra Nath* v *N endra* (19 1) 39 Cal L J 9 81 I C 867 ( ) A C 806 *M matha* v *Josada Lal* (1923) 28 Cal W N 300 7 I C 511 ( ) A C 647

( ) *I ust d Co* v *Sen en* (1916) 43 Cal 1001 34 I C

Court has under O 9 r 9 required the defendant to file a written statement (a) The Court has no power to pass an ex parte decree *before* the returnable date mentioned in the summons (b)

Ex parte decree for amount in excess of sum actually due—If the plaintiff obtains an ex parte decree for a sum in excess of that which is due to him the defendant is entitled ex d bito justitae to have such decree set aside (c) except where the error was due to an accidental slip within the meaning of s 152 in which case the Court may on the plaintiff s application allow the decree to be amended by reducing it to the proper amount (d)

Subsequent appearance of defendant pending suit—When a defendant files a written statement but does not appear on the day fixed for the hearing and it is in consequence declared ex parte he should not be precluded from appearing at a later stage of the suit while it is still pending he should be allowed to come in at the stage at which the suit is (e)

Appears—As to the meaning of the word appears see note to r 9 below Appearance

Remedies open to a defendant in the case of an ex parte decree—See note to r 13 below Remedies in case of ex parte decree

7 [S 101] Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non appearance

This rule was applied in the undermentioned case (f)

8 [S 102] Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing the Court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder

Procedure where defendant only appears

Where defendant only appears—If neither party appears on the day fixed for the hearing of the suit the procedure laid down in r 3 is to be followed. If the plaintiff appears and the defendant does not appear the procedure laid down in r 6 is to be followed If the defendant appears and the plaintiff does not appear the procedure laid down in the present rule is to be followed. All that a defendant is entitled to under this rule is to have the plaintiff s suit dismissed He is not entitled to call any evidence

(a) *Moopa* *Karupa a* (1928) 6 Rang 466 [where the excess was 8s]
11 I C 438 (28) A R 61
(b) *Dh jlal* v *H rm*) (1908) 3 Bom 31
(c) *H jh s* *Just* [1891] 1 Q B 66 *M v Jenk* [1913] K B 41
(d) *Armit g* v *Ja son* [1908] K B 410
(e) *J all b rama* v *N I* (1928) 51 Mad 697 (7) A M 119
(f) *Venkat subbiah* v *Lak hm a anmham* (1923) 49 Mad L J 3 91 I C 515 ('25) A M 1 4

even though it be to disprove charges of fraud or the like that may have been made against him in the plaint (*g*)

If the plaintiff does not appear—See notes to r 9 below Appearance This rule does not apply to the case of non appearance by reason of death Where a sole plaintiff dies before the hearing of a suit and the suit is dismissed for non appearance under this rule the fact of his death not being known to the Court there s inherent jurisdiction in the Court under s 151 to set aside the dismissal and thus rectify the mistake which has been inadvertently made It is then for the legal representative of the plaintiff to apply to be brought on the record under O 22 r 3 (*h*) Similarly the rule does not apply if the plaintiff has been adjudged insolvent before the hearing for there is no person on the record who has any right or duty to appear and the Court should not dismiss the suit but should under O 22 r 8 fix a time within which the Official Assignee may decide to continue the suit (*i*) Where on the day fixed for hearing the plaintiff does not appear and the defendant appears but applies for time and the Court dismisses the suit for default the order falls under this rule and not under r 4 above (*j*)

More plaintiffs than one—This rule provides for the case where a single plaintiff or *all* the plaintiffs if there are more than one do not appear Rule 10 provides for a case where there are more plaintiffs than one and *one or more* of them appear and others do not appear (*k*)

More defendants than one—If there are several defendants of whom one appears the suit will be dismissed against the defendant who appears under O 9 r 8 and the plaintiff will under O 9 r 9 be precluded from bringing a fresh suit against him But as against the defendants who have not appeared the dismissal will be under O 9 r 3 and the plaintiff will under O 9 r 4 be at liberty to bring a fresh suit against them (*l*)

Remedies in case of dismissal under this rule—See notes to r 9 below Remedies in case of dismissal under rule 8

The Court shall make an order that the suit be dismissed—These words have been substituted for the words the Court shall dismiss the suit [Code of 1882 s. 102] An order of dismissal under this rule for default of plaintiff s appearance is not a decree and is not therefore appealable See s 2 (2) (b) and notes Order of dismissal for default on p 11 above

9 [S 103] (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

Decree against plaintiff by default bars fresh suit

(*g*) *Kesri Chand* v *National Jute Mills C* (1913) 40 Cal 119 17 I C 8

(*h*) *Debi B khsh* v *Habib Shah* (1913) 35 All 331 40 I A 151 19 I C 6

(*i*) *Kissen* v *Sukl l* (19 7) 53 Cal 844 1 I C 731 (7) A C 76

(*j*) *B j l Lal* v *Maharajah raj* (1) P 333 109 I C 64 ( ) A P

(*k*) *Kulendra* v *Lal Kishori* (1) Cal 7 6 I C 11 ( ) A C 1 6

(*l*) *Mahmud* v *Farkh* (1926) 48 All 97 I C 2 (6) A A 102

9 (2) No order shall be made under this rule unless notice of the application has been served on the opposite party

Remedies in case of dismissal under rule 8—A plaintiff whose suit is dismissed under r 8 for default of appearance on the day fixed for the hearing cannot appeal from the order of dismissal as such an order is not a decree [s 2 cl. (2) sub cl (b)] but he may—

(1) apply for a review of the order under O 47 r 1 (m) though the High Court of Bombay (n) has held that since the decision of the Privy Council in *Chajju Ram* v *Neki* (o) a plaintiff whose suit has been dismissed under r 8 has no remedy by way of review Or he may

(2) apply under this rule for an order to set aside the order of dismissal

He is entitled to apply for a review without a previous application to set aside the dismissal under this rule (p) The period of limitation for an application for a review of the order is 10 days from the date of the order in the case of an order made by the Provincial Court of Small Causes 20 days from the date of the order in the case of an order made by any of the chartered High Courts in the exercise of its original jurisdiction and 90 days from the date of the order in other cases (q) The period of limitation for an application under this section is 30 days from the date of the dismissal of the suit (r)

The first remedy is open to any plaintiff whose suit has been dismissed *whatever the ground of dismissal may be* whether it is dismissed for default of appearance at the hearing or on the merits after a hearing But the second remedy that is the remedy provided by this rule can only be availed of by a plaintiff who *does not appear* at the hearing and the suit is dismissed for default of appearance under r 8 above The remedy given by this rule is not open to a plaintiff whose suit is dismissed *on any ground other than default of appearance* Hence if a plaintiff's suit is dismissed on his failure to establish his case by reason of *non attendance of his witnesses* (s) or for *want of evidence* (t) the dismissal is not one under r 8 and he cannot therefore avail himself of the remedy provided by this rule

There is a conflict of decisions whether if a plaintiff does not apply under this rule within the 30 days allowed by law he is entitled to apply for a review under O 47 r 1 after the expiration of that period The Patna High Court has held (u) following an earlier decision of the Calcutta High Court (v) that he is not on the other hand the Calcutta High Court has held in a latter case that he is (w) The ground of the Patna decision is that to allow a review in such a case would be an evasion of the rule of limitation See note below *limitation*

Appearance —A plaintiff or a defendant will be deemed to have appeared on the day fixed for the hearing of the suit if he appears—

(1) in person or

(2) by a pleader either himself duly instructed and able to answer all material questions relating to the suit or accompanied by some person able to answer such questions [O 5 r 1 sub r (2)]

(m) *I j Na a n Ana)* (1899) 6 Cal 593
( ) *M h I o v Lak hm N ven* (19) 49 Bom 830 90 I C 610 (5) A B 1
( ) (19) 49 I.A 144 3 Lah 1 7 79 I C 945 ( ) A A 730
(p) (1 99) 6 C 1 593
(q) Limitation Act 1908 Sch I arts 161 16 and 1 3
( ) Limitation Act 1908 Sch I art 163 *H ya v M na* (1904) 31 Cal 1 0
( ) *M h m d v H B k h* (1973) 5 All H C 74
(t) *Kart k v Srull* (18 6) 1 Cal 563
(u) *Dei I p S gh v Gopal Singh* (1916) 1 Pat L J 54 38 I C 3
( ) *K da v N ba hrip* (189) Cal W N 315
(w) *Lal Chet N n v Rampal* (191) 16 Cal W N 613 15 I C 554 f ll wing *Lal N n v Ana ya* (1899) 6 Cal 95

First as regards Appearance of a party in person—The mere presence of a party in Court at the hearing is sufficient to constitute appearance within the meaning of this Order. It does not matter for what purpose he appears or what action he takes on the appearance. A plaintiff appearing and applying for an *adjournment* on the ground that his witnesses are not present will be deemed to have appeared. If the application is refused and the suit is dismissed owing to his inability to establish his case in the absence of witnesses, the dismissal is not one under r 8, for the plaintiff *did appear*, and he cannot therefore avail himself of the provisions of this rule (x). Similarly a defendant appearing and applying for an *adjournment* on the ground that he had no time to prepare his case will be deemed to have appeared. If the application is refused and a decree is passed against him *owing to his unpreparedness to defend the suit*, the decree is not *ex parte* under r 6, for he *did appear*, and he cannot therefore avail himself of the provisions of r 13 below (y).

Next as regards Appearance of a party by a pleader—Different considerations arise when a party is represented by a pleader. Appearance by a pleader within the meaning of this Order does not like appearance by a party in person mean mere presence in Court; it means appearance by a pleader duly instructed and able to answer all material questions relating to the suit, or by a pleader accompanied by some person able to answer all such questions [O 5 r 1]. Hence a party cannot be said to appear by a pleader if the pleader appears at the hearing and states that though he has filed his vakalatnama he has not received any instructions from his client with regard to the case and that he is therefore unable to go on with the suit ( ). Similarly a party cannot be said to appear by a pleader if the pleader has no instructions other than to apply for an adjournment and on the adjournment being refused withdraws from the suit stating that he has no further instructions to go on with the suit (a). In neither case can it be said that the party appeared by a pleader *duly instructed and able to answer all material questions relating to the suit*. But what if the party himself is *also* present in person in Court at the time? According to the Madras (b) and Patna (c) High Courts it makes no difference that the party himself is present in Court, for mere physical appearance does not constitute appearance. According to the Bombay High Court he must be deemed to have appeared, the reason given being that if the pleader is not duly instructed to answer material questions the Court may under O 10 r 1 ask questions relating to the suit to the party himself and may examine his witnesses (d).

A pleader appears at the hearing on behalf of a plaintiff and applies for an adjournment on the ground that he had no time to prepare himself with the case or on the ground that the papers being left with his senior he could not proceed with the case. The application is refused and the pleader being unable to go on with the case the suit is dismissed. Can it be said under these circumstances that the plaintiff *appeared*

( ) *S onderl l v G rpr sad* (1899) 23 Bo 414
(y) *Hoojendra v Nobt* (1869) 17 W R 3 0
(z) *Sh ikar v I dha* (1898) 0 All 19; *Aruna hala v I atha* (19 4) 47 Mad L J 514, 8 I C 107, (1) A M 84; *Fulam v Tara h* (19) 0 All L J 1 3, 65 I C 7, (2) A A 68; *Ja ela a v I gh r* (19 3) 4 All 618, 75 I C 387, (3) A A 551; *Motilal v Na dram* (19 3) 25 Bom L R 1 8, I C 1 4, (4) A B 139
(a) *Soonderl l v Goorp as I* (1899) 3 Bom 414; *Lalta v N nd Kisho* (1900) All 66; *Krish a D v I am Ugra* (19 3) 1 All L J 00, 74 I C 815, (3) A A 549; *Cocl v H u N Coal Co* (1904) 8 C W N 8 1; *N t sh Cha dra v Ahara Pras d* (1907) 34 Cal 403; *Gopala I ow v M na ay* (1907) 30 Mad 74; *I man ja v Pu ga ami* (1908) 18 M d L J 51; *Man I m v Mahudum* (19 4) 47 M L 819, 8 I C 10 ( ) A M 1 (F B); *Ram Ki hun v Jat dhari* (1918) 3 Pat L J 431, 46 I C 488; *Maung Pway v S y P* (19 7) 4 Ran 408, 99 I C 717, (7) A R 46; *Mylne v Ko* (1928) 6 Ran 3 3, (9) A R 191
(b) *G pala v Mana* (1907) 30 Mad 74; *Kaliappa v Kumarasami* (19 6) 51 Mad L J 0, 97 I C 517, ('26) A M 9 1
(c) *Lalji k v Lachmi Narain* (1918) 3 Pat L J 335, 47 I C ; *Shaikh Muhammad v Ch ha Mallo* (1919) 4 Pat L J 71, 5 I C 00; *M hant Damod r v I j Kuma* (19) 1 Pat 183, 69 I C 837, ( ) A I 48
(d) *Esmail v Haj Ja Mahomed* (1909) 33 Bom. 4, 3 I C 99

by a pleader? It has been held in the undermentioned cases that the plaintiff must be held to have appeared by a pleader and that the order of dismissal could not therefore be said to be one made under r 8 so as to entitle the plaintiff to apply under this rule (*e*)

Suit. —An application under s 158 of the Bengal Tenancy Act 1885 is not a suit within the meaning of r 8 or this rule (*f*)

Fresh suit in respect of the same cause of action—If the plaintiff fails to appear and the suit is in consequence dismissed under r 8 the dismissal does not operate as res judicata (*g*) In such a case however the plaintiff is precluded by *this* rule from bringing a fresh suit in respect of the same cause of action Thus if *A* sues *B* for damages for breach of a contract and the suit is dismissed for default of *A*'s appearance *A* cannot bring a fresh suit to recover damages for breach of the same contract *A*'s only remedy in such a case is to apply for a review or to apply under this rule for an order to set aside the dismissal But if the cause of action in the subsequent suit is *different* from that in the first suit the subsequent suit will not be barred under this rule Thus the dismissal for default of a suit by a reversioner against a Hindu widow for an injunction *to restrain her from making a gift* of immovable property inherited by her from her husband is no bar to a subsequent suit by the same plaintiff against the widow for a declaration that a *gift* of the property *made* by the widow after the first suit is inoperative (*h*) Similarly if *A* sues *B* for the *rent* of certain lands and the suit is dismissed for default of *A*'s appearance under r 8 the dismissal does not operate as a bar to a suit by *A* against *B* for enhanced rent (*i*) or for *possession of* the lands (*j*) For other cases in which it was held that the cause of action in the subsequent suit was not the same as in the first suit see cases cited in foot note (*k*)

If the right of redemption has not been extinguished the rule will not apply to a suit for redemption (*l*) The Privy Council case of *Shankar Baksh* v *Daya Shanker* (*m*) seems to have been decided on the English rule that the dismissal of an action for redemption operates as a foreclosure

This rule does not apply to a suit for partition The reason is that the right to enforce partition is a legal incident of a joint tenancy and as long as such tenancy subsists so long may any of the joint tenants sue for partition of the joint property (*n*)

The dismissal under r 8 of a suit filed by the Voluntary Liquidator against a shareholder for the recovery of money alleged to be due to the company is a bar to a subsequent application by the Official Liquidator to have the name of the defendant placed in the list of contributories in respect of the same claim (*o*)

This rule does not apply when an application for probate is dismissed for default (*p*) nor when an adjudication order is annulled under sec 43 (1) of the Provincial Insolvency Act 1920 for default of appearance of the insolvent on the day fixed for hearing his application for discharge (*q*)

(*e*) *I am ha I a* v *M Ihac* (189) 16 Bom 3 *Cl j* v *I u lan* (1899) 0 All 91 *I at n/are* v *I ell* (1903) 6 M d 67 See these cases discussed in *S tish Cha d a* v *Aha a I rasad* (1907) 34 Cal 404 411 414

(*f*) *J H Fay* v *Raja K lu a d* (1923) 2 Pat 19 4 I C 464 (3) A I 381

(*g*) *I idha I arshad* v *Lal Saheb* (1890) 1 I A 1 0 13 All 53

(*h*) *Cha d ka* v *I artab S gh* (1 88) 15 I A 156 16 Cal 9

(*i*) *Gopal Lal* v *T j M hammad* (19) Pat 8 103 I C 615 (7) A I 3

(*j*) *G* I v *Afzul* (1883) 9 Cal 4 6 *I ikrisha I gh* v (1923) 45 All 81 74 I C 991 (1923) A A 400 [first suit to eject defendant a tenant—and suit to eject him as licensee]

(*k*) *I a* (*pal Taj Mahomed* (1928) 7 Pat 8 103 I C 61 ( ) A I 3 5 *Ma ng Be T* v *Ma Th I Su* (19 7) 5 Rang 8 109 I C 809 (8) A R 3 [suit by Buddhist for his share of inheritance]

(*l*) *Anth r* v *G* (1928) 5 Bom 111 105 I C ( ) A B 67

(*m*) (1888) 15 Cal 4 15 I A 66

(*n*) *Bish h r Das* v *I m I rasa l* (1906) All 6 *Ma l Moh* v *Bisk ath Nath* (1906) 10 Cal W N 839 *Math* v *S ha Reld* (19 6) 49 Mad 939 97 I C 6 (6) A M 1019

(*o*) *I p I m* v *Fazal Din* (1920) 1 Lah 57 I C 2 1

(*p*) *S* v *J ynarayan* (19 6) 53 Cal 5 94 I C 3 (6) A C 1017

(*q*) I *gopal cha* v *Chi lal* (1926) 49 Mad 935 9 I C 06 (6) A M 91

Minor plaintiff—A fresh suit notwithstanding the provisions of this rule may be instituted in respect of the same cause of action where the first suit was brought by a next friend on behalf of a minor and was dismissed under r 8 for default of the next friend's appearance *owing to gross want of care and diligence on his part* (r) See notes to r 13 below Ex parte decree against minor defendant

Sufficient cause—What is sufficient cause is in each case a question of fact —

(1) A plaintiff left the Court house believing that a part heard case which preceded his case would occupy some time he returned in about half an hour and found that his suit had been called on and dismissed owing to his absence He then applied to set aside the order of dismissal *Held* refusing the application that the above circumstances did not amount to sufficient cause for non appearance *Manilal* v *Gulam Husain* (1889) 13 Bom 12

(2) Where it was the duty of an attorney's clerk to examine every evening the board for the next day and to inform his master what cases in which he was engaged as attorney were on the board for hearing and the clerk neglecting his duty did not inform the master and no one appearing for the plaintiff the suit was dismissed it was held that the absence was caused by a bona fide mistake and the suit was restored on payment by the attorney of the costs of the hearing *The Oriental Corporation* v *The Mercantile Corporation Ld* (1866) 2 B H C 267

(3) In two cases the High Court of Bombay said that the rule of practice to be observed in the subordinate Courts in the Bombay Presidency is that when a party arrives late before the Judge and finds that his suit has been dismissed before his arrival he is entitled to have his suit restored though there may be no sufficient cause for his late arrival on payment of such costs as may have been incurred by reason of his default by the defendant *Chhotalal* v *Ambalal* (1925) 27 Bom L R 685 89 I C 225 ('25) A B 423 *Sorabji* v *Pamjilal* (1924) 26 Bom L R 321 80 I C 237 ('24) A B 39 In a later case it was held that there was no such hard and fast rule and that the Court had a discretion in each case to deal with the matter *Currimbhoy* v *Moos* (1929) 31 Bom L R 468 117 I C 593 ('29) A B 250

(4) A litigant should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part *Arunachalam* v *Subbaramiah* (1923) 46 Mad 60 63 68 I C 971 ('23) A M 63 [delay caused by inevitable accident] As to negligence of pleader see the undermentioned case (s)

Inherent power to restore suit dismissed for default—It has been held by the High Courts of Allahabad (t) Bombay (u) and Rangoon (v) that this rule does not take away the inherent power of a Court to restore a suit dismissed for default if there be a just and reasonable cause for restoring it even if no sufficient cause is shown within the meaning of this rule for the plaintiff's non appearance Thus where a case was called on at 12 o'clock and the plaintiff's pleader being under the impression that the case would be taken up at 2 o'clock was engaged in other cases in other Courts and the plaintiff himself was waiting in his pleader's room and the suit was dismissed for default of appearance it was held that though there was no sufficient cause for non appearance within the meaning of this rule the case was one in which the Court should in the exercise of its inherent powers restore the suit to the file (w) Similarly where a plaintiff believing that his case which was fourteenth on the list would not be reached immediately did not attend the Court but went to bring his principal

(r) *Lalla Sheo* v *P[illegible]* (1895) Cal 8 *C[illegible]* v *Lalkarah* (18[illegible]) 19 Bom 571 5 *H[illegible]* v *J[illegible]* (1900) 4 [illegible] 54 55
(s) *Abdul [illegible]* v *The Punjab National Bank Ltd* (1929) 10 Lah 5 0 114 I C 6 ('[illegible]) A L 16
(t) *Lalta Prasad* v *Ram Karan* (191[illegible]) 34 All 4 6, 14 I C 18
(u) *B[illegible]* v *[illegible]* (1919) 1 Bom L R 9 3 I C [illegible]
(v) *M[illegible]* v *M[illegible]* *Pyu* (1926) 4 Rang 18 93 I C 5 1 ('[illegible]) A R 109
(w) (191[illegible]) 34 All 4 8 14 I C 1 *supra* But see *Kali* v *[illegible]* *Laksh* (1921) 19 All L J 90 64 I C 5[illegible] ('[illegible]) A A 411

by a pleader? It has been held in the undermentioned cases that the plaintiff must be held to have appeared by a pleader and that the order of dismissal could not therefore be said to be one made under r 8 so as to entitle the plaintiff to apply under this rule (e)

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Fresh suit in respect of the same cause of action—If the plaintiff fails to appear and the suit is in consequence dismissed under r 8 the dismissal does not operate as res judicata (*g*) In such a case however the plaintiff is precluded by *this* rule from bringing a fresh suit in respect of the same cause of action Thus if *A* sues *B* for damages for breach of a contract and the suit is dismissed for default of *A* s appearance *A* cannot bring a fresh suit to recover damages for breach of the same contract *A* s only remedy in such a case is to apply for a review or to apply under this rule for an order to set aside the dismissal But if the cause of action in the subsequent suit is *different* from that in the first suit the subsequent suit will not be barred under this rule Thus the dismissal for default of a suit by a reversioner against a Hindu widow for an injunction *to restrain her from making a gift* of immovable property inherited by her from her husband is no bar to a subsequent suit by the same plaintiff against the widow for a declaration that a *gift* of the property *made* by the widow after the first suit is inoperative (*h*) Similarly if *A* sues *B* for the *rent* of certain lands and the suit is dismissed for default of *A* s appearance under r 8 the dismissal does not operate as a bar to a suit by *A* against *B* for enhanced rent (*i*) or for *possession of* the lands (*j*) For other cases in which it was held that the cause of action in the subsequent suit was not the same as in the first suit see cases cited in foot note (*k*)

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(*e*) *Ram ha d* v *Malhar* (189) 16 Bom 73 *Ch j* v *Pi la* (1898) 0 All 91 *I i nh re* v *Lell* (1903) 6 Mad 67 See these cases discussed in *Satish Cha d a* v *Ahara Pras d* (1907) 34 Cal 403 411 414

(*f*) *Ju H Lay* v *P ja I I I* (19 3) P t 19 4 I C 464 ( ) A I 381

(*g*) *P dha I rshad* v *Lal Saheb* (1890) 1 I A 1 0 13 All 53

(*h*) *Cha d kou* v *I artal S gh* (1888) 15 I A 156 16 C 1 98

(*i*) *G pal Lal* v *T j M k mmad* (19) 7 Pat 8 103 I C 615 ( ) A I 3

(*j*) *Go d Afzul* (1883) 9 Cal 4 6 *I llresh I gh I ir* (19) 45 All 81 74 I C 991 (23) A A 400 [1 t suit to eject d fen lant a tenant—2 d suit to eject him a licensee]

(*k*) *I ya C j I Taj Mahomed* (19) 7 Pat 8 103 I C 615 (7) A I 3 5 *Ma I 7 v Ma Th t S* (19) 5 Rang 8 108 I C 809 (28) A R 3 [dt b Bh d ll t I r hi share of inheritance]

(*l*) *Aradha* v *G* (1928) 5 Bom 111 105 I C (28) A B 67

(*m*) (1888) 15 Cal 4 15 I A 66

(*n*) *Lukeh Das* v *Ram Pras d* (1906) 4 All 6 *Madan Mohon B k nis Sen* (1906) 10 Cal W N 833 *Mudh ra* v *A h Reddi* (19 6) 49 Mad 933 9 I C 6 (6) A M 1018

(*o*) *P p I am* v *Fazal Din* (1920) 1 Lah 57 I C 3

(*p*) *S rya* v *Jayn ya* (1926) 53 C l 5 4 98 I C 3 (6) A C 1057

(*q*) *Ve j puli k rna* v *Chi n lal* (1926) 49 Mad 93 9 I C 706 (26) A M 94

Minor plaintiff—A fresh suit notwithstanding the provisions of this rule may be instituted in respect of the same cause of action where the first suit was brought by a next friend on behalf of a minor and was dismissed under r 8 for default of the next friend's appearance *owing to gross want of care and diligence on his part* (r) See notes to r 13 below Ex parte decree against minor defendant

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(4) A litigant should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part *Arunachala* v *Subbaramiah* (1923) 46 Mad. 60 63 68 I C 971 (23) A M 63 [delay caused by inevitable accident] As to negligence of pleader see the undermentioned case (s)

Inherent power to restore suit dismissed for default—It has been held by the High Courts of Allahabad (t) Bombay (u) and Rangoon (v) that this rule does not take away the inherent power of a Court to restore a suit dismissed for default if there be a just and reasonable cause for restoring it even if no sufficient cause is shown within the meaning of this rule for the plaintiff's non appearance Thus where a case was called on at 12 o clock and the plaintiff's pleader being under the impression that the case would be taken up at 2 o clock was engaged in other cases in other Courts and the plaintiff himself was waiting in his pleader's room and the suit was dismissed for default of appearance it was held that though there was no sufficient cause for non appearance within the meaning of this rule the case was one in which the Court should in the exercise of its inherent powers restore the suit to the file (w) Similarly where a plaintiff believing that his case which was fourteenth on the list would not be reached immediately did not attend the Court but went to bring his principal

(r) *Lalla Sh o v I an ri t* (189) ° Cal 8 C a las v Lallara (18) 19 Bom 571 5 7 *H ma t pa v Ji ba* (1900) 4 Bom 54 55

(s) *Abd l Az v The Pu j b N tio al B k Ltd* (19 9) 10 Lah 5 0 114 I C 6 (29) A L 96

(t) *Lalla Pra d v I m K ra* (191) 34 All 4 6 14 I C 1

(u) *B las ra v C ndas* (1919) 1 Bom L R 95- 53 I C --

(v) *Maung Saw v M Pwin Byu* (19 6) 4 Ran 18 95 I C 5 1 (6) A R 109

(w) (191) 34 All 4 6 14 I C 18 *supra* But see *Shaikh Kall v Sad Laksh* (19 1) 19 All L J 90 64 I C 52- (2-) A A 441

9 witnes and the suit being called on in the meantime his counsel applied for an adjournment on the ground that his client was not in Court but the application was refused and the suit dismissed, it was held that even if there was no sufficient cause within the meaning of this section the Court had inherent power to re tore the suit having regard to the special facts of the case (x) On the other hand it has been held by a Full Bench of the Madras High Court that a Court has no power apart from the provisions of this rule to restore a suit or apart from the provisions of r 13 to set aside an ex parte decree (y) The Patna High Court has followed the Madras ruling ( )

Appeal —*An appeal lies under O 43 r 1 (c) from an order rejecting an appl a tion* (in a case open to appeal) made under this rule but no appeal lies from an ord r *granting* the application (a) As regards an order rejecting an application to set aside the dismissal of a suit made by a single Judge sitting on the original side of the *High Court* it has been held by the High Court of Calcutta that it is appealable not only under O 43 r 1 (c) but also as a judgment within the meaning of cl 15 of the Letters Patent (b) but that an order granting the application is not appealable either under O 43 r 1 (c) or as a judgment under cl 15 of the Letters Patent (c)

Where an application is made by a plaintiff under this rule but the *application* is dismissed *for default* no appeal lies from the order of dismissal (d)

Revision —If there is no sufficient cause for setting aside the dismissal the Court cannot do so as a matter of grace because it involves a heavy claim and if it does so the High Court will set aside the order in revision even though the suit has been tried and decreed (e)

Whether this rule applies to proceedings in execution —As has already been stated in the notes on sec 141 the provi ions of O 9 do not apply to proceedings in execution Therefore if an application for execution is dismi sed for default it cannot be restored under this rule (f) It is competent however to the applicant to present a fresh application for execution (g) The High Court of Lahore has held that if an application for execution is dismissed for default the Court may restore it in the exercise of its inherent power under sec 151 of the Code (h) A different view has been taken by the High Courts of Patna and Madras (i)

An application to set aside a ale on the ground of irregularity under O 1 r 90 is al o a proceeding in execution and the provisions of this Order do not apply to it A a judgment debtor who e property i old in execution of a decree applies under O 1 r 90 to et aside the sale on the ground of material irregularity in conducting the sale Notice of the hearing of the application is given to *B* the decree holder and to *C* the auction purchaser Three cases might occur First where none of the parties appears at the hearing of the application and the application is dismissed for non appearance Secondly where *B* and *C* appear at the hearing but *A* does not and the application is di mi sed for *A* s non appearance Thirdly where A alone appears at the

(x) (1910) 21 Bom L R 9 53 I C 25 ... *t pra*

(y) *Ve k re v Naraynna* (19 0) 43 Mad 94 53 I C 81 approving *Venkatanma v Nat raju* (1913) 4 Mad L J 3 18 I C 380 an l o erru ll g *S m r v Subb mma* (1903) 26 Mad 593

(z) *G Das v Musammat I h l Kuer* (19) 1 Pat 65 I C 341 (2) A P 4 2

( ) *H rdha un v J nzhoor* (1 0) Cal 11 *F l v H ishmat* (1916) Pu j I n 40 p 11 31 I C 914

(b) *Math ra v H ra Ch ndra* (1916) 43 Cal 8 31 I C 634

( ) *Maharaj Kush n v Karan* (19) 49 Cal 616 61 I C 8 I ( ) A C 40

(d) *J gtuh v H rbans* (1917) 2 Pat L J 20 43 I C 54, *H ra h ma v M rm* (19) 36 (a) L J 1 4 63 I C 1003 (2) A C

(e) *M l m v M h f m* (19) 43 Mad L J 1 8 I C 401 ( ) A M 201

(f) *H r t v I l l a* (1 91) 18 P m 4 *Naray a v M th* (19 6) 50 Mad 6 9 I C 100 (6) A M 9 0 *Bhol F* I C ... *Babu J l* (1 1) 2 Lah 66 60 I C ... v *U khdeo* (1912) 4 I L J 331 4 I C 683 *Bharat v l jhs* (19 3) 45 All 148 3 I C 453 (3) A A 40

(g) *That l ras i v Fat rul h* (1) 1 All 106 11 I C 66 *F v Azhar* (19 3) 4 All 14 3 I C 453 (3) A A 460

(h) *Bhd v l m Lal* (19 1) Lah 64 63 I C 0

( ) *Bab l v U khdeo* (1919) 4 P L J 35 49 I C 6 3 *N r a M th* (19) 50 Mad 6 9 I C 6 3 (26) A M 114

hearing and an ex parte order is made granting A s application and setting aside the sale Since O 9 does not apply the dismissal of the application in the *first* case cannot be treated as a dismissal under O 9 r 3 and the provisions of O 9 r 4 do not apply (j) Similarly the dismissal in the *second* case cannot be treated as a dismissal under O 9 r 8 and the provisions of O 9 r 9 do not apply (k) For the same reason the ex parte order made in the *last* case cannot be treated as one under O 9 r 6 and the provisions of O 9 r 13 do not apply

The provisions of O 9 do not apply to proceedings under O 21 rr 9, 101 (l)

Dismissal for default of application to restore suit—This rule provides for the revival of a *suit* dismissed for default Does it apply where an *application* to set aside the dismissal of a suit is itself dismissed for default? A suit by *A* against *B* is dismissed for *A* s default *A* applies under this rule to set aside the dismissal *A* does not appear at the hearing of the application and the *application* also is dismissed for default Can the *application* be restored under this rule? No according to the Patna High Court the reason given being that such an application is a proceeding in execution and that O 9 cannot therefore apply to such an application (m) On the other hand the other High Courts (n) have held that such an application may itself be treated as an application to restore the suit provided it is made within the period prescribed for the original application In later cases in Allahabad (o) and Calcutta (p) it was said that the second application may be entertained under s 151 The same rules apply to applications to restore an application to set aside an ex parte decree which has been dismissed for default

Limitation—Where no application to set aside a dismissal is made within the period of limitation the Court has no inherent power under s 151 to set aside the dismissal after the expiry of the period (q) See notes above Remedies in case of dismissal under r 8 The High Court of Bombay has made a rule under sec 122 applying sec 5 of the Indian Limitation Act 1908 to applications under this rule The rule so made has been held to be intra vire (r)

Procedure in case of non attendance of one or more of several plaintiffs

10 [S 105] Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit

More plaintiffs than one—See notes to r 8 above under the same head

(j) *Da a al Ila v Peaj H n* (10 6) 3 Cal 6 9 06 I C 0 (26) A C 3 *Na end a v I Khali* (19) 41 C I L J 36 9 I C 3 1 ( ) A C 510

(k) *Bl i em v Talakdhar* (1919) 4 P t L J 13 49 I C 61 *I alj I v Soor y ar it* (19 4) 4 M 1 L J 60 81 I C 841 (5) A M 1 6 *J ksh the v I a j* (19) 31 B m 1 R 400 118 I C 700 (9) A B 17 *Cha i Cla i v Chandi* (1915) 19 C W N 9 I C 49 *Seal Ih rat Cla dra v Ias* (191) 21 C W N 61 41 I C 586

(l) *H ri Ch ra v Ma m th* (1913) 41 Cal 1 19 I C 683 *A i Al I v I I* (19 6) 50 M 1 L J 00 9 I C 33 (6) A M 41

(m) *P ng I im v Sh o Deonarai* (1919) 4 Pat L J 87 51 I C 15

( ) *P pi B h ri v Abd l Farik* (191) 44 Cal 950 35 I C 613 *J it mba Lal v Dod a Singh* (19 4) 46 All 310 8 I C 358 (4) A A 503 *Sid i Beg v Kolayya* (19 6) 94 I C 151 (6) A M 6 4 *Thapoon v D Il tr ya* (19 6) 50 Bom 45 96 I C 411 (6) A B 3 7 *M no v Laf n* (1925) 3 Rang 534 93 I C 94 (6) A R 4 *Abd l v Shah na* (19 0) 1 Lah 331 *I k t ra mha v S rya trayan a* (19 6) 50 Mad L J 9 I C 807 (6) A M 3 5

(o) *Ga esh Prasad v Phag I P m* (19 5) 47 All 8 8 89 I C 3 0 (25) A A 3

(p) *Sarat Krishna v Bunreswa* (19) 54 C I 40 103 I C 6 ( ) A C 534 *N nd n N th v J t ndra N th* (19 4) 3 C W N 811 115 I C 3 (9) A C 1

(q) *D sch d v Pri md* (1925) Lah L J 13 86 I C 256 (25) A L 3 I See also *Ay thya v Mussammat I h I Kuer* (19) 1 Pat 7 65 I C 341 ( ) A P 479

( ) *Pandhari ath v Thakordas* (19 9) 53 Bom 453 (9) A B 6

Procedure in case of non-attendance of one or more of several defendants

11 [S 106] Where there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person

12 [S 107] Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants respectively, who do not appear

Where party directed to appear in person—This rule applies to *all* cases where a party has been ordered to appear in person and fails to do so This is clear from the fact that the words under the provisions of section 66 or section 436 (now O [illegible] r 3 and O 20 r 3 respectively) which occurred in the corresponding s. 107 of the Code of 1882 have been omitted from the present rule (*s*)

Setting aside Decrees ex parte

Setting aside decree ex parte against defendant

13 [S 108] In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also

Old section—This rule corresponds with s 108 of the Code of 1882 The words as against him have been added after the words shall make an order setting aside the decree The proviso to the rule is also new See as to the effect of these changes note Proviso to the Rule

Remedies in case of ex parte decree—A defendant against whom an ex parte decree has been passed under r 6 for default of appearance at the hearing has the following courses open to him (*t*) —

(1) he may appeal from the ex parte decree under s 96

(*s*) *[illegible] v Valliamma* (1918) 41 Mad 2[illegible] [illegible] 41 I C 19

(*t*) *Jethalal v [illegible]* (19[illegible]) 46 Bom 1[illegible] 63 I C 4[illegible] ( ) A I R [illegible]

(2) he may apply for a review of judgment under O 47 r 1 (u)

(3) he may apply under this rule for an order to set aside the ex parte decree provided the application is made in cases to which the Limitation Act 1908 applies within 30 days from the *date of the decree* or where the summons was not duly served when he has *knowledge of the decree* (v) and in cases to which the Limitation Act 1877 applies within 30 days from the *date of executing any process* for enforcing the judgment (w) As to knowledge of the decree it has been held that it must be knowledge of a particular decree passed against the defendant in a particular Court in favour of a particular person and for a particular sum and not merely the knowledge that a decree has been passed by some Court against him (x)

Where the right to make the application is barred under the Act of 1877 and the bar arose before the Limitation Act of 1908 came into force the provisions of that Act could not revive the right (y) But where the right is not barred the law of limitation to be applied to applications under the present rule made after January 1 1909 is art 164 of the Limitation Act of 1908 and not art 164 of the Limitation Act of 1877 though the ex parte decree was passed when the Limitation Act of 1877 was in force ( )

The first two remedies that is the remedies by way of appeal and review are open to any person against whom a decree is passed whether the decree is ex parte or not But the third remedy the one provided by this rule can only be resorted to if the decree is passed ex parte that is to say passed against the defendant for *default of appearance under r 6* The remedy given by this rule is not open to a defendant if the decree is passed on *grounds other than his non appearance*

Whether remedies concurrent — A defendant against whom an ex parte decree is passed is at liberty as stated above to apply to set aside the decree under this rule or to appeal from the decree or to apply for a review of the judgment. He is entitled to apply under this rule to set aside the decree and at the same time to appeal from the decree Further he is entitled to appeal from the decree without a previous application to set aside the decree under this rule (a) Similarly he is entitled to apply for a review without previously applying under this rule (b) If he applies under this rule and his application is rejected he is entitled under O 43 r 1 (d) to appeal from the order rejecting the application But he is not bound to appeal from the order he may appeal under s 96 from the ex parte decree itself

If a defendant against whom an ex parte decree is passed does not apply under this rule to set aside the decree but appeals from the decree two questions arise namely —

(1) Whether the appellate Court can consider the reason for the defendant's *non appearance* at the hearing and determine whether the lower Court was right in proceeding ex parte or whether the only question which it could consider is whether the evidence on the record is sufficient to support the ex parte decree in other words whether the decree can be sustained on the *merits* and

(2) whether if the appellate Court comes to the conclusion that the suit ought not to have been heard ex parte it has the power to remand the case for re hearing to the lower Court

Upon these points there is a conflict of decisions In a case under the Code of 188 the Calcutta High Court held that the only question which the appellate Court could

( ) *I l M t v H A F pa* (1884) 6 All 65
(v) Limitation Act 1908 S I I art 164
(w) Limitation Act 1877 Sch II art 164
( ) *I p ra v S th* (1903) 4 Bom 455 I C 190 (8) A R 194
(y) *S pal Ch ira v S rol* (191) 39 Cal 506 15 I C 551

( ) *H pe Mills Ltd v Vithalda* (1910) 1 Bom L R 30 I C 9 ; *Jus Lal v Lak Lak* (1915) 3 All 59 30 I C 5 3
( ) *Ashruff* *Lak reaux* (18) 8 Cal *Ka ppan v Ayyathora* (1896) 9 Mad 44
(b) See *Raj Nara v Ana pa* (1 99) 26 Cal 59
( ) *J na dan v Ramdhone* (1 96) 23 Cal 33 743

3 consider was whether the decree was wrong in law or based on insufficient evidence and that it could not deal with the question whether the lower Court was right in proceeding ex parte (c) But in a recent case (d) under the present Code the Calcutta High Court has treated this decision as obiter and holds that the Court of Appeal can deal with the reason for the defendant s non appearance and if not satisfied with the ex parte order can remand the suit for trial on the merits. In a Bombay case also decided under the Code of 1882 it was held that the appellate Court could consider the reason for the defendant s non appearance but it had no power to remand the case to the lower Court for a re hearing the reason given being that an order of remand could only be made under s 562 [now O 41 r 23] when a suit was disposed of on a *preliminary* point and that the disposal of a suit ex parte was not a disposal on a preliminary point (e). In *Sadhu* v *Kuppan* (f) which also was a case under the Code of 1882 a Full Bench of the Madras High Court held that the appellate Court could consider the reason for the defendant s non appearance and that it came to the conclusion that the lower Court ought not to have proceeded ex parte it had the power to remand the case to that Court for a re hearing The Madras ruling was followed by the High Court of Bombay in *Jethalal* v *Varajlal* (g) where it was held that even if the appellate Court had no power under the Code of 1882 to remand a case except under s 562 it has power now to make an order of remand under s 151 of the present Code and also under O 41 r 33 The High Court of Rangoon has followed the first Calcutta ruling (h)

If an application to set aside an ex parte decree is rejected and the defendant does not appeal from the order under O 43 r 1 (d) he cannot according to an Allahabad ruling reagitate the matter in appeal from the ex parte decree the reason given bein that the appellate Court has no power to consider the reason for the defendant s non appearance but it can only hear the appeal on the merits (i)

As to review see notes to r 9 Remedies in case of dismissal under rule 8

Where written statement filed —A defendant against whom a decree is passed ex parte for default of appearance is entitled to apply under this rule to set aside the decree though he may have filed his written statement (j)

Prevented from appearing —As to the meaning of appearing see notes to O 9 r 0 Appearance

Hearing of application pending appeal —The High Courts of Calcutta (k) Madras (l) and Allahabad (m) have held that where a defendant against whom an ex parte decree is passed applies under this rule to set it aside and at the same time prefers an appeal from it the proper Court to hear the application is the Court which passed the decree and not the appellate Court A obtains an ex parte decree against *B* *B* applies under this rule to have the decree set aside At the same time he prefers an appeal from the decree Which Court has jurisdiction to hear the application—is it the Court which passed the decree or is it the appellate Court? According to the above decisions the only Court which has jurisdiction to hear the application is the Court which passed the decree The reason given is that the matter to be considered in a proceeding under this rule is entirely distinct from the matter to be considered in an appeal from the ex parte decree the one being concerned with the

(d) *Jnanendra* v *Prof Ilananda* (1928) 3 C W N 301 106 I C 51* ('29) A C 81
(e) *Pratusha kar* v *Bai Naval* (189) 17 Bom 733
(f) (190) 30 M 1 4 9
(g) (19) 46 Bom 184 63 I C 4 9 (22) A B 67
(h) *J j Cha d a* v *K D O C Fay* (19 1) Rang 108 79 I C 06 (19 4) A R. 137
(i) *H mmi* v *Azl-ud-d n* (1917) 39 All 143 36 I C 7
(j) *Me uapan* v *P l yan* (1908) 31 Mad 505
(k) *Sarat h dra* v *D mod r* (1906) 12 C W N 685 *Damod* v *S rat C andra* (1908) 13 C W N 846 *A m I Nath* v *Jot ndra N th* (1911) 38 Cal 394 9 I C 1 9 *K l m di* v *Fuah E di* (19 1) 51 C I 13 3 33 83 I C 220 (1) A C 630
(l) *J la appa* v *S b m la* (19 1) 44 M 1 731 6 I C (1) A M 64
(m) *C fr j* v *Swami N th* (1917) 39 All 11 *Mirza Abdullah* v *I mam* (19 7) 21 A L J 901 9 I C 341 (4) A A 1 2

due service of summons and the other with the determination of the merits of the controversy between the parties Similarly if *A* sues *B* and *C* and *C* alone appears and an ex parte decree is passed against *B* and a decree on the merits is passed against *C* *B*s application to set aside the ex parte decree can only be heard by the Court which passed the decree although an appeal by *C* may be pending in the appellate Court It makes no difference that the *application* is made by *one defendant* and the *appeal* is preferred by *another defendant* (n)

Hearing of application after disposal of appeal—But if the appeal is disposed of other considerations arise The High Courts of Calcutta (o) Allahabad (p) and the Chief Court of Oudh (q) have held that where an appeal is preferred from an ex parte decree and the decree is confirmed or otherwise disposed of in appeal under O 41 r 32 the Court which passed the ex parte decree has no longer any power to entertain an application to set it aside even if the application was made before the appeal was filed This is because the decree of the lower Court is merged in that of the appellate Court But if the appeal is dismissed for default there is no merger and the original Court can entertain the application (r) On the other hand it has been held by the High Court of Madras that the Court which passed an ex parte decree had jurisdiction to entertain an application to set aside even after an appeal therefrom has been dismissed (s) See notes to s 36 Merger of decree

Where a defendant against whom an ex parte decree is passed is not joined as a party to the appeal preferred by other parties to the suit and the appellate Court does not adjudicate upon his case the ex parte decree against him does not merge in the decree of the Court of appeal so as to preclude him from applying under this rule to the Court which passed the ex parte decree to set aside the decree *A* sues *B* *C* and *D* and obtains an ex parte decree against *B* and a decree on the merits against *C* and *D* *C* and *D* appeal from the decree *B* is not joined as a party to the appeal The appellate Court confirms the decree of the Court of first instance passed against *C* and *D* This does not preclude *B* from applying to the Court of first instance to set aside the ex parte decree against him (t)

Ex parte decree obtained by fraud—A regular suit does not lie to set aside an ex parte decree merely on the ground of non service of summons (u) But where an ex parte decree is alleged to have been obtained by a plaintiff by fraud the defendant is entitled to institute a regular *suit* to set aside the decree on the ground of fraud (v) The suit is maintainable even though the defendant was unsuccessful in his application made under this rule to set aside the ex parte decree and though he did not appeal from the order rejecting his application (w) But if the very fraud that is set up by the defendant in his suit was set up in his application and the Court after going into the question of fraud rejected the application the suit would be barred as *res judicata* unless the fraud alleged was of such a nature that it could not properly come within the scope of enquiry under this rule *A* applies under this rule to set aside an ex parte decree

(n) *P I n appa v Subra a* (19?1) 44 Mad 31 6 I C

(o) *Dhonai v Tar kn th* (1910) 1 Cal L J 53 5 I C 5 *Kal m dd n v F ah k d d n* (19 4) 51 Cal 715 733 83 I C 0 (4) A C 830 But see *Abd l Ohad v Amtal* (19 1) 48 Cal 153 57 I C 969

(p) *M th a v I am Charan* (1915) 37 All ?08 ?8 I C ?61

(q) *Cinth n L I v Dep ty Commissioner* (19 9) 4 Luck ?01 114 I C 319 (?9) A O 3

( ) *I f qat v Bibi Ta caif* (1917) 39 All 393 39 I C 519 See also (19 4) 51 Cal 715 83 I C 220 (?4) A C 830 and See also *Shyam Ma dal v Sat nath* (1916) 44 Cal 951 939 960 33 I C 493

( ) *Subrama ia v I arad f lu* (19?7) ?3 Mad L J 110 103 I C 146 ( ) A M

I l appa v Subr m (19??) 4 Mad L J 1 dissenting from *Sankara v S brava* (190) 30 M d 535

(t) *G j j v Swami Nath* (1917) 39 All 13 36 I C 307

(u) *Na s gh Da v F Khan* (1910) 3? Cal 19 5 I C 193 *Ibrah m v Jusuf* (1920) 22 Bom L R 79? 57 I C 5?1 *Jha ds gh v Mst La hmi* (19?0) 1 Lah 344 56 I C 8 3

( ) *Abdu v Mahomed* (1891) 1 Cal 60?

(w) *I adha I aman v Pre Nath* (19 1) 23 Cal 457 *Khagendra Nath v Pran Nath* (190?) ?9 Cal 395 ?9 I A 99 [where the suit itself was attacked as a fraud] *Dwa ka v Lachhoma* (1 99) 1 All 2 9 *M stry* (? (19?) 5 Ran 4 1 104 I C 315 (?) A R ?41

3 on the ground of fraud in respect of the service of summons upon him The Court after going into the question of fraud rejects the application A then institutes a regular suit to set aside the ex parte decree basing his suit on the very fraud that was alleged by him in the application The suit is barred as *res judicata* (x) In a recent Calcutta case A sued B in a Munsif s Court on a hand note and obtained an ex parte decree for Rs 59 B applied to set aside the decree but the application was refused. B then sued A in the Munsif s Court to set aside the decree on the grounds (1) that the summons was not duly served and (2) that the decree was obtained by perjured evidence It was held that the issue as to service of summons was not res judicata the reason given being that the suit included matters which could not have been raised on the application to set aside the decree (y) This decision it is submitted is not good law

Application by legal representative of deceased defendant—Under the Code of 1882 it was not settled whether his *legal representative* could apply for an order to set aside the ex parte decree against a deceased defendant The High Court of Calcutta held that he could (z) The High Courts of Madras (a) and Allahabad (b) held that he could not But the Allahabad Court conceded that if the application was made by the defendant and he died during the pendency of the application the proceedings could be *continued* by his legal representative (c) Under this Code (s 146) such an application may be made by the legal representative of the deceased defendant (d)

Grounds on which ex parte decree may be set aside—These are stated in the second paragraph of the rule the one being that the summons was not duly served upon the defendant (e) and the other that though the summons was duly served the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing (f) A summons cannot be said to be duly served if it is a misleading document having no relevance to the real proceedings which are contemplated and having no reference to the order ultimately passed (g) When a summons was served upon a *purdanashin* lady to whom the serving officer was not able to obtain access by affixing a copy of the summons on the outer door of her dwelling house under O 5 r 17 and it appeared that the lady had no knowledge of the suit against her the Court set aside the ex parte decree passed against her on the ground that she was prevented by sufficient cause from appearing at the hearing of the suit (h) But duly does not mean personally and a summons may be duly served by substituted service (i)

Sufficient cause—Where an ex parte decree has been passed against a defendant who has failed to appear at the hearing he is not entitled to have the decree set aside as a matter of course even if he applies on the same day for the purpose It is a matter for the discretion of the Court (j) The fact that a defendant was contemplating an appeal from a preliminary decree in a suit for partition is no ground for his failure to attend proceedings in connection with the division of property and for setting aside the final decree for partition (k) In a Rangoon case under the Land Acquisition Act 1894 the Collector failed to appear as he was on tour at that time and there was

(x) *Pu[illegible]n Chand* v *Sheodat Rai* (190[illegible]) [illegible] All 1 [illegible] *Mal* v *[illegible]nak [illegible]* (190[illegible]) [illegible] All [illegible] *Maha[illegible]* v [illegible] Pat [illegible]33 *Jangal* v *Lalji* (19[illegible]1) 6 Pat 1 [illegible] 60 I C [illegible]

(y) [illegible] (19[illegible]) [illegible] Cal W N [illegible] 3[illegible] 80 I C [illegible] A [illegible] 663

(z) *Ga[illegible]* v *Sh[illegible]* (190[illegible]) [illegible] Cal 33

(a) [illegible]*amla* v *Veera* (190[illegible]) [illegible] Mad [illegible] 61

(b) *Ja[illegible]* v *[illegible]* (1899) 1 All [illegible]

(c) *[illegible]* v *[illegible] Bihari Lal* (1907) [illegible] All [illegible]

(d) See *[illegible]* v *Krishnamurthy* (191[illegible]) 3[illegible] Mad 4[illegible] [illegible] I C [illegible]

(e) *[illegible]* v *[illegible]* (1901) 23 All 99 *[illegible] Mal* v *Har [illegible]* (19[illegible]) [illegible] All [illegible]

(f) *Soma[illegible]* v *[illegible]* (19[illegible]3) [illegible] Mad 5[illegible]

(g) *[illegible]* v *[illegible]* (19[illegible]) [illegible] L J 791 [illegible] I C 1[illegible] A [illegible]

(h) *[illegible]* v *[illegible]* (1915) 19 C W N [illegible] 31 [illegible] I C 61

(i) *[illegible]* v *[illegible]* (19[illegible]) [illegible] 31 [illegible] L J [illegible] 102 I C [illegible] A [illegible] 60

(j) *[illegible]* v *[illegible]* (19[illegible]) 31 [illegible] L R [illegible] 117 I C [illegible] 93 ([illegible]) A [illegible]

(k) *[illegible]* v *[illegible]* (19[illegible]) [illegible] All [illegible] 10 I C [illegible] ([illegible]) [illegible] v *[illegible]* (19[illegible]) [illegible] All [illegible] 3[illegible] 6 ([illegible]) A [illegible]

considerable pressure of work One of the Judges of a Division Bench held that this was a sufficient cause for his non appearance while the other Judge held that it was not (*l*) For other cases see note to O 9 r 9 Appearance

O 9

Upon such terms as to payment into Court —In restoring a case under this rule the Court may make it a condition that costs (*m*) or the decretal amount or some portion thereof be paid into Court (*n*) If a decree is set aside on failure to comply with a condition imposed by a Court an appeal will lie under O 43 r 1 (d) and the appellate Court will consider whether the condition was a reasonable one (*o*)

High Court of Calcutta Original Side —The High Court of Calcutta has held that this rule does not apply in terms on the Original Side of the High Court The principle however of this rule is applied on that side and Rankin C J said that the High Court on its Original Side has a discretion which it may exercise independently of the rule and that it may set aside an ex parte decree even in a case in which there has been an element of negligence (*p*) The same High Court has also held that an application to set aside an ex parte decree not being one under this rule is not governed by art 164 of the Limitation Act (*q*)

Inherent power to set aside ex parte decree —See notes to r 9 Inherent power to restore suit dismissed for default

Ex parte decree against minor defendant —It is no ground for setting aside an ex parte decree passed against a minor defendant that the Nazir who was appointed guardian ad litem of the minor did not appear and defend the suit if the failure to defend was owing to the fact that the Nazir did not receive instructions from any person to defend the suit It would be otherwise if fraud collusion or gross negligence on the part of the guardian ad litem were proved (*r*) See notes to r 9 Minor plaintiff

Proviso to the rule —Cases under this proviso fall into two classes

I Where the decree is ex parte against *all* the defendants but the application to set aside the decree is made only by *some of them*

II Where against some of the defendants the decree is passed ex parte but against others who have appeared and defended the suit it is passed on the merits and the application to set aside the decree is made by one or more of the defendants against whom the decree was passed ex parte

In cases under both classes the question is whether if the decree is set aside as *against the applicant* the Court can set aside the decree *as against the other defendants also* so as to reopen the whole suit and if so in what cases? No provision was made in the old section as to these cases The present rule expressly provides for these cases The first para of r 13 says that where a defendant against whom a decree is passed ex parte applies for an order to set it aside and satisfies the Court that the summons was not duly served upon him etc the Court shall make an order setting aside the decree *as against him* [that is the applicant] (*s*) The proviso to r 13 says that *where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants* The object is to provide for cases where it may be necessary in the ends of justice to set aside the decree not

(*l*) *Mah ed v C ll ctor f Poi goo* (19) 5 Ran 80 10 I C 3 9 (2) A R 1 0

(*m*) *Ahm t v H rdial* (19 6) 48 All 190 90 I C 43 (6) A A 11 ( )

(*n*) *Shy m Lal v I m Nara n Lal* (19 0) 5 Pat L J 4 0 57 I C 300

(*o*) *Na yan v I k t* (19) 51 Bom 7 9 I C 331 ( ) A B 1 overruling *J k rgouda v I ah d a* (19 6) 50 Bom 3 6 96 I C 3 1 (6) A B 3 3

(*p*) *Ba rje v S brawa dy* (19) Cal 4 3 106 I C 91 ( ) A C

(*q*) *H I mk v Hafiz* (19) 3 C W N 411 ( ) A C 864

(*r*) *Tum v Dat* (190) 9 Bom L R 1099

(*s*) See as to the insertion of the words "as against him" the judgment of Stanley C J in *Bh ra Mal v H Kishan Das* (190) 4 All 353, at p. 357

3 only against the applicant but also against the other defendants (*t*) This would as a general rule be so

(1) *where the decree is one and indivisible* (*u*)

(2) where the suit would result in inconsistent decrees if the decree were not set aside as against the other defendants also (*v*)

(3) where the relief to which the applicant is entitled in the suit could not effectively be given otherwise than by setting aside the decree as against the other defendants also (*w*)

(4) where the decree proceeds on a ground common to all the defendants (*x*)

These four cases may be considered under the two classes referred to above

Class I —Where the decree is ex parte passed against all the defendants but the application to set aside the decree is made by some of them only

Illustrations

(a) *B C* and *D* who constitute a joint Hindu family execute a mortgage of their joint property in favour of *A* *A* sues *B C* and *D* to enforce the mortgage *D* is served with the summons but not *B* and *C* None of the defendants appears at the hearing and an ex parte decree is passed against all the defendants for a sale of the mortgaged property *B* and *C* apply for an order to set aside the decree on the ground that the summons was not served upon them Here the decree being *one and indivisible* the Court may set aside the decree not only as against *B* and *C* but also as against *D* though he was served with the summons and there was no sufficient cause for his non appearance *Ajodhya Pershad* v *Sheo Pershad* (1900) 5 C W N 58 *Ashfaq Husain* v *Gauri Sahai* (1911) 33 All 264 38 I A 37 9 I C 975

(b) *A* sues *B* and his minor sons *C* and *D* members of a joint Hindu family to recover Rs. 1 000 alleged to have been advanced to *B* as manager of the family None of the defendants appears at the hearing and an ex parte decree is passed against all the three All the three defendants apply to have the decree set aside As to *C* and *D* it is proved that no summons was served upon them As to *B* it is proved that the summons was duly served upon him Here the decree being *one and indivisible* (*y*) the Court may set aside the decree not only as against *C* and *D* but also as against *B* though the summons was served upon him and there was no sufficient cause for his non appearance Moreover this is a case where the relief to which the minors *C* and *D* are entitled could not effectively be granted unless the decree was set aside as against *B* also For if the decree were allowed to stand as against *B* *B*'s share in the joint family property could be attached and sold though the sons might succeed in showing at the re trial of the suit that the debt never was incurred or that it had been discharged or that from its nature the joint family property was not liable The sale of the father's share in the joint family property would be *a manifest injury to the sons* and this could only be avoided by setting aside the decree against the father also and re opening the whole suit *Jhura Mal* v *Har Kishan Das* (1902) 24 All 383 at pp 400 and 401

(c) *A* alleging that *A* and *B* are in joint possession of certain immovable property sues *A* and *B* and asks for a declaration that he is in joint possession with them *A*

(*t*) *Doolhee Khan* v *Pajessuree Pauree* (1871) 15 W R 371 per Norman C J and Loch J *Mahomed Hamidulla* v *Tohurennissa Bibi* (1898) 25 Cal 155 158 159 *Jhura Mal* v *Har Kishan Das* (1902) 24 All. 383 400

(*u*) *Mahomed Hamidulla* v *Tohurennissa Bibi* (1898) 25 Cal. 155 160 *Monomohini* v *Nara Narayan Roy* (1899) 4 C W N 456, 458

(*v*) *Jhura Mal* v *Har Kishan Das* (1902) 24 All 383 399 400

(*w*) *Jhura Mal* v *Har Kishan Das* (1902) 24 All 383 400 401 *Mahomed Hamidulla* v *Tohurennissa Bibi* (1898) 25 Cal 155 159

(*x*) *Doolhee Khan* v *Pajessuree Pauree* (1871) 15 W R 371 per Norman, C J and Loch J See also *Gopala Chetti* v *Subbier* (1903) 26 Mad 604

(*y*) See *Mahomed Hamidulla* v *Tohurennissa Bibi* (1898) 25 Cal 155 160 where it was said of a similar decree that it was *one and indivisible*

is served with the summons but *B* is not Neither defendant appears at the hearing and a decree ex parte is passed against both the defendants *B* applies to have the decree set aside and it is set aside as against him *but not as against A* At the hearing *B* establishes that X has no title whatever to the property There would in such a case be *two absolutely inconsistent decrees* namely the ex parte decree held by X against *A* *declaring X to be jointly in possession* with *A* and *B* and the decree against X passed at the rehearing *that X was not in joint possession* with *A* and *B* This is therefore a case in which the decree must be set aside not only as against *B* but as against *A* also see *Bhura Mal* v *Har Kishan Das* (1902) 24 All 383 at p 388

(d) X sues *A* and *B* on a promissory note executed by *A* *B* is *A*s nephew and he is joined as a defendant on the ground that *A* and *B* are members of a joint Hindu family and that the note was for a debt binding on the family Neither defendant appears at the hearing and an ex parte decree is passed against both the defendants The decree against *A* proceeds on the ground that *the note* was passed by him and against *B* on the ground that *the debt was incurred for a family purpose* *B* applies for an order to set aside the decree alleging that the summons was not served upon him and that the debt in respect of which the note was passed by *A* was not incurred for a family purpose *It is not disputed that the amount was actually advanced to A* Such being the case the decree may be set aside as against *B* but it must not be set aside as against *A* Justice does not require it for the contention of *B* that the debt was one not binding on him is a defence peculiar to him alone and not one common to him and *A* *Gopala Chetti* v *Subbier* (1903) 26 Mad 604

(e) *A* sues *B* *C* and *D* personally and as managers of a devasam to recover Rs 275 being revenue paid by him on behalf of the defendants None of the defendants appears at the hearing and an ex parte decree is passed against them personally and against the devasam property If *B* alone applies under this rule and shows sufficient cause for his non appearance at the hearing the decree may be set aside so far as it ordered payment by *B* personally and from the devasam property but it cannot be set aside so far as it directs *C* and *D* to pay the amount personally *Valia Koni* v *Marutha* [illegible]*eera* (1908) 31 Mad 454

Class II —Where against some of the defendants the decree is passed ex parte but against others who have appeared and defended the suit it is passed on the merits and the application to set aside the decree is made by one or more of the defendants against whom the decree was passed ex parte —In this case the question arises whether if the decree is of such a nature that it cannot be set aside as against the applicant only but must be set aside also as against the *defendants against whom the decree was passed on the merits* the Court has the power to set aside the decree as against *such defendants* also It is submitted that it has The words the decree in the proviso mean the decree passed in the suit not only against the defendants who did not appear but also against the defendants who did appear The words other defendants in the proviso mean defendants other than the applicant against whom the decree is passed whether as against them it was passed ex parte or after a hearing (*z*)

Illustrations

(a) X sues *A* and *B* alleging that *A* and *B* are in joint possession of certain immovable property and asking for a declaration that he is in joint possession with them *A* appears and defends the suit *B* does not appear The Court finds that *A* and *B* are in joint possession and that X is entitled to joint possession with them and a decree is passed against *A* and *B* declaring that X is entitled to joint possession with them Here the decree so far as regards *A* is passed after a hearing and as regards *B* it is ex parte

(*z*) See the judgment of Banerjee J in *Mahomed H* [illegible] v *T* [illegible] (189) 15 Cal 155 159 160 and cf Aikman J in *Bhura Mal* v *Har Kishan Das* (1902) 24 All 383 400

13 But there is *only one decree* and the words the decree in the proviso can only refer to that decree Therefore if *B* applies for an order to set aside the decree and the decree is set aside as against him it must also be set aside as against *A* otherwise in the event of *B* succeeding in the suit this absurd position would arise that A and *B* being in joint possession of the property A would be in possession of a decree declaring him to be jointly in possession along with *A* and *B* whilst *B* would be in possession of a decree in his favour declaring that A is not entitled to joint possession with him and A see *Lkura Mal v. Har Kishan Das* (1902) 24 All 383 at p 400

(b) A and *B* both Mahomedans pass a promissory note to A *B* dies leaving three heirs *H1* *H2* and *H3* A sues A (surviving maker of the note) and *H1* *H2* and *H3* as heirs of *B* A and *H1* appear at the hearing and defend the suit *H2* and *H3* do not appear A decree is passed against all the defendants the liability of *H1* *H2* and *H3* under the decree being limited to the extent of the property of *B* inherited by them as *B*'s heirs Here the decree so far as regards A and *H1* is passed after hearing and as regards *H2* and *H3* it is ex parte *H2* and *H3* apply to have the decree set aside alleging that the summons was not served upon them The Court is satisfied that the summons was not served Upon these facts the High Court of Calcutta held under the old section that the decree should be set aside not only as against *H2* and *H3* but also as against A and *H1* the ground of the decision being that the decree was *one and indivisible* *Mahomed Hamidulla v. Tohurennissa Bibi* (1898) 25 Cal 1??

(c) A sues *B* and *B*'s mother *C* Native Christian upon a promissory note jointly passed by them *B* appears at the hearing and defends the suit *C* does not appear A decree is passed against both defendants for the amount of the note Here the decree so far as regards *B* is passed after a hearing and as regards *C* is ex parte *C* applied for an order to set aside the decree alleging that the summons was not served upon her The Court finds that the summons was not served upon *C* Upon these facts the High Court of Bombay held under the old section that if the decree were set aside as against *C* it should not be set aside as against *B* also *B* having appeared and defended the suit *Mainaku v. Sitaram* (1894) 18 Bom 14? If the Bombay decision means that the setting aside of a decree ex parte against a defendant does not necessarily revive the suit as against a defendant who has appeared and defended the suit the decision is still good law But if it means that where a decree is passed ex parte against *A* and after a hearing against *B* the Court can set aside the decree only against A and cannot set it aside in *any case* against *B* the decision is no longer law see the proviso to the rule

(d) A sues *B* and *C* for a *declaration of title* to certain lands and *D* and *F* (tenants of *B* and *C*) for *possession* of the lands *B* and *C* appear and defend the suit *D* and *F* do not appear The Court passes a decree against all the four defendants, as against *B* and *C* declaring that the lands belong to A and as against *D* and *F* directing them to deliver possession of the lands to A Here the decree against *D* and *F* is ex parte for they did not appear at the hearing *D* and *F* apply for an order to set aside the decree alleging that the summons was not served upon them The Court is satisfied that the summons was not served Should the decree be set aside *as a whole* that is against all the defendants *B* *C* *D* and *F* or should it be set aside against *D* and *F* only The decree should not be set aside as a whole for the decree is *not one and indivisible* The relief granted to A as against *B* and *C* is a *declaration of A's title* to the lands The relief granted to A as against *D* and *F* is that they should *deliver up possession* of the lands to A In fact the decree though nominally one really consists of two decrees each against one set of defendants, the relief granted against each set being separately specified Hence the decree may be set aside as against *D* and *F* but not against *B* and *C* for the *relief granted against B and C is distinct from that granted against D and F* who alone applied for an order to set aside the decree *Mohesh ... v. Nani* (18??) 4 C W N ...

(e) A sues B C and D the holders of a holding for rent and an ex parte decree is passed against them B alone applies to set aside the decree The decree may be set aside as against B but it should not be set aside as against C and D the reason being that a decree for rent can be passed against some holders of a holding without impleading the other holders *Keshav Chandra* v *Joyfulnessa* (1927) 32 C W N 507 (28) A C 397

Whether this rule applies to execution proceedings—This rule does not apply to proceedings in execution See notes under the same head to r 9 above

Dismissal for default of application to set aside ex parte decree—See note to r 9 above Dismissal for default of application to restore suit

Application to set aside ex parte decree after it has been executed—The fact that an ex parte decree has been satisfied does not preclude the defendant from applying to the Court for an order to set it aside under this rule A obtains an ex parte decree against B and attaches B s goods in execution of the decree B pays the amount of the decree under protest and applies for an order to set aside the decree on the ground that the summons was not served upon him The Courts may make an order setting aside the decree notwithstanding that the decree has been satisfied (*a*)

Effect of setting aside ex parte decree—When an ex parte decree is set aside all proceedings from the stage of the non appearance of the defendant are equally set aside (*b*)

Ex parte decree against firm—A decree against a firm cannot be said to be ex parte against a partner in the firm because he has not appeared at the hearing An ex parte decree against a firm can be set aside on the ground that the summons was not duly served on the firm If the summons was duly served upon the firm the decree cannot be set aside because one of the partners was not served Under O 30 r 3 it is not necessary to serve every partner A sues X Y & Co a firm The firm consists of two partners X and Y The summons is served on X alone as a partner Y is not served with the summons Neither X nor Y appears at the hearing and an ex parte decree is passed against the *firm* The summons having been duly served on the firm the decree against the firm cannot be set aside because Y was not served and he did not appear at the hearing (*c*)

Appeal—Where an application under this rule is dismissed an appeal lies from the order dismissing the application whether the dismissal was on merits or for default (*d*) [O 43 r 1 cl (d)] But where the application is granted no appeal lies from the order granting the application (*e*) Where an application to set aside an ex parte decree has been dismissed for default and a fresh application is made to set aside such dismissal and the fresh application also is refused no appeal lies from the order refusing the fresh application (*f*)

Revision—It has been held by the High Court of Allahabad that an order setting aside an ex parte decree is not subject to revision under s 115 the reason given being that the validity of the order may be attacked under s 105 in an appeal from the final decree (*g*) The High Court of Madras has held that an order setting aside an ex parte decree may be set aside in revision if it is not based on any ground recognised by law (*h*)

(a) *Zer dool I* v *Kishorilal* (1890) 3 Bom 716

(b) *Sal van* v *Am l rparanat m* (1928) 5 Mad L J 6 11 I C 691 (28) A M 969 ( )

(c) *Id vppa* v *Pr ai* (19 1) 26 Bom L R 388 80 I C 3 (4) A B 366

(d) *M mm t Yodha* v *Ram Cha d a* (19) 6 Pat 4 4 101 I C 53 ( ) A P 240 *M ft* v *Lal* (1 3) 8 L 533 11 I C 31 (9) A L 5 9

(e) *Sh ma Das* v *H rbans* (19 3) 16 Cal 4 6 *F al* v *H hm t* (1916) L R no 40 p 115 31 I C 914

(f) *Sharif* v *Ha t* (1922) 20 All L J 19 6 I C ( ) (22) A A 337 *Cha a ah* v *Durga Prasad* (1921) 46 All 535 79 I C 3 3 (4) A A 6

(g) *Sheikh Ka* v *N dir Bakhsh* (19 1) 19 All L J 90 61 I C 597 (22) A A 441

(h) *Subrama ia* v *Veradaja* (19) 53 Mad L J 110 103 I C 14 ( ) A M 72

Limitation—A Full Bench of the Madras High Court has held that a rule framed by that Court applying s 5 of the Limitation Act 1908 to applications under r 13 was intra vires (i) See notes above Remedies in case of ex parte decree

Where no application to set aside an ex parte decree is made within the period of limitation the Court has no inherent power under s 151 to set it aside after the expiry of the period (j)

Vakalatnama—No fresh vakalatnama is necessary for the purpose of an application to set aside an ex parte decree (k) See O 3 r 4

14 [S 109] No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party

No decree to be set aside without notice to opposite party

Opposite party—Where in a suit for partition by *A* against *B* and *C* an ex parte decree is passed against *B* the opposite party on whom notice should be served under this rule is *A* the plaintiff and not *C* the co defendant (l)

ORDER X

Examination of Parties by the Court

1 [S 117] At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of facts as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made The Court shall record such admissions and denials

Ascertainment whether allegations in pleadings are admitted or denied

2 [S 118] At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied may be examined orally by the Court, and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party

Oral examination of party or companion of party

Object of examination under this rule—The object of examination under this rule is not to take *evidence* or ascertain what is to be the evidence in the case but to determine the *matters in dispute* between the parties (m)

3 [S 119] The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record

Substance of examination to be written

(i) *Krishna ... v Srirang ... mmal* (19 4) 47 Mad 8 4 80 I C 87 (...) A M 14

(j) *Ajodhya v M ... sammat Ph ... iker* (19) 1 Pat 77 65 I C 341 (...) A P 479 See also *Decch ... d v I ... m Das* (19 5) 7 Lah I L 13 ... I C ...6 ( ) A L S 1

(k) *Ba ... bhai v Ibrah m* (19) 47 Bom 11 6 I C 169 (... 9) A B 207

(l) *S ... v ... ta* (19..7) Cal 8 103 I C 860 ( ) A C 69

(m) *G ... ga v T... ckr m* (1888) 15 Cal 533 1 I A 119

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (2)]

Consequence of refusal or inability of pleader to answer

4 [S 120] (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2 refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit

Direct that such party shall appear in person—Under this rule an order directing a party to appear in person can only be made if the pleader who represents him has refused or is unable to answer material questions (*n*) See O 9 r 12

Appeal—An appeal lies from an order pronouncing judgment against a party under sub r (2) [O 43 r 1 cl (e)] Where in a suit by *A* against *B C* and *D* the Court struck off *B*'s defence owing to his failure to appear in person but ultimately decided the case on the merits and passed a decree against all three defendants their defences being similar it was held that *B* was not entitled to appeal from the order striking off his defence but that he was at liberty to appeal from the final decree and in that appeal to object to the order striking off his defence [s 105] (*o*)

Res judicata—A dismissal of a suit under sub r (2) operates as res judicata so as to bar a subsequent suit in respect of the same matter (*p*)

ORDER XI

Discovery and Inspection

Discovery by interrogatories

1 [R S C O 31, r 1, *Cf* S 121] In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer Provided that no party shall deliver more than one set of interrogatories to the same party without

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( ) *S[illegible] v H[illegible]* (1899) 3 Bom 318
( ) *Math[illegible] v [illegible]* (191) 33 All 450 39 I C 151
(*p*) *[illegible] v Maluo* (1911) 13 Bom L R 638 11 I C 963

an order for that purpose Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross examination of a witness

Discovery by interrogatories—Every party to a suit is entitled to know the *nature of his opponent s case* (q) so that he may know beforehand what case he has to meet at the hearing (r) But he is not entitled to know the *facts which constitute exclusively the evidence of his opponent s case* the reason being that it would enable an unscrupulous party to tamper with his opponent s witnesses and to manufacture evidence in contradiction and so shape his case as to defeat justice (s) The *nature* of a plaintiff s case is disclosed in his plaint The *nature* of a defendant s case is disclosed in his written statement But a plaint or a written statement may *not sufficiently* disclose the nature of a party s case and to make good the deficiency either party may administer interrogatories in writing to the other through the Court Interrogatories may also be administered by a party to his opponent *to obtain admissions from him to facilitate the proof of his own case* The party to whom interrogatories are administered must answer them in writing and on oath (r 8) This is called *discovery* by interrogatories the party to whom the interrogatories are administered *discovers* or discloses by his affidavit in answer to the interrogatories the *nature* of his case

Every suit contemplates two sets of facts namely, (1) facts which constitute a party s case and (2) facts by which a party s case is to be proved (see O 6 r 2) The first set of facts discloses the *nature* of a party s case The second set forms the evidence of his case Thus if *A* sues *B* for damages for breach of a contract *A* must prove (1) the contract and (2) breach of the contract These two facts *constitute* A s case and determine the *nature* of *A* s case Therefore *B* may administer interrogatories to A to elicit particulars of (1) the contract and (2) the breach thereof He may also interrogate *A* to obtain admissions from him *to facilitate the proof of his own case* But he is not entitled to administer interrogatories to ascertain the *evidence by which A will prove these two facts* Thus *B* may not ask who was present at the time when the alleged contract was made in other words it is not permissible to ask the names of A s witnesses (t) But if the name and address of a person is itself a relevant *fact* an interrogatory as to that name and address is not rendered inadmissible merely because it involves the disclosure of a witness s name (u) In a suit for the recovery of the amount of a hundi drawn by the defendant for an advance of Rs 5000 made by the plaintiff and to have been dishonoured by non payment the defendant is entitled to discovery of the form in which consideration was paid and particulars of the time and place when and where defendant accepted the hundi and the names and addresses of persons by whom and the time and place at which the hundi was presented for payment All these are *material facts* which constitute the plaintiff s case (v) See notes to O 6 r 4 Object of particulars See also note below Interrogatories relating to names of persons

What interrogatories may be allowed—In England interrogatories are allowed for the following purposes —

(1) *To ascertain the nature of your opponent s case or the material facts constituting his case* (w)

(q) *Saunders v Jones* (1877) 7 C D 43
(r) *Marriott v Chamberlain* (1886) 17 Q B D 154
(s) *Benbow v Low* (1880) 16 C D 93 9 *Re Strachan* [189] 1 Ch 439 44 447 448
(t) *McColla v Jones* (1887) 4 Times Rep 1 *Eade v Jacobs* (187) 3 Ex D 335 *Marriott v Chamberlain* (1886) 17 Q B D 154 *Nash v Layton* [1911] Ch 71
(u) *Marriott v Chamberlain* (1886) 17 Q B D 151 161 166
(v) *Baijnath v Raghunath* (1914) 41 Cal 6 I C 76
(w) *Eade v Jacob* (1877) 3 Ex D 335 337 *Attorney General v Gaskill* (188) 0 C D 519 5) *Marriott v Chamberlain* (1886) 17 Q B D 154

(2) *To support your own case either*

(a) *directly by obtaining admissions or*

(b) *indirectly by impeaching or destroying your adversary s case (x)*

Case (1) has already been dealt with The following is an illustration of Case 2 *A* sues *B* to recover Rs 5 000 for making model machinery for exhibition The defence is that the machinery was defective and unworkable *A* may interrogate *B* whether the machinery did not obtain a prize at the exhibition If it did it is clear that the answer would tend to destroy *B* s case and support *A* s case (*y*) Moreover the answer will serve as an admission from *B* and the getting of admissions by interrogatories is always allowed for it supports the party s case ( )

There is one *exception* to the rule in Case 2 (b) *A* sues to eject *B* from a piece of land alleging that the land belongs to him and that *B* is wrongfully in possession thereof This is an action of ejectment *A* is plaintiff in ejectment and *B* is defendant in ejectment In an action of ejectment the plaintiff must prove his own title affirmatively It is not enough for him to impeach or destroy the defendant s title If he does not establish his own title to the land he will not be entitled to a decree though he may succeed in impeaching or even destroying the defendant s title The reason is that the defendant being in *possession* he cannot be dispossessed of the land except by proof of *title* on the part of the claimant Hence the plaintiff in ejectment should not be allowed to interrogate the defendant merely for the purpose *of destroying or impeaching* the defendant s title (*a*) And this is the *Exception* above referred to But the plaintiff in ejectment is entitled to interrogate the defendant as to any matter relating to the defendant s title that may support his case *directly* (*b*) The same principles apply in the case of discovery by production of documents

The High Court of Calcutta has said that interrogatories in India should not be allowed for the first of the above purposes that is to ascertain the nature of your opponent s case but that they may be allowed for the second that is to support your own case (*c*) This is on the ground that where a party has not sufficiently disclosed his case it is the *Court* that has to determine the exact nature of his case by procedure under O 8 r 7 and O 14 rr 1 2 and that it is not therefore permissible to the *opposite party* to get that information by *discovery* But these rules are it is submitted intended not to supersede but to supplement discovery and there is no reason why any distinction should be drawn between the English and the Indian practice (*d*)

What interrogatories may not be allowed —These may be divided into three classes —

1 *A party is not entitled to administer interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary s case or title* (*e*)

2 *A party is not entitled to interrogate as to any confidential communications between his opponent and his legal advisers*

3 *A party is not entitled to execute interrogatories which would involve disclosures injurious to public interests*

See notes to r 13 below Grounds of objection to production of documents

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(*x*) *Gru brecht* v *I y* (1 84) S W R (Eng) 5 8 *H ry* v *Bright* (1890) 4 Q B D 445 447 *Att rn y Gen ral* v *Newcastle upon Tyne Corporation* [1] Q B 384 394 *Fidler* v *B ty* (188) 9 C D 79

(*y*) *Hall* v *L ndet* (18 3) W N P 1 5

(*z*) *Att y General* v *Ga k l* (188) 20 C D 519 8

(*a*) *Fy e* v *Lodiers* (1831) 40 W 1 (En) 13 *Lyell* v *Ken edy* (1 3) 8 App Ca 17 *Morris* v *Edward* (1 90) 1 App C 309

(*b*) *Mıller* v *Kirwn* [1903] 1 P 1

(*c*) *A K der* v *Gol d Das* (1) 1 Cal 847

(*d*) *B jnath* v *Pa k nath* (1913) 41 Cal. 6 at p 9 4 I C 65

(*e*) *Penlow* v *I w* (18 0) 16 C D 9 9 *Pl m m* v *M y* (1 50) 1 Ves 4 6 Bray on Discovery pp 444 465 Wigram on Discovery I 261

1 **Interrogatories relating to names of persons**—Interrogatories relating to the names of persons not already parties to the action are only allowable where the object is either to make the proceedings complete and effective for all purposes or to enable the plaintiff more effectively to substantiate the case which he makes against the existing defendant (*f*) Such interrogatories are not allowable in any other case Thus in a suit by the vendor against the purchaser for specific performance of a contract for sale the plaintiff is not entitled to interroga e the defendant for the purpose of disco vering whether he was acting as agent for an undisclosed principal The only ob ect of such an interrogatory is to give the plaintiff the opportunity of releasing the defendant and of securing for the plaintiff some other person liable under the contract in substitution for and not jointly with the defendant (*g*)

As to interrogatories as to names of witnesses see note above Discovery by interrogatories and notes to O 6 r 4 Object of particulars As to interroga tories as to names of informants in defamation cases see the undermentioned cases (*h*)

Refusal by company to regist r transfer—Where an article of a company's articles of association empowers the directors without assigning any reason to decline to register any transfer of shares not fully paid up made to any person not approved by them or made by any member jointly or alone indebted to the company and the company refuses to register a transfer the company is not entitled in an action for a declaration that the refusal was wrongful to refuse to state which of the grounds mention ed in the article the directors had acted under although it might refuse to say what reasons influenced them in exercising their discretion before that ground (*i*)

Foreign law—An interrogatory involving a question of foreign aw is not per missible unless the party interrogated is shown to be an expert in that law (*j*)

Time for delivery of interrogatories—A plaintiff may under this rule deliver interrogatories to a defendant even before the filing of the written statement But there is this difference if the English practice is to be followed here that in what are called *common law actions* interrogatories if delivered before filing the written statement will as a rule be struck out under r 7 as unnecessary and vexatious unless sufficient reasons are given by the plaintiff to explain why the interrogatories are neces sary at that stage of the suit (*k*) while in suits of the nature of *chancery actions* (*l*) they may as a rule be allowed though no written statement has been filed (*m*)

A defendant as a rule is not allowed to deliver interrogatories to the plaintiff before he has filed his written statement (*n*)

Leave of Court—The application for leave to administer interrogatories is as a rule made ex parte In determining whether leave should be granted the Court should consider whether it is a fit and proper case for administering interrogatories Leave should be refused if the interrogatories are scandalous or are an abuse of the process of the Court But it is not the duty of the Court when granting leave to con sider what particular questions the party interrogated should be compelled to answer The proper time for considering that question is after the party interrogated has made his affidavit in answer [r 8] (*o*) See r 2 below

(*f*) *Thol* v *L sk* (18 5) 10 Ex 704 *Hancocks* v *Lebla he* (1878) 3 C P D 197 _0

(*g*) *Sebright* v *Ha bury* [1916] 2 Ch 245

(*h*) *Chapman* v *Leach* [19_0] 1 K B 338 [nder] *Lyle S mu l* v *Odhams Ld* [19 0] 1 I B 135 [action for libel in a newspaper]

(*i*) *S therl nd (D k)* v *Br t sh Dom nions Land Settlem nt Corporat on* [19 6] 1 Ch 746

(*j*) *Perlak I etroleum Maatsch ppij* v *Deen* [19 4] 1 K B 111

(*k*) *Mercier* v *Cotton* (1876) 1 Q B D 44 and see *Strong* v *Tappin* (1876) W N [Eng]

(*l*) That is actions assigned by the Judicature Act 1873 s 34 to the Chancery Divisio

(*m*) *Ha bord* v *Monk* (1878) 9 C D 616 [ion *Bank of London* v *Manby* (1879) 13 C D _39 241

( ) *Du e* v *Longbo rne* (1876) C D 0 See *Hawley* v *I eads* (18 6) W [Eng] 64

(*o*) *Sham Kishore* v *Sha h bhoom* (1880) 5 Cal 70 *Prem S kh* v *Ind o* *th* (1 91) 13 Cal 4 0

Opposite party —These words do not include solely the relation of plaintiff and defendant Hence one defendant may administer interrogatories to another defendant provided there is *some right to be adjusted in the action between them* (p)

Where opposite party is a minor or lunatic —Where a party to a suit is a minor or a lunatic interrogatories may be administered to his next friend or guardian *ad litem* as the case may be see r 23 below

Points of distinction between interrogatories and cross examination —

(1) Not every question which could be asked to a witness in the box may be put as an interrogatory Thus questions which are put only to test the credibility of a person will not be allowed although of course they may be asked in cross examination (q)

(2) Interrogatories can be administered only to a *party* to a suit and not to a witness (r)

Impleading party for discovery —A person cannot be made a party to a suit solely for the purpose of discovery (s)

Distinction between pleadings and interrogatories —Interrogatories are not like pleadings confined to the *material* facts on which the parties rely in support of their claim or defence Interrogatories may be administered not only to ascertain the nature of your opponent s case but *to obtain admissions* from him of everything which is material on the pleadings so as to facilitate the proof of your own case and *thus save yourself the expense of proving facts admitted by your opponent in answer* to the interrogatories (t)

Probate proceedings —O 11 applies by virtue of s 266 of the Indian Succession Act 39 of 1925 to proceedings in probate (u)

2 [*New* R S C, O 13 r 2] On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court In deciding upon such application, the Court shall take into account any offer which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs

Particular interrogatories to be submitted

Power of Court under this rule —It is to be noted that the Court has no power under this rule to settle interrogatories but to state only what interrogatories should be administered (t) Further the allowance by the Court of interrogatories to be administered to a party does not amount to a decision that the party is bound to answer them but leaves him at liberty to take any objection to answering which he might otherwise have taken (w) See rr 6 7 below

(p) *Molloy* v *Kilby* (1880) 15 C D 16 *Shaw* v *Smith* (1886) 18 Q B D 193 *Birchal* v *Birch Crisp & Co* [1913] Ch 375

(q) *Allhusen* v *Labouchere* (1878) 3 Q B D 654 *Kennedy* v *Dodson* [1895] 1 Ch 334 338 *Bhagwandas* v *Emperor* (1913) 37 Bom 347 17 I C 15

(r) *Attorney General* v *Gaskill* (1882) 20 C D 519 530

(s) *Fazalbhoy* v *Turner* (1893) 17 Bom 341

Lyell v *Macfarlane* [1891] 2 Q B 41, 47

(t) *Attorney General* v *Gaskill* (1882) 20 C D 519 528

(u) *Abdul hala* v *Rajendra nath* (1915) 43 Cal. 300 34 I C [illegible]

( ) *Abdul dabaus* v *Rajendra nath* (1915) 43 Cal. 200 34 I C [illegible]

(w) *Peek* v *Ray* (1894) 3 Ch [illegible]

Running down cases—In running down cases only such interrogatories should be allowed as may be necessary for disposing fairly of the suit or for saving costs within this rule (*x*)

3 [R S C, O 31 r 3 *Cf* S 123] In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the cost occasioned by the said interrogatories and the answer thereto shall be paid in any event by the party in fault

Costs of interrogatories.

4 [*New* R S C, O 31, r 4] Interrogatories shall be in Form No 2 in Appendix C, with such variations as circumstances may require

Form of interrogatories

5 [R S C O 31 r 5 *Cf* S 124] Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued whether in its own name or in the name of any officer or other person any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly

Corporations

Delivery of interrogatories to an officer of a corporation—A corporate body cannot answer for itself and if it is necessary that some officer should answer for it His answer is the answer of the Company and can be read against the Company Therefore he is only bound to answer with reference to knowledge *acquired in the course of his employment* by the Company and as the result of inquiries made by him of the other officers and agent of the Company with regard to their knowledge *acquired in the same way* He is not bound to answer as to *his own knowledge* or to make inquiries of the other officers or agents of the Company as to their knowledge *acquired accidentally or in some other capacity* (*y*)

6 [R S C O 32 r 6 *Cf* S 125] Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited bona fide for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer

Objections to interrogatories by answer

(*x*) *Griebart* v *Morris* [19 0] 1 K B 6 0
(*y*) *Wel b ch Incandes ent Gas Light g Co* v ... S ... *ght Inc ... lescent Co* [1900] Ch. 1

O 11

Scandalous interrogatories — Certainly nothing can be scandalous which is relevant ( ) Interrogatories which tend to incriminate a party are not scandalous if they are relevant (*a*)

Irrelevant interrogatories —The discovery by interrogatories as distinguished from cross examination must be *directly relevant* to the matter in issue (*b*) Thus in an action for damages against the defendant for seducing the plaintiff's daughter the defendant cannot be asked how rich he is as it is perfectly irrelevant in such cases whether the defendant is rich or poor the true measure of damages being the amount of compensation to be paid to the plaintiff for the injury he has sustained by the seduction of his daughter But interrogatories as to whether the defendant has had sexual intercourse with the daughter and whether he had stated that he believed that she had not had such intercourse with any other man are allowable (*c*) Similarly interrogatories will not be allowed if the defence at which they aim would be no defence in law to the suit (*d*)

Where a party seeks discovery of *documents* and the opposite party alleges that the documents are *not relevant* the procedure to be followed is that laid down in r 18 sub r (2) below A party should not be compelled by means of interrogatories to give discovery of document the relevancy of which is denied (*e*)

Not exhibited bona fide for the purpose of the suit —Though an interrogatory may be relevant it may be ojected to on the gound that it is put with a view to serve an ulterior object beyond the scope of the suit

Not sufficiently material at that stage —An interrogatory may be perfectly relevant to a suit and put *bona fide* for the purposes of the suit but if it is premature it will not be allowed (*f*) This may be illustrated by the following cases —

(1) *A* sues *B* for breach of an alleged trust and for profits made by *B* by such breach *B* denies the alleged trust *A* is not entitled to interrogate *B* so as to require from him an *account* of profits of the alleged trust fund unless the trust is proved (*g*) but it is otherwise if the breach of trust is admitted (*h*)

(2) In *Hennessy* v *Clark* (*i*) the plaintiff's interrogatories as to the *amount of damages* were *held to be premature as it was not yet decided whether the* plaintiff was entitled to any damages at all Cotton L J said The Court is always unwilling before the right to relief is established to make an order for discovery which may be injurious to the defendant and will only be useful to the plaintiff if he succeeds in establishing his title to relief

Or any other ground —Besides the three specific grounds mentioned in the rule a party interrogated may object to answer an interrogatory on the ground that it is prolix oppressive unnecessary or scandalous (r 7) or on the grounds specified in the notes to r 1 What interrogatories may not be allowed on p ol above

Fishing interrogatories not allowed —The questions asked must not be fishing that is to say they must refer to some definite and existing state of circumstances and must not be put merely in the hope of discovering something which may help the party interrogating to make out some case (*j*) See Odgers on Pleading 8th Ed p 218 For instances of fishing interrogatories see *Ali Kadar* v *Gobind Das* (*k*)

( ) *Fisher* v O (18 8) 8 C D 645 653 per Cotton L J
( ) *Allhusen* v *Labouchere* (18 8) 3 Q B D 654 (18 8) 8 C D 645 p a
(*b*) *Fe II wel* v *Morgan* (1888) 39 C D 316 *Kennedy* v *Dodson* [1895] 1 Ch 334 338 340
( ) *Hodsoll* v *Taylor* (1873) L R 9 Q B 9
(*d*) *Lowe & Co* v *Lambert & Co* (1 90) 4 Q B D 5 3
( ) *N tomoy* v *Soob I* (189) 23 Cal 11
(*f*) *Neckram* v *I a k of Bengal* (1 3) 14 Cal 03
(*g*) *Parker* v *W I* (1881) 18 C D 4 7
(*h*) *Whatham* v *Whatham* (18 1) 25 Sol Jo 456
( ) (1888) 37 C D 184 [infringement of trade-mark]
(*j*) *Cowley* v *Plimsoll* (18 3) L R 8 C P 262 *Hennessy* v *Wright* (No 2) (1890) 4 Q B D 445
(*k*) (1 90) 17 Cal 840 842 843

Contracts by way of wager—In cases where the defence of wager is set up the Court will refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in the suit the reason being that it is manifestly unfair to compel a person to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case (*l*)

Defamation—Where a statement of claim in an action for slander alleges publication to one named person and publication also to various other persons unnamed it is not generally permissible to ask the defendant whether he uttered the words complained of to any person or persons other than the person named and if so to give their names Such an interrogatory is a fishing interrogatory the object being to find out some cause of action against the defendant other than the specific cause of action alleged in the plaint (*m*)

Setting aside and striking out interrogatories

7 [*New* R S C, O 31, r 7] Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous, and any application for this purpose may be made within seven days after service of the interrogatories

Setting aside and striking out interrogatories—*A* as trustee in the bankruptcy of *C* sues *B* for a declaration that a piece of land purchased by *B* and *C* in 1883 was purchased by *B* and *C* in partnership *B* denies the partnership *A* exhibits interrogatories to *B* asking for particulars of purchases of land by *B* and *C* previous and subsequent to 1883 to prove that they had been co partners in various other purchases similar to that of 1883 The interrogatories are irrelevant and oppressive and must be struck out To ask the defendant to take the trouble to go through his books and papers for so many years is vexatious and oppressive (*n*)

The present rule does not apply where the interrogatories are merely irrelevant An objection that an interrogatory is irrelevant must be taken in the affidavit in answer (r 6) and is no ground for setting aside the interrogatory under this rule (*o*)

There is no foundation for the opinion that a person who has a ground for refusing to answer [an interrogatory] is precluded from availing himself of that ground because he has not applied to have the interrogatory struck out (*p*)

Affidavit in answer filing

8 [R S C, O 31, r 8, S 126] Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow

Answers as to matters done by agent or servant of party interrogated—A party to a suit is not excused from answering interrogatories relevant to the question in issue on the ground that they are as to matters which are not within his own knowledge but are only within the knowledge of his agents or servants if such knowledge has been acquired by them *in the ordinary course of their employment* He is bound to obtain the information from such agents or servants unless he shows that it would be unreasonable to require him to do so as for instance if either such agents or

(*l*) *Bhagwandas* v *Burjorji* (1913) 37 Bom 317 17 I C 15
(*m*) *Barham* v *Huntingfield* [1913] K P 193
(*n*) *Kennedy* v *Dodson* [1895] 1 Ch 334
(*o*) *Dalgleish* v *Lowther* [1899] Q B 590
(*p*) *Fisher* v *Owen* (1878) 8 C D 645 6 4

servants have left his employment or if it would occasion unreasonable expense or an unreasonable amount of delay or the like (q) A party's banker or solicitor is his agent within the meaning of the above rule (r) But a party is not bound to disclose matters that have come to the knowledge of his agents or servants otherwise than in the ordinary course of their employment (s)

Form of affidavit in answer

9 [*New* R S C, O 31, r 9] An affidavit in answer to interrogatories shall be in Form No 3 in Appendix C, with such variations as circumstances may require

No exception to be taken

10 [*New* R S C O 31, r 10] No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court

Order to answer or answer further

11 [R S C O 32 r 11 S 127] Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct

Application for further answer to interrogatories—An application for a further answer to interrogatories ought to specify the interrogatories or parts of interrogatories to which a further answer is required (t)

Answers insufficiently — With regard to an answer to interrogatories what the Court has to consider is this simply whether the answer is insufficient not to go into the question of the truthfulness of the answer but to see whether it is insufficient or not and if it is insufficient then only can it require a further answer (u)

When an answer is couched in a form which makes it embarrassing that is to say which prevents the person who asks for it from using it without having thrust upon him irrelevant matters as part of it the answer is insufficient and the proper course to pursue is to ask that a further answer shall be made (v)

Privilege—Where in an answer to interrogatories the party interrogated declines to give further information on the ground of privilege and the privilege is properly claimed in law the Court will not require a further answer to be put in unless it is clearly satisfied either from the nature of the subject matter for which privilege is claimed or from statements in the answer itself or in documents so referred to as to become part of the answer that the claim for privilege cannot possibly be substantiated *The mere existence of reasonable suspicion* which is sufficient to justify the Court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer

(q) *Bolckow Vaughan and Co v Fisher* (188[illegible]) 10 Q B D 161 *Rasbotham v Shropshire Union Railway and Canal Co* (1884) 24 C D 110 113
(r) *Alliot v Smith* [1[illegible]9[illegible]] 2 Ch 111
(s) *Welsbach Incandescent Gas Lighting Co v New Sunlight Incandescent Co* [1900] Ch. 1 10-11
(t) *[illegible] v North and South Woolwich Subway Co* (1[illegible]9) 11 C D [illegible]
(u) *Lyell v Kennedy* (1[illegible]84) 2[illegible] C D 1 [illegible]
(v) *Ib* p [illegible]8

to interrogatories is sought to be falsified (*u*) See notes to r 13 below

3 Conclusiveness of affidavit of documents

Consequence of failure to answer interrogatories—See r 21 below

12 [R S C, O 31, r 12, S 129] Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein On the hearing of such application the Court may either refuse or adjourn the same, *if satisfied that such discovery is not necessary, or not* necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

Application for discovery of documents

13 [R S C, O 31 r 13 S 129, 2nd para] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No 5 in Appendix C, with such variations as *circumstances may* require

Affidavit of documents

Discovery and production of documents—Besides discovery by way of answer to interrogatories there is another species of discovery called *discovery of documents* The parties to a suit may have in their possession or power *documents relating to the matters in question in the suit* These documents may be divided into two classes —

(i) those which the adversary is entitled to inspect and

(ii) those which he is not entitled to inspect

Documents which belong to class (ii) are described and classified below under the head Grounds of objection to production of documents As to class (i) it may be said that the adversary is entitled to inspection of all documents which do not come within class (ii) Speaking generally we may say that the adversary is entitled to inspection of all documents which do not of themselves constitute *exclusively* the party's *evidence* of his case or title But how is inspection to be obtained? If A wants to inspect documents in the possession of *B* which he is entitled to inspect it is clear that he cannot inspect them unless they are produced by *B* A must therefore call upon *B* to produce the documents But how can A do this unless he knows what documents are in the possession or power of *B*? To enable him to obtain this information A is entitled to *discovery* from *B* of the documents in his possession or power (*x*) For this

(*w*) *Lyell* v *Kennedy* (1883) [illegible] C D 1

(*x*) See *Municipal Board of Agra* v *Asharfi Lal* (19[illegible]) 44 All [illegible] 65 I C 981 ([illegible]) A A 1

purpose *A* may apply to the Court for an order requiring *B* to make an affidavit called *affidavit of documents* stating what documents are in his possession or power relating to the matters in dispute in the suit When the Court makes the order *B* is bound to make his affidavit of documents and if he fails to do so he will be subjected to the penalties specified in r 21 below After *B* has disclosed his documents by affidavit *A* may require him to *produce* for his inspection such of the documents as he is in law entitled to inspect O 11

Contents of affidavit of documents —A party who is ordered to make his affidavit of document should *set forth* in the affidavit all documents which *are* or *have been* in his possession or power relating to all matters in question in the suit As to documents which *are not but have been* in his possession or power he must state what has become of them and in whose possession they are in order that the opposite party may be enabled to get production from the persons who have possession of them For the same reason if there are any documents in which he has a *joint* property with other persons not before the Court he must state the names of those persons Rule 13 provides that every affidavit of documents should also specify which of the documents therein *set forth* the declarant objects to *produce* for the inspection of the opposite party together with the grounds of such objection (see App C Form No 5) These grounds are three in number and are detailed below The Court examines these grounds when it is called upon to make an order for *production* of the documents in a party's possession for the inspection of the opposite party (r 14)

Grounds of objection to production of documents —Production of documents can be resisted as of right on three grounds (1) as disclosing the party's evidence (2) as being within the doctrine of legal professional privilege and (3) as being injurious to public interests

1 *A party is not bound to produce for the inspection of his opponent documents which of themselves evidence exclusively the party's own case or title* (y) —Documents constituting *evidence* of the party's case or title are not protected unless they are *solely or exclusively* evidence of it Where a document is or may be evidence *for the adversary as well as the party* the party cannot withhold inspection of it from the adversary (z) although his own evidence may be thus disclosed (a) It is not enough for a man to say such and such documents are the title deeds of *his property* it is no ground for refusing their production if they are necessary to *support* the adversary's case (b) But a document is protected from production and inspection if it *exclusively* evidences a party's own case and does not support the adversary's case (c) To entitle the party to this protection the privilege must be properly claimed that he must state in his affidavit that the documents constitute evidence of his own case or title that they contain nothing supporting or tending to support the adversary's case or title and that they contain nothing impeaching his own case or title (d) As to discovery in actions of ejectment see notes to r 1 above What interrogatories may be allowed

2 *A party is not bound to produce any confidential communications between him and his legal adviser* (e) —The object of this rule is to enable persons to obtain legal advice

(y) Frankenstein v Gavin's [illegible] Co [1897] 2 Q B 62 [illegible] Attorney General v Emerson [illegible] [illegible] of Newcastle upon Tyne [1899] 2 Q B 478

(z) Bray on Discovery p 448 Burrell v Nicholson (1833) 1 M & K 680 [illegible] Beaufort (1845) 1 Ph [illegible] Combe v Corp of London (1845) 13 L J Ch [illegible] 83

(a) Lord Ca[illegible] v Chi[illegible] (1849) 6 C B [illegible] [illegible] v Chadwick (1841) 3 M & C 5[illegible]

(b) Attorney General v Thompson (1849) 8 Ha p 113 Sutherland v [illegible] (18[illegible]) 10 Cal 808

(c) Lyell [illegible] Board v Tremont Iron Ore Co (18[illegible]) 14 Ch D 1[illegible] Morris v Edwards (1890) 15 App Cas [illegible]

(d) Attorney General v Emerson (18[illegible]) 10 Q B D 191 Morgan v Morgan (18[illegible]) L R 8 Ch 361 Attorney General v Newcastle [1899] 2 Q B 4[illegible] Balamo[illegible] v [illegible] (190[illegible]) 30 Mad 23[illegible] 231

(e) [illegible] v [illegible] (1[illegible]) 15 Bom 7[illegible] See Evidence Act ss 126 and 129

to interrogatories is sought to be falsified (u) See notes to r 13 below Conclusiveness of affidavit of documents

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Documents which belong to class (ii) are described and classified below under the head Grounds of objection to production of documents As to class (i) it may be *said that the adversary is entitled to inspection of all documents which do not come within class (ii)* Speaking generally we may say that the adversary is entitled to inspection of all documents which do not of themselves constitute *exclusively* the party's *evidence* of his case or title But how is inspection to be obtained? If A wants to inspect documents in the possession of B which he is entitled to inspect it is clear that he cannot inspect them unless they are produced by B A must therefore call upon B to produce the documents But how can A do this unless he knows what documents are in the possession or power of B? To enable him to obtain this information A is entitled to *discovery* from B of the documents in his possession or power (x) For this

(u) *Lyell v Kennedy* (1884) [illegible] C D 1 [illegible]
(x) See *Municipal Board of Agra v Asharfi Lal* (19[illegible]) 41 All [illegible] 6 I C 981 ([illegible]) A A 1

purpose *A* may apply to the Court for an order requiring *B* to make an affidavit called *affidavit of documents* stating what documents are in his possession or power relating to the matters in dispute in the suit When the Court makes the order *B* is bound to make his affidavit of documents and if he fails to do so he will be subjected to the penalties specified in r 21 below After *B* has disclosed his documents by affidavit *A* may require him to *produce* for his inspection such of the documents as he is in law entitled to inspect

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Grounds of objection to production of documents —Production of documents can be resisted as of right on three grounds (1) as disclosing the party's evidence (2) as being within the doctrine of legal professional privilege and (3) as being injurious to public interests

1 *A party is not bound to produce for the inspection of his opponent documents which of themselves evidence exclusively the party's own case or title* (*y*) —Documents constituting evidence of the party's case or title are not protected unless they are *solely or exclusively* evidence of it Where a document is or may be evidence *for the adversary as well as the party* the party cannot withhold inspection of it from the adversary (*z*) although his own evidence may be thus disclosed (*a*) It is not enough for a man to say such and such documents are the title deeds of *his property* it is no ground for refusing their production if they are necessary to *support* the adversary's case (*b*) But a document is protected from production and inspection if it *exclusively* evidences a party's own case and does not support the adversary's case (*c*) To entitle the party to this protection the privilege must be properly claimed that he must state in his affidavit that the documents constitute evidence of his own case or title that they contain nothing supporting or tending to support the adversary's case or title and that they contain nothing impeaching his own case or title (*d*) As to discovery in actions of ejectment see notes to r 1 above What interrogatories may be allowed

2 *A party is not bound to produce any confidential communications between him and his legal adviser* (*e*) —The object of this rule is to enable persons to obtain legal advice

(*y*) *J dlen v W ll n* [1 93] 2 Q B 43 *Frecke t v C s Co* [1 9] 2 Q B 6 *Att n y G er l v M yor of New astle upo T y* [1 93] 2 Q B 4 8

(*z*) Bray on Discover p 4 8 *B ll v N h l m* (1833) 1 M C 1 C 0 *Smith v Lo f rt* (184) 1 1 h p 0 *C mbe v C rp L nd n* (1 45) 15 L J Ch 83

(*a*) *Lond n G s L ht C v Ch l ea* (18 9) 6 C B N S 411 4 6 *St t v Chad c k* (1 31) 3 M A 5 5

(*b*) *Attorney-General v Thompson* (1849) 8 Ha p 113 *H lands v gh Ch rn* (1) 10 Ch 808

(*c*) *Egremo t I n l I ord v I remont Iro O e C* (18) 14 C D 1 *Morr v Edw* (1 90) 15 App Ca 309

(*d*) *Attorney-General v Emerson* (18) 10 Q B D 191 *W ard v Morgan* (1 3) L R 8 Ch 361 *Attorney-General v New ca tle* [1 99] Q B 4 *Balamoney v Jamasam* (1907) 30 Mad 23 231

(*e*) *Perr v Sh k* (1 91) 15 Bom See Evidence Act ss 1 0 and 129

3 safely and effectually (*f*) The following are amongst the confidential communications between a client and his legal adviser that are protected from production and inspection (1) statement of facts drawn up by the client for submission to his solicitor and documents prepared by him for the purpose of providing the solicitor with evidence and information for the conduct of his case (*g*) (2) advice given by the solicitor with reference thereto (*h*) (3) entries in the solicitor s diary of communications between himself and his client (*i*) (4) memoranda or minutes made by the client of the communications between himself and the solicitor (*j*) (5) communications between solicitor and counsel with reference to the client s case (*k*) (6) draft pleadings (*l*) (7) case laid before counsel for his opinion and other briefs for counsel (*m*) (8) solicitor s bill of costs for it is virtually the solicitor s *history of the transaction* in which he was concerned (*n*) But the communication is not privileged unle s it is of a *confidential* nature (*o*) And further it must have been made to the *legal adviser with a view to obtain professional advice* (*p*) It is not necessary that it should have been made either during an actual or even an expected litigation. A communication with a legal adviser is protected though it relates to a transaction *which is not the subject of litigation* provided it is a communication made to him for the purpose of obtaining professional advice (*q*) But no privilege attaches to communications between a solicitor and his client which are in themselves facts of a criminal or unlawful proceeding (*r*) Where one of the trustees of a will is a solicitor and acts as the solicitor for the trustees communications passing between him and his co trustees which would be privileged if the solicitor were not a trustee are privileged notwithstanding that he is a trustee (*s*) But confidential communications between a principal and an agent who is not a legal agent *e g* a commercial agent are not privileged whether they are made after litigation has become imminent and after legal advice has been taken or even after litigation has commenced (*t*) Similarly reports made by a servant to his master regarding the subject matter of the suit are not privileged (*u*) See Evidence Act 1872 ss 126 129

3 *A party is not bound to produce any public official document if its production would be injurious to public interests* (*v*)—This head of privilege applies as a rule when a party to a suit is a public officer See Evidence Act 1872 ss 123 124

In all the three heads of privilege mentioned above the privilege must be claimed in the affidavit of documents and the grounds of privilege must be sufficiently disclosed If the affidavit of documents does not sufficiently raise the claim of privilege the party may be allowed to put in a further affidavit in support of that claim (*w*)

Is a party bound to give discovery of documents which will tend to criminate him or expo e him to a penalty or forfeiture ? No according to the English law (*x*) But

(*f*) *Wheeler* v *Le Merchant* (1881) 17 C D 675 pp 681 68 *Re Strachan* [1895] 1 Ch 439 444 *Bullivant* v *Attorney General* [1901] A C 196 00

(*g*) *Southwark Co* v *Quick* (18 8) 3 Q B D 315 *Birmingham and Midland Motor Omnibus Co Ld* v *London and North Western Ry Co* [1913] 3 K B 850 *Recherd* v *London General Omnibus Co* [1918] K B 56

(*h*) *Pyrie* v *Shishahk* (1891) 15 Bom 7

(*i*) *Ward* *Marshal* (1888) 3 Times Rep 5 8

(*j*) *Woolley* v *N L R C* (1869) L R 4 C P 60

(*k*) *Mostyn* v *West Mostyn Co* (18 6) 34 L T 3 5

(*l*) *Lamb* v *Orton* (1853) L J Ch 713

(*m*) *William* v *Stainton* (1863) H & M 1 *Mancherjshaw* v *New Dhurumsey Co* 1880) 4 Bom 5 6

(*n*) *Turton* v *Barber* (1874) L R 17 Eq 3 9 *Chant* *Brown* 9 Ha 90

(*o*) *Hajee Haroon* v *Abdul Karim* (18 9) 3 Bom 91 *Framji* v *Mohansing* (1894) 18 Bom 63 71 *Emperor* v *Rodrigues* (1903) 5 Bom L R 1

(*p*) *Framji* v *Mohansing* (1894) 18 Bom 63 *Foakes* v *Webb* (1884) 8 C D 8

(*q*) *Wheeler* v *Le Marchant* (1881) 17 C D 6 5

( ) *Bullivant* v *Attorney General* (1901) A C 196 00 01 *Whitworth In re* (1919) 1 Ch 3 0 333 338

(*s*) *Whitworth In re* [1919] 1 Ch 3 0

(*t*) *Wallace* v *Jefferson* (1878) 2 Bom 453 *Bipro Dass* *Secretary of State for India* (1885) 11 Cal 655 *Pyrie* v *Shishanks* (1891) 15 Bom 7 *Umbica Churn* v *Bengal S & W Co* (189) Cal 105

(*u*) *Central India Spinning Co* v *G I P Ry Co* (1927) 29 Bom L R 414

(*v*) *Wadeer* v *E I Co* (1865) 8 De G M & G p 18 *Jehangir* v *Secretary of State* (1904) 6 Bom L R 131 160

(*w*) *Umbica Churn* v *Bengal S & W Co* (1895) 2 Cal 10

(*x*) Bray on Discovery 311 319 Steph Dig art. 1 0

apparently yes according to the Indian law See Evidence Act s 132 where the term witness obviously includes a *party* to a suit O 1

Conclusiveness of affidavit of documents Further affidavit—If a party states in his affidavit of documents that he has no documents relating to the matters in question in the suit other than those set forth in the affidavit his oath is conclusive and the other party cannot cross examine upon it nor adduce evidence to contradict it nor administer interrogatories asking whether he has not in his possession or power documents other than those set forth in his affidavit (*y*) The oath of the party being conclusive the Court will not order him to make a further affidavit of documemts though the opponent may state on oath that the party has got other documents in his possession (*z*) the reason being that in all questions of discovery the oath of the party making the discovery is conclusive as against the oath of the party claiming the discovery (*a*) The only case in which the Court may require a party to make a further affidavit is where there is a resonable probability or presumption *or even ground for suspicion* derived from certain sources that he has other relevant documents in his possession (*b*) The sources into which the Court may look for this purpose are (1) the affidavit of documents itself (²) the documents therein referred to and (3) the pleadings(*c*) Unless the affidavit is shewn from any of these sources to be insufficient the general rule is that no further affidavit can be ordered But this rule is qualified where the basis on which the affidavit has been made turns out to be wrong Thus if the party making the affidavit has misconceived his case so that the Court is practically certain that if he had acted on a proper view of the law he would have disclosed further documents then the Court will refuse to recognise the affidavit as conclusive and order a further affidavit (*d*)

The affidavit of documents is also conclusive as to the facts constituting the ground of objection to *production* Thus if a party sets forth five documents in his affidavit and objects to produce two of them on the assertion that they relate *exclusively* to his own title and that they contain nothing tending to support the adversary s title the Court will not go behind the affidavit (*e*) and will not order production unless the Court is *reasonably satisfied or reasonably certain* from the sources specified in the preceding paragraph that the nature of the documents as described by the party has been misconceived by the party or that the documents are of such a character that the party cannot properly make such an assertion (*f*) *Mere suspicion* that the documents are not of the character described by the party though it is sufficient to justify the Court in ordering the party to make a *further affidavit of documents* (see preceding paragraph) does not entitle the Court to order their *production* (*g*)

In a suit for the price of material supplied to the defendant in which the defence was that the materials were defective the defendant objected to produce his engineer s report on the ground that it formed *evidence* of his own case *exclusively* but the Court ordered production on the ground that the defendant *had set forth the nature of the report in his written statement* and the statement showed that the report was not of the character described by the defendant (*h*)

Inspection by Court of documents for which privilege is claimed—Where on an application for an order for inspection privilege is claimed for any document the

(*y*) *Hall* v *Truman* (1885) 9 C D 30 *Nichol* v *Wheeler* (1886) 17 Q B D 101
(*z*) *Fenwick* v *Spry* (185) 1 De G M & G 6 6
(*a*) *Lyell* v *Kennedy* (1884) 27 C D p 19 *Kumar Ram Krishna* v *P* [illegible] *Jaikrishnath* (19 0) 5 I [illegible] L J 550 59 I C [illegible] *Kedar Nath* v *Vishwanath* (19 4) 46 All 41 80 I C. 78 (4) A A 510
(*b*) *Hall* v *Truman* (1883) 29 C D p 319 *Lyell* v *Kennedy* (1884) 27 C D p 20 *Compagnie Financier* v *Peruvian Guano Co* (18) 11 Q B D 55
(*c*) *Jones* v *Monte Video Co* (1880) 5 Q B D 556 *Kent Coal Concessions* v *D* [illegible] [1910] 1 K B 904 and cases cit [illegible] in last note
(*d*) *British Association of Glass Bottle Manufacturers* v *Nettlefold* [191] A C (9)
(*e*) *Vinayakrao* v *Narotam* (1 93) 17 Bom 91
(*f*) *Attorney-General* v *Emerson* (18) 10 Q B D 191 *Frankenstein* v *Gavins C* [1 9] 2 Q B 6 *Roberts* v *Oppenheim* (1 84) 6 C D [illegible]
(*g*) Bray on Discovery 503
(*h*) *Umbica Churn* v *Bengal S & W Co* (1825) 22 Cal 105

3 Court may inspect the document for the purpose of deciding whether the claim of privilege is valid See r 19 sub r (2)

Sufficient description of documents—As it is one of the objects of the affidavit of documents to enable the Court to make an order for production of the documents mentioned therein the affidavit ought to contain a sufficient description of the documents A description will be held sufficient if it is of such a character that if an order for production is made the Court can determine whether the documents are the same as those ordered to be produced (i) Where there are numerous documents the practice is to tie them up in bundles to schedule the bundles and number the documents or otherwise ear mark them in such a way that the other party may ask for those which he wants to see (j)

When a party claims to withhold certain documents from production although some description may be necessary he need not give such a description as would enable the adversary to know their contents (k) Thus where privilege is claimed for letters it is not necessary to state the dates or the names of the writers nor such other particulars as might enable the opponent to discover indirectly the contents (l)

Not necessary at that stage of the suit—See notes to r 6 above Not sufficiently material at that stage

Relating to any matter in question in the suit.—Every document which will *throw any light* on the case is a document relating to a *matter in dispute* in the suit (m) though it may not be *admissible in evidence* (n) A document may not be admissible in evidence and yet it may contain information which may either directly or indirectly enable the party seeking discovery either (1) to advance his own case or (2) to damage his adversary's case or which may fairly lead him to a train of inquiry which may have either of these two consequences (o) Every such document must be included in the affidavit of document and the opposite party is entitled to inspection of such documents Thus a plaintiff may be required to *produce* for inspection of the defendant correspondence containing mere matter of opinion by non legal agent as to the prospect of the plaintiff's success in the case though the correspondence *may not be admissible in evidence* (p)

Non disclosure of documents—Presumption— It is open to a litigant to refrain from producing any document that he considers irrelevant if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper If he fails so to do neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual *and proper way if he fails to do so no inference in his favour can* be drawn as to the contents thereof (q) But where an *order for discovery is made* upon a party and it is alleged by him as to some of the documents that they may have been destroyed or may have perished it is incumbent on him to give evidence of diligent search and of failure to find them if no such evidence is given the presumption arises that the contents of the documents not accounted for are as regards the issue in dispute unfavourable to that party (r)

(i) *Taylor v Batten* (18 8) 4 Q B D 85
(j) *Hill v Hart Davis* (1884) 6 C D 4 0 4 Cooke v Smith [1891] 1 Ch 509 *Price v Price* (1879) L. J Ch. 215
(k) *K n v F rrer* (18 7) 37 L T 4 0
(l) *Gardner v Irvin* (18 8) 4 Ex D 50
(m) *Hutchinson v Glover* (1875) 1 Q B D 138
(n) *Bustros v White* (18 6) 1 Q B D 4 *Hutchinson v Glover* (1875) 1 Q B D 141
(o) *Compagnie Financiere v Peruvian Guano C* (188) 11 Q B D 63
(p) *Fuster v White* (18 6) 1 Q B D 423
(q) *Bilas Kunwar v Desraj* (1915) 3 All 55 566 4 I A 20 206 30 I C 99 Distinguished *Murugesam v Manickavasaka* (191) 44 I A 98 103 40 Mad 402 408-409 39 I C 6 9
(r) *Moti Lal v Kundan Lal* (191) 19 Bom L R 471 4 6 39 I C 964 [I C]

Several plaintiffs or several defendants.—Where there are several plaintiffs or several defendants *all* must join in making the affidavit of documents unless some specific reasons to the contrary are shown. The fact that some of the parties reside in England is no reason why they should be excused from making such affidavit (*s*).

Minors and lunatics.—The next friend or guardian *ad litem* as the case may be of a minor or a lunatic may be required to make an affidavit of documents (r. 23).

Affidavit of documents from a co-defendant.—An affidavit of documents may be required by a defendant from a co-defendant if there is an issue joined between them but not otherwise (*t*). See notes to r. 1 above, "Opposite party".

Advocate General.—No order can be made against the Advocate General whether he be plaintiff or defendant requiring him to give discovery on *oath*. Hence no affidavit of documents can be required from the Advocate General. But an affidavit of documents may be required from the relators (*u*). See s. 9.

Official Liquidator.—The Official Liquidator being an officer of the Court should not in the absence of special circumstances be required to make an affidavit as to documents in his possession though he is bound to produce to the adverse litigant the documents which the latter requires to see (*v*).

Marine Insurance.—The affidavit of ship's papers which underwriters are entitled to require from the plaintiff in an action on a policy of marine insurance on cargo is not limited to documents in the possession of the plaintiff or other persons interested in the insurance but extends to all material documents in whomsoever's possession they may be (*w*).

Sealing up parts of documents.—Where one part of a document relates to matter in dispute in the suit and another part does not, the latter may be sealed up and so concealed from inspection. Similarly where protection from discovery can be claimed for one part of a document and not for another part, the part which can be protected may be sealed up (*x*). In some cases the Judge has ordered the sealed parts to be unfastened in order that he might inspect them himself (*y*). See r. 19, sub-r. (2).

Duty of solicitor.—Where after a party has made his affidavit of documents his solicitor finds that there are other documents which have not been disclosed, it is the duty of the solicitor to bring those documents to the notice of his opponent at the earliest possible opportunity (*z*).

Inspection of property being subject-matter of suit.—See O. 39, r. 7 (1) (a).

Production of documents

14. [R. S. C., O. 31, r. 14, S. 130.] It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and

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(*s*) *F*[illegible] *v. Sh*[illegible] (1897) 15 [illegible].

(*t*) [illegible] *v.* [illegible] (1893) 1[illegible] Bom. 384.

(*u*) *Advocate General v.* [illegible] (1906) 8 Bom. L. R. 565. See Bray on Discovery, pp. 6[illegible]-69.

(*v*) *M*[illegible] *Society, in re* (1883) [illegible] Ch. D. [illegible].

(*w*) *Teneri Mod*[illegible] *v. New Zealand I*[illegible] (19[illegible]) 1 K. B. [illegible].

(*x*) [illegible] on Discovery, p. [illegible]33; *Jal*[illegible] *v. K*[illegible] (1[illegible]) [illegible] Cal. 5[illegible]; *Herralal v.* [illegible] (1[illegible]) 4 Cal. 83.

(*y*) *Lafon v. Falkland Island C*[illegible] (18[illegible]) [illegible] J. Ch. [illegible]; *Caton v. Lewis* (1[illegible]) [illegible] W. R. [Eng.] 11[illegible]; [illegible] *v. Tulsiram* (1901) [illegible] Cal. [illegible].

(*z*) *Attorney*, [illegible] *the matter of an* (19[illegible]) [illegible] Cal. W. N. 99, 61 [illegible].

A party is entitled under this rule to inspection of letters referred to in an affidavit of the opposite party though the affidavit has not been filed provided it is sworn and a copy thereof is furnished to him (t)

Inspection by party or his pleader—No one is entitled under this rule to inspection except a party or his pleader The term party includes the authorized agent of the party (w) But if such agent was formerly in the employ of the opposite party and in charge of his books the Court ought not to permit inspection to be taken by him (x)

16 [R S C, O 31, r 16] Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No 7 in Appendix C with such variations as circumstances may require

Notice to produce

17 [R S C, O 31, r 17, S 132] The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground Such notice shall be in Form No 8 in Appendix C, with such variations as circumstances may require

Time for inspection when notice given

Documents—This rule applies to all documents mentioned in r 15 it is not confined to cases where there has been an affidavit of documents under rr 12 and 13 (y)

Banker s books—See notes to O 7 r 17 Bankers Books Evidence Act 1891

Business books—See r 19 below

Usual place of custody—A who owns a ginning factory at Broach agrees with *B* in Bombay to gin *B* s cotton in his factory at Broach *B* sues *A* in Bombay for damages for breach of the contract and requires inspection of *A* s books in Bombay *A* offers to give inspection at Broach where the books are kept *B* is not entitled to inspection in Bombay for Broach is the place where the books are kept ( )

18 [R S C, O 31, r 18, Ss 133 134] (1) Where the party served with notice under rule 15 omits to give such notice of a time for

Order for inspection

(t) *Pe Fenner and Lord* [1897] 1 Q B 667
(w) *William v Prince of Wales Ass Co* (1857) 23 Lev 338
(x) *Enamul v Ekram* I, 1898) 25 Cal 91
(y) *Re Fenn and Lord* [1897] 1 Q B 667 669 670
(z) See *Keraldas v Pestonji* (1881) 5 Bom 46

inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it make an order for inspection in such place and in such manner as it may think fit Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavits of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

Served with notice —No order for inspection can be made under this rule unless notice has been served under r 15 (a)

Sub rule (2) —This sub rule provides for the inspection amongst others of documents not disclosed in the affidavit of documents and the Court may under this sub rule direct a party to give inspection of such documents But an opportunity should be given to such party to make an affidavit in answer and if he in such affidavit denies possession of the document the affidavit will be conclusive on that fact (b) But he cannot merely rely on his previous *affidavit of documents* in answer to an application under this sub rule for such an affidavit is conclusive for the purposes only of *discovery* as distinguished from inspection (c)

Appeal —No appeal lies under the Code from an order for inspection Nor does an appeal lie under cl 15 of the Letters Patent for an order directing inspection to be given as it is not a judgment within the meaning of that clause (d)

Bankers Books Evidence Act —In ordering inspection under the Bankers Books Evidence Act 1891 the Court is guided by the general rules regulating the inspection of documents before trial (e)

19 [*New* R S C, O 31 r 19A] (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the

Verified copies

(a) *Mohendro* v *Isha n Chu der* (1881) 10 Cal 56 *Dhap* v *Ram* *shad* (1887) 14 Cal 68

(b) See *Nitto Moye* v *Sool* (1896) 5 Cal 117 1 7

(c) *Ja nla Coomar* v *K m d* (1911) 38 Cal 4 9 I. I C. 1

(d) *Sonbai* v *Ahmed bai* (18) 9 Bom. H C 398 400 *Ahmed* v *Ayeshabai* (1909) 11 Bom L. R I C 16

(e) *Waterhouse* v *Barker* [19 4] 2 K B 59

affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power, and, if not then in his possession, when he parted with the same and what has become thereof Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application and that they relate to the matters in question in the suit, or to some of them

Specific documents—To justify an application under sub r (3) the party making the application must in his affidavit *name and specify* so that they can be identified the particular documents of which he desires discovery It is not sufficient to make a general affidavit based on a *priori* reasoning that certain classes of documents must be in his opponent s possession or power (*f*)

Premature discovery

20 [R S C, O 31, r 20 S 135] Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection

(*f*) *White v Spafford & Co* [1901 2 K B 41

Issue to decide upon right to inspection—The object of the rule is to enable the Court to decide an *issue* in a suit as distinguished from the suit itself for the purposes of discovery (g) See notes to r 6 above Not sufficiently material at that stage

Non-compliance with order for discovery

21 [R S C O 31, r 21, S 136] Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly

Dismissal of suit—This rule cannot be applied unless there has been an order for discovery under r 12 or for inspection under r 18 (h) And even where such an order has been made it is only when the default is wilful and as a last resort that the Court should dismiss the suit or strike out the defence (i) If the parties concerned are *purdanashin* ladies this should be taken into account before making the order (j) The word production which occurred after discovery in the corresponding s 136 of the Code of 1882 has been omitted in the present rule It has hence been held by the High Courts of Allahabad (k) and Madras (l) that this rule does not apply to cases where there has been non compliance with an order for production of documents made under r 14 According to a Lahore decision (m) this rule applies also to orders made under r 14

Contempt—Besides the penalty prescribed by this rule a party to a suit filed in a Chartered High Court who has failed to answer or give inspection is liable to be committed for contempt by that Court This power has been conferred on Chartered High Courts by their Letters Patent (n) An order of *committal for contempt* is appealable according to the Bombay decisions (o) but not according to the Allahabad decisions (p)

Appeal—An appeal lies from an order under this rule under O 43 r 1 (f) below (q)

Using answers to interrogatories at trial

22 [*New* R S C, O 31, r 24] Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such

(g) Ah edbhoy v Jullebh y (188) 6 Bom 5
(h) K han Lal v S ita S gh (1916) 38 All 5 30 I C 5 3 Decka a v N a das (19 3) Bom L R 631 8 I C 15 ( ) A B 388 Ram nat v H bib Ullah (19 6) All 3 5 9 96 I C 16 (6) A A 553
(i) Ismoolla v Abdool (18 3) 9 Cal 9 3 Sh m Kishore v Shoshi m (1880) 5 Cal 70 Da ruler v Meyers (1 83) W N 58 Ha gh v H gh (1 6) 31 C D 4 8
(j) F ke Lal v Hab ba B bi (1886) 8 All 6
(k) Lyallp S gar Mil C Ltd v R m Cha dra G r Sah Cotton Mills C Ltd (19) 44 All 565 67 I C 3 (2) A A 35
(l) Sithamall v Ramanatha (19 1) 48 Mad L J 330 I C 66 (2) A M 5
(m) Ramnath v Farabhu Dayal (19 1) 6 I C 661
(n) Hassanbhoy v Cowasji (1883) 7 Bom 1 See al Sudh v Kameswar (19) C L 1110 11 I C 1 9 ( ) A C 11
(o) Narsaloo v Naraism (1883) 7 Bom 5
(p) God v raj Mal (190) All 9
(q) Mau g Khant v Ma That (1925) 3 Rang 63 63 I C 51 (25) A R 19

answer Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last mentioned answers ought not to be used without them, it may direct them to be put in

Order to apply to minors

23 [*New* R S C, O 31, r 29] This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability

Minors and lunatics—Prior to this rule the practice of the different High Courts as to discovery from minors and persons of unsound mind was not uniform It is useless to note the decisions under the old Code

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ORDER XII

Admissions

Notice of admission of case

1 [R S C, O 32, r 1] Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party

Different kinds of admissions—The object of obtaining admissions is to do away with the necessity of proving facts that are admitted [see Evidence Act 1872, s 58] Admissions are of three kinds namely—

I Admissions in pleading—

(1) *actual* that is those contained in the pleadings (O 7 r 5) or in answer to interrogatories (O 11 r 22)

(2) *constructive* that is those which are merely the consequence of the form of pleading adopted (O 8 rr 3 4 5)

II Admissions by agreement

III Admissions by notice

Admissions by notice are dealt with in this Order

The importance of admission consists in the fact that either party may *at any stage of the suit* move for judgment on the admissions made by the other side (r 6)

Notice to admit documents

2 [R S C, O 32, r 2, S 128] Either party may call upon the other party to admit any document, saving all just exceptions, and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs, and no

costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense

Admissions between co defendants —Admissions between co defendants to which the plaintiff is not a party cannot be entered as evidence against the plaintiff (r)

Form of Notice

3 [*New* R S C O 32, r 3] A notice to admit documents shall be in Form No 9 in Appendix C, with such variations as circumstances may require

Notice to admit facts

4 [*New* R S C, O 32 r 4] Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just

Form of admissions

5 [*New* R S C O 32, r 5] A notice to admit facts shall be in Form No 10 in Appendix C, and admissions of facts shall be in Form No 11 in Appendix C, with such variations as circumstances may require

Judgment on admissions

6 [*New* R S C, O 32, r 6] Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties and the Court may upon such application make

(r) *Dodd v Tate* (1884) 25 C D 617

such order, or give such judgment, as the Court may think just

Scope of the rule—This rule is new It is a reproduction of O 32 r 6 of the English Rules It enables either party at any stage of the suit to move for judgment on the admissions which have been made by the other side Either party may by availing himself of this rule get rid of so much of the suit as to which there is no controversy (s) The rule however is permissive it does not preclude a party who does not avail himself of it and proceeds to trial in the ordinary way from relying at the trial on the admissions made by the opposite party (t)

The Court may make such order or give such judgment as the Court may think just —A judgment on admissions is not a matter of right but is in the discretion of the Court If a case involves questions which cannot be conveniently disposed of on a motion under this rule the Court may in the exercise of its discretion refuse the motion (u)

There is no hard and fast rule that where the defendant admits part of the plaintiff s claim and denies the rest of the claim the Court should if it gives judgment under this rule for the plaintiff as to the portion of the claim admitted by the defendant refuse to allow the plaintiff to proceed with the suit as to the remainder of his claim If there is a clear and unambiguous admission by the defendant as to part of the plaintiff s claim the Court has jurisdiction to enter judgment as to that part of the plaintiff s claim and it is in its discretion having regard to the nature of the case and the allegations contained in the pleadings and the admissions made in Court whether it should allow the plaintiff to proceed to prove the remainder of his claim (v) *A* sues *B* for Rs 6 800 *B* admits that only Rs 4 500 are due and alleges as to the rest of *A* s claim that it was in respect of goods as to which there was a separate arrangement between the parties The issue as to the balance of *A* s claim being an issue independent of the other part of the claim the Court may pass judgment for *A* for Rs 4 500 and give leave to *A* to prove his claim to the balance It is clear that even if the issue as to the balance of *A* s claim were decided in *B* s favour it would not having regard to *B* s admission reduce *A* s claim below Rs 4 500 (w)

In the *United Telephone Co* v *Donohoe* (x) the plaintiffs sued the defendant for infringement of a patent claiming injunction and damages The defendant admitted ten instances of infringement but denied he had committed any others The plaintiffs thereupon moved for judgment upon the admissions in the pleadings In the Court of first instance the Vice Chancellor granted an injunction against infringement by the defendant of the plaintiff s patent but he refused an enquiry as to damages The Court of Appeal held that the plaintiffs were entitled to an enquiry as to damage but that it must be limited to the instances of infringement admitted and that the judgment having been obtained upon a motion for judgment upon the pleadings the plaintiffs were bound to take the negative as well as the affirmative allegations therein Referring to this case Sanderson C J said in the Calcutta case cited above (y) that the question whether the Judge who in the first instance heard the application would have had jurisdiction to give judgment on the admissions and to allow the plaintiffs to proceed to prove the rest of their claim as to the other alleged infringements if such an application *had been made was not before the Court*

(s) *Thorp* v *Holdsworth* (1876) 3 C D 637 640
(t) *Tildesley* v *Harper* (1878) 7 C D 403
(u) *Mellor* v *Sidebottom* (1877) 5 C D 342 *Re Wright Kirke* v *North* [1895] 2 Ch 747 *Calcutta* v *F D Samson & Co Ld* (1923) 27 Cal W N 583 82 I C 318 (24) A C 190
(v) *Prem k Das* v *Ud* ... (191) 45 C 1 ... 138 144 44 I C 833 ... *Patriotic Assurance Co of Ireland* (1 6) I R 18 Ir 115
(w) *Prem k Das* v *Udairam* (1918) 45 Cal 138 44 I C 233
(x) (1886) 31 C D 399
(y) *Premsukh Das* v *Udairam* (191) 45 C 1 ... 44 I C 33

Admissions on pleadings—Under this rule either party may move for judgment upon admissions of fact made on the pleadings or otherwise Admissions in pleadings are either actual or constructive Actual admissions consist of facts *expressly* admitted either in pleadings or in answer to interrogatories [O 11 r 22] The patent case cited in the preceding paragraph is an instance of actual admissions Constructive admissions on the other hand are admissions which are *inferred or implied* from pleadings as a consequence of the form of pleading adopted [O 8 rr 3 4 5] Constructive admissions usually arise where a defendant has not specifically dealt with some allegation of fact in the plaint of which he does not admit the truth [O 8 r 3] for as we have seen every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the written statement will be taken to be admitted except as against persons under disability [O 8 r 5] Constructive admissions also arise where a defendant denies an allegation of fact in the plaint evasively and does not answer the point of substance [O 8 r 4]

Illustrations

1 A alleging that he and *B* having agreed to carry on certain business in partnership draft articles of partnership were prepared and approved by *B* and that they both thereupon proceeded with the partnership undertaking sues *B* for a declaration that he and *B* were partners and claims that the partnership may be dissolved *B* in his written statement admits that he agreed to enter into partnership as alleged but adds that terms of the arrangement between himself and the plaintiff were *not definitely agreed upon* as alleged This is an evasive denial of the fact of partnership (O 8 r 4) and it will therefore be *construed* as an admission by *B* of the partnership *A* is therefore entitled under this rule to a decree for dissolution of partnership without adducing any evidence to prove the partnership But though the written statement will be construed as an admission of the *fact* of partnership it will not be construed as an admission of the *terms* of the partnership *B* may therefore claim an inquiry as to the terms of the arrangement of partnership and if such inquiry is claimed the Court will direct it by its decree (z)

2 A defendant by his written statement simply puts the plaintiff to proof of the several allegations in the plaint The denial not being specific (O 8 r 3) the defendant will be deemed to have admitted the facts alleged in the plaint (O 8 r 5) so as to entitle the plaintiff to a decree under this rule without adducing any evidence in support of his case (a)

In applying the present rule in India it is to be noted that where a plaintiff applies for a decree upon *constructive admission* in a written statement the Court may in its discretion refuse to pass the decree if it thinks in the special circumstances of the case that the defendant must not be held to have admitted facts not specifically denied in his written statement (b) See the proviso to r [illegible] of O 8 and notes thereto

An order on admissions on the pleadings will not be made unless the admissions are *clear and unequivocal* (c) Moreover a plaintiff moving for judgment on admission in the defendant's written statement must have a clear case and the mere admission by the defendant of a right asserted by the plaintiff but which has in fact *no existence in law* is not sufficient to entitle the plaintiff to a judgment establishing his right (d)

(z) Thorp v Holdsworth (1[illegible]6) 3 C D 63

(a) [illegible] (18[illegible]8) [illegible] C D 8 [illegible] Tiller v Z[illegible] (18[illegible]9) 1[illegible] C D 5[illegible] see also [illegible] (1[illegible]9) 14 C D 589

(b) See for instance [illegible] Jodha [illegible] (18[illegible]) 11 Cal 111 [illegible] 6 All 406

(c) [illegible] (18[illegible]6) 34 W R (Eng) [illegible] [illegible] Lond [illegible] 190

(d) [illegible] Corporation of London (1[illegible]) 17 C D 35

6 **Judgment upon admissions made otherwise than on pleadings**—A judgment may be given under this rule not only upon admissions made in the pleadings but upon admissions *otherwise* made The words "or otherwise" in this rule are not confined to admissions made under r 1 or r 4 of this Order but are of general application and justify the giving of an immediate judgment when an admission is made by letter of facts which show that the defendant has no defence to the action (e) A judgment may be given under this rule even upon a verbal admission if it is clearly proved (f)

Orders which may be made under this rule—This rule was framed for the express purpose that if there was no dispute between the parties and if there was on the pleadings such an admission as to make it plain that the plaintiff was entitled to a particular order he should be able to obtain that order at once upon motion It must however be such an admission of facts as would show that the plaintiff is clearly entitled to the order asked for whether it be in the nature of a decree or a judgment or anything else The rule was not meant to apply when there is any serious question of law to be argued But if there is an admission on the pleadings which clearly entitled the plaintiff to an order then the intention was that he should not have to wait but might at once obtain any order which could have been made on an original hearing of the action (g) An order amounting to what is called a preliminary decree in this Code may appropriately be made under this rule upon a simple motion Where such an order was applied for under the corresponding English rule by a plaintiff in a suit for partition and the defendant contended that that would be giving a *decree* to the plaintiff and that the plaintiff should wait until the action was set down for trial the Court held that the plaintiff was entitled to an order directing the usual inquiries upon the admissions of the defendant and that he was not bound to wait (h) [O 20 r 18] Such orders have also been made in administration actions (i) [O 20 r 13] in actions for dissolution of partnership (j) [O 20 r 15] in actions for partnership accounts (k) [O 20 r 15], in actions for accounts between principal and agent (l) [O 20 r 16] and in actions for the execution of the trusts of a settlement (m)

Practice—Motions in England under the corresponding English rule are brought on upon an ordinary motion day after notice to the other side As to form of application see Daniel's Ch Forms 270 The practice in England is when an order is made amounting to what is called a preliminary decree in this Code to adjourn the further hearing of the case without requiring any further prior hearing the words generally used in the order being "and without requiring any further prior hearing than this motion of the said cause the further hearing of the said cause is adjourned" (n). See Seton on Decrees Vol I p 390 Form No 5

At any stage—A plaintiff may move for judgment upon admissions in the written statement *at any stage of the suit* and notwithstanding that he has joined issue on the defence (o)

Co plaintiffs—An application under this rule for an order against a defendant on admissions of fact must be made by all the plaintiffs and not merely by some of them If the application is made by some of the plaintiffs only it must be refused (p)

(e) *Ellis v Allen* [1914] 1 Ch 904
(f) *Re B eny* [1894] 1 Ch 499 [order directing payment into Court]
(g) *Gilbert v Smith* (18 6) 2 C D 686 689 6 3 per M llin L J
(h) *Gilbert v Smith* (18 6) C D 686 *B r ll v Bur ell* (18 9) 11 C D 13
(i) *Re Ba ker Hetheri gton v Longrigg* (18 8) 10 C D 16
(j) *Th rp v Hold worth* (18 6) 3 C D 6
(k) *T qua d v W d* (1) 1 C D 43
(l) *Lum ey v Leade* (18 6) 3 C D 611
(m) *Be n tt v Moo e* (18 6) 1 C D ev
(n) *Be tt v Moor* (18 6) 1 C D 67 691 *Gilbe t v Smith* (18 6) C I and 690
(o) *Brown v Pearson* (18) 1 C I 716
(p) *Re Wr ght Ki ke v North* [1 21] Ch 747

Withdrawal of admission—Where it is shown that an admission was made by mistake the party may be allowed to amend his pleadings under O 6 r 17 for the purpose of withdrawing it upon such terms as to the Court may appear just (q) O rr

Appeal—An order rejecting an application for judgment on admission is a judgment within the meaning of cl 15 of the Letters Patent and is appealable (r)

Affidavit of signature

7 [*New* R S C, O 32, r 7] An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required

Notice to produce documents

8 [*New* R S C O 32 r 8] Notice to produce documents shall be in Form No 12 in Appendix C, with such variations as circumstances may require An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served

Notice to produce documents—It is always desirable when a document is in the possession or power of the opposite party to give him notice to produce the same for unless such notice is given secondary evidence of the document cannot be given see Indian Evidence Act 1872 s 65 cl (a) and s 66

Costs

9 [*New* R S C, O 32, r 9] If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice

See rr 2 and 8 above

ORDER XIII

Production, Impounding and Return of Documents

Documentary evidence to be produced at first hearing

1 [Ss 138 140] (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in Court, and all documents which the Court has ordered to be produced O 13,

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(q) *Holl v F* [illegible] (1880) 13 Ch [illegible]

(r) *Kor mall v Mongual* (1919) 3 Cal W N 101 54 I C 536

(2) The Court shall receive the documents so produced provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs

Shall produce at the first hearing —This rule does not exclude the discretion of the Court to receive documentary evidence at a subsequent stage of the proceedings (*s*) See r 2 below and note

Form of list of documents produced by Parties —See App H Form no 5

Effect of non production of documents

2 [S 139] No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non production thereof, and the Court receiving any such evidence shall record the reasons for so doing

Unless good cause is shown —This rule has been enacted to prevent fraud by the late production of suspicious documents But no suspicion can attach to certified copies of public documents such as records of Government or records of judicial proceeding Such copies therefore may be received in evidence though they have not been produced at the first hearing (*t*) The rule however is not confined to public documents only The Court may in its discretion admit other documents also at a subsequent stage of the proceedings (*u*) See notes to r 1 above

Appeal —The fact that further documentary evidence is admitted *after* the first hearing is not a good ground of appeal (*v*) Nor can an appellate Court reject evidence admitted by the Court of first instance simply on that ground (*w*)

Rejection of irrelevant or inadmissible documents

3 [S 140] The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection

Rejection of inadmissible documents —Questions as to the admissibility of evidence should be decided as they arise and should not be reserved until judgment in the case is given (*x*)

When a Court is doubtful as to whether a document is admissible or not and its decision is open to appeal it is better to admit than to exclude the document (*y*)

(*s*) *Imambandi* v *Mutsaddi* (1918) 45 I A 73 ... 47 I C 513 *Har ... v For ...* (19..) ... 110 I C ... 36 (...) A I

(*t*) *... v ...* (1903) ... Bom ... 1 3 *... v ...* (1908) ... C W N 31

(*u*) See *Imambandi* v *Mutsaddi* (1918) 45 I A 73 ... 45 Cal ... 47 I C ... *... v ...* (1933) ... 114 I C ... 61 (...) A I C ... *... v ...* (19..) ... Mad 47 ... 110 I C 16 (...) A M 516 ...

... v ... Tu (19..) 6 R ... 111 I C 4 (...) A R 196

(*v*) *C... v ...* (1 69) 1 W P F C 3

(*w*) *Mi... v ...* (1885) 8 M ... *... v ...* (19..) 7 1 ... 1 C 36 (...) A P 555

(*x*) *Jalu* v *...* (1 90) 1 C L ... *... v Oghore Nath* (1 ...) ... 401

(*y*) *The Collector of ...* v *...* (1 ...) 1 All ... 6

4 [S 141] (1) Subject to the provisions of the next following sub rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely —

Endorsements on documents admitted in evidence

(a) the number and title of the suit,

(b) the name of the person producing the document,

(c) the date on which it was produced, and

(d) a statement of its having been so admitted,

and the endorsement shall be signed or initialled by the Judge

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge

Or initialled —These words which occur after the word signed in sub rr (1) and (2) are new

Shall be endorsed —The rule as to endorsement of documents admitted in evidence must be strictly followed In *Sadik Husain Khan* v *Hashim Ali Khan* (z) where some of the documents were not so endorsed the Judicial Committee said Their Lordships with a view of insisting on the observance of the wholesome provisions of this rule will in order to prevent injustice be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required Documents admitted on the record without making the endorsement prescribed by this rule cannot be regarded as being legally before the Court (a) but documents should not be endorsed until they are proved (b) Where a document has been duly proved and put in before a commissioner appointed to take evidence and endorsed by him it becomes part of the record and is evidence notwithstanding the fact that the trial Court did not endorse it as required by this rule (c) The High Court of Madras has held that a mere endorsement under this rule does not necessarily imply that the Court has considered the question of the admissibility of the document (d)

5 [S 141 A] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter book or a shop book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry

Endorsements on copies of admitted entries in books, accounts and records

(z) (1916) 43 I A 1 3 38 All 6 [illegible] 36 I C 104

(a) *Secretary of State* v *Sham* [illegible] (19[illegible]) 5 Lah 91 [illegible] L 54 [illegible] v [illegible] (19[illegible]) 8 Lah 1 100 I C [illegible] L 113 [illegible] 9 Lah 4 110 [illegible]

(b) *Feroze Din* v *Nawab Khan* (19[illegible]) 9 Lah [illegible] 11 [illegible] L 432

(c) [illegible] (19[illegible]) [illegible] 104 118 I C 122 [illegible] 11

(d) [illegible] v *Parasuram* (19[illegible]) 56 Mad L J 633 (19[illegible]) A.M 522

(2) Where such a document is an entry in a *public* record produced from a public office or by a public *officer* or an entry in a book or account belonging *to a person other than a party* on whose behalf the book or account is produced, *the* Court may require a copy of the entry to be furnished—

(a) where the record, book or account is *produced on* behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court *acting of its own motion*, then by either or any party

(3) Where a copy of an entry is furnished under the fore going provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the persons producing it

Bankers Books Evidence Act—See notes to O 7 r 17

Stamp—A copy or extract from an entry in an account book filed under the provisions of this rule and rule 7 does not require any stamp (*e*)

Endorsements on document rejected as inadmissible in evidence

6 [S 142] Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4 sub rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge

Or initialled—These words are new

Recording of admitted and return of rejected documents

7 [S 142 A] (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them

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(*e*) [illegible] (190[illegible]) [illegible]

8 [S 143] Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court for such period and subject to such conditions as the Court thinks fit

Court may order any document to be impounded

9 [S 144] (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,

Return of admitted documents

(a) where the suit is one in which an appeal is not allowed when the suit has been disposed of, and,

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it

Shall be entitled —On an application being made by a party under this rule the documents are necessarily returned if the application is in the proper form the act of returning the documents is purely ministerial (*f*)

And undertakes to produce the original if required to do so —These words are new

10 [S 137] (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit send for, either from its own records or from

Court may send for papers from its own records or from other Courts

(*f*) G[illegible]yananda v *The Emperor* (19[illegible]1) [illegible]6 Cal W N 660 66[illegible], [illegible] I C 666 ([illegible]1) A [illegible]

any other Court, the record of any other suit or proceeding
1 and inspect the same

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit

11 [S 145] The provisions herein contained as to documents shall, as far as may be, apply to all other material objects producible as evidence

Provisions as to documents applied to material objects

ORDER XIV

Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon

1 1 [S 146] (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other

Framing of issues

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue

(4) Issues are of two kinds (a) issues of fact, (b) issues of law

(5) At the first hearing of the suit the Court shall after reading the plaint and the written statements, if any, and after such examination of the parties as may appear

necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence

Of the framing of issues—The plaint and written statement in a suit are called *pleadings* [O 6 r 1] Section 58 of the Evidence Act enacts that no fact need be proved at the hearing which a party has *admitted* by his pleadings unless the Court requires proof thereof Admissions on pleadings may be either actual or constructive (*g*) [O 8 rr 3 4 5] *Issues* are to be framed in respect only of those facts which have been alleged by one party and either denied or not admitted by the other party (*h*) They must however be confined to *material* facts that is to points on which the right decision of the case depends The practice of raising issues which do not state the main questions in the suit but only various *subsidiary* matters of fact upon which there is not agreement between the parties is embarrassing and must be avoided (*i*) Where an issue though in terms covering the main question in the cause does not sufficiently direct the attention of the parties to the main questions of fact necessary to be decided and a party may have been prevented from adducing evidence a fresh issue may be directed to try the principal question of fact (*j*)

The duty of raising issues rests under the Code of Civil Procedure on the Court and it would be unsafe to presume from the failure of the Court to raise the necessary issues an intention of the defendant to admit the facts which the plaintiff was bound to prove (*k*) See also notes to O 8 r 5

Omission to frame issues—Where a material fact stated in the plaint is denied or is not admitted in the written statement the Court must frame an issue on the fact denied What is the consequence of an omission to frame an issue of fact? The answer depends on the following considerations If though no issue is framed on the fact the parties adduce evidence on the fact and discuss it before the Court and the Court decides the point *as if there was an issue framed on it* the decision will not be set aside in appeal on the ground merely that no issue was framed The reason is that mere omission to frame an issue is not fatal to the trial of a suit (*l*) But if the point denied in the written statement is not tried at all or if tried is tried imperfectly so as to cause failure of justice the case will in appeal be remanded for a re trial after framing the necessary issue (*m*) In other words omission to frame an issue is an *irregularity* which *may* or *may not* affect the disposal of a suit on the merits If it does the appellate Court should remand the case for a new trial to the lower Court after framing the necessary issue If it does not the appellate Court should not remand the case (s 99) In *Mitna* v *Syed Fazl* (*n*) their Lordships of the Privy Council said —

In this case the omission to raise the issues was brought before the notice of the appellate Court the appellate Court expressed its regret and their Lordships are glad

(*g*) [illegible] (190[illegible]) 6 Bom [illegible] 73
(*h*) See *Fat[illegible] M[illegible]* v *[illegible]* (19[illegible]0) [illegible] L [illegible] L J 188 68 I C 106
(*i*) *West [illegible] Co* v *[illegible] Co* (1911) 35 B[illegible] 10 I C 60
(*j*) *O[illegible]* v *[illegible]* (18[illegible]) 11 L [illegible] 115 [illegible] I A [illegible] 316
(*k*) *C[illegible]* v *[illegible]* (19[illegible]) 6 I [illegible] 60
(*l*) *Mitna* v *Syed Fazl* (1[illegible]0) 13 M I A [illegible]; *Kat[illegible]* v *[illegible]* (1869) 1[illegible] M I A 49 *Ba[illegible]* v *Da[illegible]* (1[illegible]3) 25 All 493
(*m*) *[illegible]* v *Jankee* (1866) 11 M I A [illegible]; See *Chandra Kunwar* v *[illegible]* (190[illegible]) [illegible] All 134 19[illegible] 31 I A 2[illegible]
(*n*) (1870) 13 M I A 573 583

1 to observe that it did express its regret that the Principal Sudder Ameen had omitted to settle the issues The [appellate] Court however neverthele s conceived that it was not under any positive obligation to remand the case but seeing that *the parties had gone to trial knowing what the real question between them was that the evidence had been taken and that the conclusion had been in the opinion of the appellate Court correctly drawn from that evidence* they thought it within their competence to affirm that decision without sending the case back for a re trial Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 35th section [now O 41 r 25] of the Civil Procedure Code *Their Lordships think that under all the circumstances of the case substantial justice having been done* there has not been that fatal mis trial of the cause which vitiates all the proceedings and renders a new trial necessary

Delay in raising an issue—In *Sayad Muhammad* v *Fatteh Muhammad* (o) their Lordships of the Privy Council said It does not quite appear at what period of the suit the question of the sound disposing mind of the Diwan was raised nor is it very material except in one respect Whatever system of pleading may exist the sole object of it is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issue and it may perhaps be not altogether immaterial to observe that the question of the capacity of the Diwan does not appear to have been prominently raised at all events in the first instance Their Lordships are however of opinion that they must assume that the question of his capacity was open upon the proceedings sufficiently to give each Court below the right to form a judgment upon the matter

Wrong issue—If the fir t Court frames and tries wrong issues the appellate Court should lay down the proper issues and remand the case for a new trial (p) This is however not necessary if the first Court frames a wrong issue but the judgment gives a finding on the correct issue In such a case the appellate Court need not remand the case (q)

Relief not founded on pleadings—As a rule relief not founded on the pleading should not be granted But where the substantial matters which constitute the title of all the parties are touched though obscurely in the issues and they have been fully put in evidence and have formed the main subject of discussion in the Court the Court may grant a relief though it may not be founded on the pleadings Thus in a case where the plaintiff and the defendant each claims to be exclusively entitled to certain lands the Court may if the above conditions are satisfied declare each to be entitled to a moiety (r) Similarly the Court may in a suit for ejectment pass a decree for redemption (s) But if a case not alleged by the plaintiff in his pleading is di clo ed in the evidence the Court should not deal with it unless a specific issue is raised on it and the defendant is given an opportunity of meeting it (t)

Variance between pleading and proof— It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint which constitute the case which the defendant has to meet but which are in reality contradictory of the case made by the plaintiff It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded and by joining issue in the cause has undertaken to prove (u)

(o) (1894) 2 I A 4 44 Cal 325
(p) *B er Chunder* v *Tar nee* (1869) 11 W R 20
(q) *Vishnu* v *Gan h* (1897) 1 Bom 3
(r) *Mahant Go d Rao* v *Sita Ram Ke ho* (1898) I A 19 0 1 All 53 69
( ) *Malakant Ba j* v *S resh Ch der* (1885) 1 I A 1 1 12 Cal 414 See lso *Has an U v Umaj* (1904) 8 Bom 153 *Babaj* v *Rasul* v (1875) 1 B m 9 *J ll pa* v *Venk t h* (18 6) 2 Bom 676 *Wahil* v *Saf t* (1890) 12 All 556
(t) *Parashram* v *Miraji* (1896) 0 Bom 569
(u) *Ichenchi nder* v *Sh achurn* (1866 11 M I A 7 3 *Joyt ra* v *Mal on ed* (18) 8 Cal 975

This principle applies only to *cardinal* facts and *cardinal* issues and not to subordinate facts and issues based thereon In applying the principle the whole of the circumstances must be taken into account and carefully scrutinized (t)

2 [S 146 6th para] Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issue of fact until after the issues of law have been determined

Issues of law and of fact

Or any part thereof —These words are new

3 [S 147] The Court may frame the issues from all or any of the following materials —

Materials from which issues may be framed

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties,

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit,

(c) the contents of documents produced by either party

Issues not to be inconsistent with pleadings —Issues whether raised from the allegations in the pleadings or from other materials should not be inconsistent with the pleadings (u) Thus if A sues *B* to set aside a document on the ground that it was *not executed* by him and that it is a forgery the Court should not raise an issue as whether the document was *executed under coercion or undue influence* The latter [illegible] assumes that the document was executed by the plaintiff while the case set up [illegible] plaint is that it was *not executed* by him at all (x) But the plea that the d[illegible] in suit was obtained by the defendant by fraud is not inconsistent with the [illegible] it was obtained by undue influence Therefore where fraud is pleaded in [illegible] and the plaintiff s counsel alleges at the hearing that the plaintiff was subjected [illegible] influence the Court may allow issues both as to fraud and undue influence (y)

Appeal —No appeal lies from an order refusing to frame an issue [illegible] a party to a suit ( )

The High Court of Madras once held that an appeal lies under cl. [illegible] Patent from an order made at the settlement of issues fixing a distant da[illegible] of the suit (a) But this decision has been disapproved in later cases [illegible]

( ) *Haf Um v Gu tadj* (1915) O C [illegible] 297 303-304 34 I C 269 [P C]

(u) *Modh v Dongre* (1881) 5 Bom 609 *[illegible] v [illegible]dha* (1880) 5 Cal 61

(x) *Mahmed [illegible] v Ha[illegible]* (1888) 15 Cal 684 15 I A 81 *Wal ullah v M[illegible]* (1888) 10 All 6 7

(y) *Muhammad Ibrahim v [illegible]* (1917) Punj Rec no. 90 p 3 0 33 I C 93 In this case not only an amendment of the ple[illegible] was directed [illegible] con[illegible]solidated [illegible] comprising [illegible] influence [illegible] indeed

(z) *Ebrahim v Fur[illegible]* [illegible] *Tuljaram v [illegible]* [illegible] 1 8 I C 2

( ) [illegible] (15[illegible]) [illegible]

(b) *D[illegible]* [illegible] Mad [illegible] (191[illegible]) [illegible]

Court may examine witnesses or documents before framing issues

4 [S 148] Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process

Power to amend and strike out issues

5 [S 149] (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed

(2) The Court may also at any time before passing a decree strike out any issue that appear to it to be wrongly framed or introduced

Sub rule (1)—The first part of sub rule (1) leaves it to the discretion of the Court to amend the issues or frame additional issues as appears from the word may while the latter part makes it imperative on the Judge to amend the issues and frame additional issues as appears from the word shall (c)

May amend the issues or frame additional issues—As a general rule the Court should not frame even additional issues from materials other than those specified above in r 3 *Lodtasappa* v *Pradhanappa* (1925) 27 Bom L R 1318 91 I C 426 (b) A B 33 The Court may however under special circumstances allow issues to be raised upon a matter which does not strictly come within the proper scope of the proceedings provided no injustice is done to either party (d) It follows that the Court should not frame any additional issue so as to make for either party a case which he had no intention of making for himself (e) Nor should it frame an additional issue so as to convert a suit or defence of one character into a suit or defence of a different and inconsistent character Thus if A sues B for *damages for wrongful occupation of his land* treating B as a *trespasser* he should not be allowed to raise an additional issue claiming *rent* of the land from B treating him as his *tenant* (f) But if a suit is brought on a mortgage and it transpires at the hearing that the witnesses to the mortgage deed were not present at its execution but had put their names on the document on the acknowledgment by the executant of his signature it is perfectly competent to the Judge to frame an additional issue as to whether the deed of mortgage was valid under s 59 of the Transfer of Property Act though the invalidity of the deed is not set up as a defence in the written statement

(c) *Shamu Patter* v *Abdul Kadir* (191-) 35 Mad 607 39 I A 18 16 I C 0

(d) *Nehora* v *Radha* (1880) 5 Cal 64

(e) *Naro Ha* v *Anpurnabai* (18 4) 11 Bom 160 164

(f) *Nar jan* v *H r* (1889) 13 Bom 664

Every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties (g) See notes to r 3 above Issues not to be inconsistent with the pleadings O

At any time before passing the decree — An additional issue may be raised even after the close of the argument on the case (h)

Questions of fact or law may by agreement be stated in form of issues

6 [S 150] Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement,

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct, or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute

Compare O 3(r 1

Form — As to form of agreement for issues to be tried see App H form No [illegible]

Court if satisfied that agreement was executed in good faith may pronounce judgment

7 [S 151] Where the Court is satisfied, after making such inquiry as it deems proper —

(a) that the agreement was duly executed by the parties

(b) that they have a substantial interest in the decision of such question as aforesaid and

(c) that the same is fit to be tried and decided it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court,

(g) [illegible] (191) 35 M 1 607 39 I A 1 16 I C 0 | M 3 6 611-61 9 I A 1 16 I C 0
(h) [illegible] (191) 3

7 and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement, and, upon the judgment so pronounced, a decree shall follow

ORDER XV

Disposal of the Suit at the first hearing

1 [S 152] Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment

Parties not at issue

2 [S 153] Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants

One of several defendants not at issue

Admission of claim by one of several defendants—*A* sues *B* and *C* upon a promissory note jointly passed by them *B* appears and admits the claim and a decree is passed against him The decree against *B* is no bar to the further prosecution of the suit against *C* (i) See notes to O 1 r 6 Joint liability on a contract

3 [S 154] (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit

Parties at issue

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects

(i) *Dick v Dhunji* (1901) 25 Bom 8

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires

Failure to produce evidence

4 [S 155] Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues

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ORDER XVI

Summoning and Attendance of Witnesses

Summons to attend to give evidence or produce documents

1 [S 159] At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents

Difference between the old section and the present rule—This rule corresponds with s 159 C P C 1882 except as to the time for application for witness summonses for which see next paragraph

Time for application for witness summons—Under s 159 of the Code of 1882 the application for summonses to witnesses was to be made *after* the writ of summons was delivered or sent for service on the defendant *and before* the day fixed in the summons for the appearance of the defendant Under the present rule the application may be made *at any time after the institution of the suit*

Whether witness summons can be refused—A party is entitled as of right to summonses to witnesses (j) So long as the application is made after the institution of the suit the Court is bound to issue the summons It does not matter that the party had himself originally undertaken to bring his witnesses and has failed to do so (k) Nor does it matter that the application is made at such a late stage of the proceedings that the witnesses cannot be present in Court before the final disposal of the suit (l) The Court may in either of these cases refuse to *adjourn the hearing* for the attendance of the witnesses but it has no power to refuse *to issue summonses* (m) The only case in which the Court has power to refuse to issue summonses is where the application is not

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(j) [illegible] (1 91) [illegible] 56 [illegible] (19) [illegible] R 4 [illegible] I C [illegible] A [illegible] 36

(k) [illegible] (1) 6 1 [illegible]

(l) [illegible] 56[illegible]

(m) *Bha* [illegible] (1 94) 16 All [illegible] *Ahmad* [illegible] (1 5) 9 [illegible] 30[illegible] *Emperor* (1 6) A [illegible] 864 [illegible] (19) 9 Lah. L J [illegible]

made *bona fide* as where a decree holder attaches property belonging to a *muth* and on the head of the *muth* objecting to the attachment applies to summon him as his own witness requiring his personal attendance in Court with the sole object of putting pressure upon him to relinquish his claim In such a case the Court may in the exercise of its inherent power to prevent the abuse of its own process [s 151] refuse to issue the summons (*n*)

Remedy of party when witness summons refused—Where a party applies for summonses to witnesses but the application is refused he cannot appeal from the *order of refusal* He must wait until the suit is disposed of and if the decree in the suit goes against him he may appeal from the *decree* and set forth the refusal of the lower Court to issue summonses as a ground of objection in the memorandum of appeal (s 105) If the appellate Court finds that the refusal *has* injuriously affected the decision of the case it may set aside the decree and direct the lower Court to issue the summonses but if it finds that the refusal has not injuriously affected the decision it should not interfere with the decree (*o*) [see s 99]

Form of summons to witnesses—See Schedule I App B No 13

2 [S 160] (1) The party applying for a summons shall before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance

Expenses of witness to be paid into Court on applying for summons

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case

Experts

(3) Where the Court is subordinate to a High Court regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf

Scal of expenses

Sub rule (2) is new

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (3)]

Travelling and other expenses—A witness is entitled under this rule only to travelling expenses and other expenses of a similar nature but he is not entitled to compensation for loss of time (*p*) The right to claim travelling expenses is not lost

(n) Vee *balr n* v *Vata ya* (190) 3 Mad 8
(o) *Bl j t v D b* (1 94) 16 All 218
(p) *Va n* v *Pro ono aran* (156) Hyd 236

merely because the witness did not apply for them before giving his evidence The reason is that a witness is entitle to demand his travelling expenses at any time even after he has given his evidence (q) If a witness is summoned by the plaintiff he is entitled to claim his travelling expenses from the plaintiff though he has not been examined by the plaintiff but is examined by the defendant as his witness (r) See also the undermentioned case (s)

Remedy of witness if travelling expenses not paid—The only remedy is by an application to the Court that heard the case no separate suit will lie to recover such expenses (t)

Default on part of process server—Where a plaintiff pays into Court the process fee and the expenses of his witnesses but the summons is not served owing to default on the part of the process server it is illegal to dismiss his suit for want of proof in the absence of the witnesses (u)

3 [S 161] Tender of expenses to witness

The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally

4 [S 162] Procedure where sum paid insufficient

(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration the Court may direct such further sum to be paid to the person summoned as appeared to be necessary on that account, and in case of default in payment may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons or the Court may discharge the person summoned without requiring him to give evidence, or may both order such levy and discharge such person as aforesaid

[illegible]

(2) Where it is necessary to detain the person summoned for a longer period than one day the Court may from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and in default of such deposit being made may order such sum to be levied by attachment and sale of the movable property of such party or the Court may discharge the person summoned without requiring him to give evidence or may both order such levy and discharge such person as aforesaid

(q) [illegible] 61
( ) [illegible] (1904) [illegible] 61
( ) [illegible] (1 3) [illegible]
[illegible] 119 [illegible]
(t) [illegible] (1 66) [illegible]
( ) [illegible] Lal (19 1) 6 Lah [illegible] A L [illegible]

Sale of movable property—Under this rule if the expenses are not deposited only the movable property of the defaulting party may be attached and sold but not his immovable property (t)

5 [S 163] Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes, and any particular document which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy

Time place and purpose of attendance to be specified in summons

Where hearing postponed—When a witness attends Court in pursuance of a summons on the day specified in the summons but the case is not reached on that day it is not necessary to issue a fresh summons He need only be warned that his attendance will be required on the day to which the hearing may be postponed (u)

6 [S 164] Any person may be summoned to produce a document, without being summoned to give evidence, and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same

Summons to produce document

7 [S 165] Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power

Power to require persons present in Court to give evidence or produce document

8 [S 166] Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule

Summons how served

9 [S 167] Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required

Time for serving summons

(t) *Md Warish v Rahaman* (19 1) 26 Cal W N 8 7 0 I C 1-3 (-1) A C 430

(u) *Subbaraju v Chenchuramayya* (1901) 21 Mad 00

10 [S 168] (1) Where a person to whom a summ
has been issued either to attend to g
evidence or to produce a document fa
to attend or to produce the docum
in compliance with such summons, t
Court shall, if the certificate of the serving officer has n
been verified by affidavit, and may, if it has been so verifi
examine the serving officer on oath or cause him to be
examined by another Court, touching the service or n
service of the summons

Procedure where witness fails to comply with summons

(2) Where the Court sees reason to believe that su
evidence or production is material, and that such person h
without lawful excuse, failed to attend or to produce t
document in compliance with such summons or has int
tionally avoided service, it may issue a proclamation requiri
him to attend to give evidence or to produce the document
a time and place to be named therein, and a copy of su
proclamation shall be affixed on the outer door or other co
spicuous part of the house in which he ordinarily resides

(3) In lieu of or at the time of issuing such proclam
tion, or at any time afterwards, the Court may, in its discr
tion, issue a warrant, either with or without bail, for the arre
of such person, and may make an order for the attachme
of his property to such amount as it thinks fit, not exceedi
the amount of the costs of attachment and of any fine whi
may be imposed under rule 12

Provided that no Court of Small Causes shall make a
order for the attachment of immovable property

Evidence Act S 69—*Before dispensing with the evidence of an atte t* witness under sec 69 of the Evidence Act the Court must see that all processes un sub rules (2) and (3) have been exhausted (x)

Appeal—An appeal lies from an order under this rule for the attachment property [O 43 r 1 cl (g)]

11 [S 169] Where at any tim
after the attachment of his property suc
person appears and satisfies the Court,—

If witness appears attachment may be withdrawn

(a) that he did not, without lawful excuse, fail t
comply with the summons or intentionally avo
service and

(x) M t Shah ... M h mm d Qa m (19) P t 31 110 I C 58 (1928) A P 356

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit

12 [S 170] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any

Procedure if witness fails to appear

Provided that if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment

Scope of the rule—R 11 applies to the case where the person served appears and satisfies the Court as to his failure to appear The present rule applies to the case where the person does not appear or appears but fails so to satisfy the Court (y)

Imposition of fine—Neither the issue of a proclamation nor an order for attachment under r 10 above is a condition precedent to the imposition of a fine under this rule ( )

Order releasing property from attachment—In a case under the Code of 1882 the Court accepted the fine and costs even after sale of the property attached and refused to confirm the sale as the price realised was absurdly low The auction purchaser appealed from the order but it was held that no appeal lay from the order (a) If a similar case arises under the new Code it will have to be considered in the light of rule 13 of this Order and of O 21 r 89 [which cannot apply unless the Crown is regarded as a decree holder] r 90 and r 9_

Contempt proceedings—In the case of a proceeding before a Chartered High Court the defaulting witness may also be proceeded against for contempt (b)

13 [*New*] The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment debtor

Mode of attachment

(y) See *Sib Kumari v Secretary of State* (19 0) 31 Cal L J 363 5 I C 4 5

( ) *M gavg In re* (19) 48 Mad 941 90 I C 991 ( ) A M 1 4

(a) *B dri P asad v Tej Singh* (1910) 33 All. 69 7 I C 100

(b) *Ebr l v I g E peror* (1926) 4 Rang 98 I C (6) A R. 1 3

14 [S 171] Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document

Court may of its own accord summon as witness strangers to suit

15 [S 172] Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place

Duty of persons summoned to give evidence or produce document

16 [S 173] (1) A person so summoned and attending shall, unless the Court otherwise directs attend at each hearing until the suit has been disposed of

When they may depart

(2) On the application of either party and the payment through the Court of all necessary expenses (if any) the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and in default of his furnishing such security, may order him to be detained in the civil prison

Sub rule (2) —This sub rule is new

17 [Ss 174 175] The provisions of rules 10 to 13 shall so far as they are applicable be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse in contravention of rule 16

Application of rules 10 to 13

18 [S 174 5th para] Where any person arrested under a warrant is brought before the Court in custody and cannot owing to the absence of the parties or any of them give the evidence or produce the document which

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were a judgment debto

(j) See *Sub K m ra*
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( ) *M garg In re* (19) M
091 ( ) A M

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Duty of persons summoned to give evidence or produce document

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(2) On the application of either party and the payment through the Court of all necessary expenses (if any) the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison

Sub rule (2) — This sub rule is new

Application of rules 10 to 13

17 [Ss 174 175] The provisions of rules 10 to 13 shall so far as they are applicable be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse in contravention of rule 16

Procedure where witness apprehended cannot give evidence or produce document

18 [S 174 5th para] Where any person arrested under a warrant is brought before the Court in custody and cannot owing to the absence of the parties or any of them give the evidence or produce the document which

he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison

No witness to be ordered to attend in person unless resident within certain limits

19 [S 176] No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house

See O 26 r 4

20 [S 177] Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit

Consequence of refusal of party to give evidence when called on by Court

Appeal—An appeal lies from an order under this rule pronouncing judgment against a party [O 43 r 1 cl (h)]

21 [S 178] Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable

Rules as to witnesses to apply to parties summoned

Duty of suitors to give evidence on their own behalf—In *Lal Kunwar v Chiranji Lal* (c) their Lordships of the Privy Council severely condemned the practice followed in some parts of India of advocates omitting to call their own client as a witness in the hope of forcing their opponents to call him as their witness in order that they themselves may have the opportunity of cross examining their own client when called by the other side Referring to this practice their Lordships said It is a vicious practice unworthy of a high toned or respectable system of advocacy It must embarrass and perplex judicial investigation and it is to be feared too often enables fraud falsehood or chicane to baffle justice

(c) (1909) 3 All 104 108 109 37 I A 1 4 5 5 I C 549

ORDER XVII

Adjournments

1 [S 156] Court may grant time and adjourn hearing (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment Costs of adjournment

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded

May adjourn —This rule gives a discretion to the Court to grant time to the parties and to adjourn the hearing of a suit On the one hand no adjournment should be granted if no sufficient cause is shown (*d*) On the other hand the Court should not refuse an adjournment if sufficient cause is shown (*e*) What is sufficient cause is a question of fact in each case

Payment of costs as a condition precedent —*A* sues *B* for damages At the hearing of the suit *B* applies for an adjournment The hearing is adjourned on the terms that *B* should pay Rs 50 to *A* for costs before the next hearing and that if he fails to do so his defence would be struck off and the suit would be proceeded with *ex parte* *B* fails to pay the cost The Court may proceed with the suit *ex parte* (*f*) But the Court cannot do so if the payment of costs was not a condition precedent to the hearing of *B*'s case (*g*)

Pauper suit —The Rangoon High Court has held that payment of costs by the plaintiff may be made a condition precedent to his being granted an adjournment although he is suing in forma pauperis (*h*)

2 [S 157] Procedure if parties fail to appear on day fixed Where on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit

(*d*) [illegible] (19[illegible]4) 51 [illegible] 45 [illegible] 4
(*e*) [illegible] (19[illegible]0) 51 [illegible] L J 390 [illegible] 50
(*f*) *East India* [illegible] *Co* [illegible] *Mal* (19[illegible]3) 47 All 538 86 I C 86 ('25) [illegible]
(*g*) *Varabhad*[illegible] (19[illegible]) 21 Mal 403
(*h*) [illegible] (19[illegible]3) [illegible] Ran 561 ('28) A R 3[illegible]

Distinction between O 9 and O 17—The provisions of O 9 by themselves do not apply to a case in which the plaintiff or defendant has already appeared but has failed to appear at an adjourned hearing of the suit For such a case the procedure is laid down in O 17 which deals with adjournments (i)

One of the modes directed by Order IX—The effect of this rule is to assimilate the procedure in cases where there is default of appearance at an *adjourned* hearing with that in cases where there is such default at the *first* hearing The result is that though a party may have appeared at the first hearing but fails to appear at an adjourned hearing the procedure laid down in Order 9 will apply that is to say if the *plaintiff* fails to appear at an adjourned hearing the Court may make an order dismissing the suit under this rule and O 9 r 8 and the plaintiff may if so advised then apply under this rule and O 9 r 9 for an order to set the dismissal aside (j) and if the *defendant* fails to appear at an adjourned hearing the Court may pass an ex parte decree under this rule and O 9 r 6 and the defendant may if so advised then apply under this rule and O 9 r 13 for an order to set it aside (k) If both parties fail to appear at the hearing the Court may make an order dismissing the suit under this rule and O 9 r 3 and the plaintiff may then if so advised either bring a fresh suit or apply for an order to set the dismissal aside under this rule and O 9 r 4 (l)

After a decree has been passed the Court has no jurisdiction to dismiss the suit under this rule and O 9 r 8 for plaintiff's default This is because once a decree has been made in a suit the suit cannot be dismissed unless the decree is reversed on appeal (m)

May proceed under O 9 or make such other order as it thinks fit—The High Court of Bombay has held that where the plaintiff has made a case which if uncontradicted would entitle him to a decree but does not appear at an adjourned hearing the Court should not dismiss the suit under this rule and O 9 r 8 but should decide the case on the merits The reason given is that O 9 r 8 does not apply where the plaintiff has made a case which if uncontradicted would entitle him to the relief claimed (n) On the other hand the Allahabad High Court has held that the words or make such other order as it thinks fit do not empower the Court to dispose of the suit *on the merits* but only to grant a further adjournment and if the Court does not adjourn the hearing it should proceed under this rule and O 9 that is to say dismiss the suit under O 9 r 8 if the plaintiff does not appear and pass an ex parte decree under O 9 r 6 if the defendant does not appear (o) In Calcutta it has been held that where there are no materials on the record the Court should proceed under r 2 above but if there are materials on the record the Court ought to proceed under this rule (p) It has been held in some cases that if the Court refuses a further adjournment and dismisses the suit if the plaintiff does not appear or passes an ex parte decree if the defendant does not appear but omits to state whether the order was made under this rule or r 3 below the order must be taken to have been made under this rule (q) unless it clearly appears from the proceedings that there has been a decision on the merits (r)

(i) *Enatulla v Jiban* (1914) 41 Cal 9 6 23 I C 769

(j) *Fyfe v Sherman* (18) 1 Mad 8 *Ramaya v Rangayya* (1884) Mad 41 *Ma sa v Ramkalpa* (190) 34 Cal 235 *Nagendra Kumar v Nabin Mandal* (1909) 36 Cal 189 1 I C 41 *Rukam v Tara Ch d* (19) 0 All L J 1 3 65 I C 7 5 ( ) A A 68

(k) *Bh g n v H a* (189) 19 All 3 5 *Hildreth v S jaj* (1896) 0 Bom 380 *Jo ardan v I mlhone* (1 96) 3 Cal 738 followed in *En tulla v Jiba* (1914) 41 Cal 9 6 3 I C 69

(l) *Alwar v Seshamm l* (188) 10 Mad 2 0

( ) *La hmi Na a n v Balmaku d* (19 4) 1 I A 3 1 4 Pat 61 81 I C 74 (4) A PC 198

(n) *Ning ppa v Gowdappa* (190) 7 Bom L R 61

(o) *Ful J uar v Ha hm tullah* (191) 37 All 460 9 I C 5 3 *Ra n Cha a v Jagh bir* (19 4) 45 All 618 75 I C 38 (3) A A 551 *Ram Adhin v Ram Bharose* (1 5) 4 All 181 8 I C 7 (5) A A 1

(p) See *Enatulla v Jiban* (1914) 41 Cal 9 6 3 I C 769 *Mari sa v Ramkalpa* (190) 34 Cal 235 See also *Kader Kh n v Jugg n a* (1908) 35 Cal 10 3

(q) *G n Lal v Debi Das* (1925) 47 All 140 8 I C 470 (5) A A 67

(r) *Shaikh Muhammad v Ch tha Mahto* (1919) 4 Pat L J 71 5 I C 990

There does not seem to be any doubt that default of appearance *before* hearing in a case of general adjournment as *distinguished from an adjournment granted under r 3* to enable a party to perform any act necessary to the further progress of the suit is within this rule and under r 3 so that if the plaintiff does not appear the Court may dismiss the suit under this rule and O 9 r 8 and if the defendant does not appear it may pass an ex parte decree under this rule and O 9 r 6 (*s*)

Adjourned hearing—It has been held by the High Court o Calcutta that the word adjourned in this rule refers to an adjournment *upon the application of parties* granted under r 1 and not an adjournment necessitated by the rules of the Court relating to the regulation of its own business (*t*)

Fail to appear —See notes to O 9 r 9 Appearance

Non appearance on day fixed for judgment—A suit cannot be dismissed for non appearance of parties on the day fixed for delivery of judgment (*u*)

Remedy—See notes to the next rule under the head Remedy

3 [S 158] Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith

Court may proceed notwithstanding either part fails to produce evidence etc

Scope of the rule—The provisions of this rule do not apply unless—

(1) the hearing is adjourned *on the application of a party* to the suit as distinguished from an adjournment by the Court *of its own motion* (*v*)

(2) the hearing is adjourned on the application of the party *who subsequently makes the default* (*w*)

(3) the adjournment is granted to enable the party to produce his evidence or to cause the attendance of his witnesses or to perform any *other act necessary to the further progress of the suit* and

(4) the party *fails* to perform any of the acts for which the adjournment was granted within the time allowed by the Court

Any other act —A sues *B* to recover possession of certain land *B* contends that the suit is not properly valued The Court thereupon appoints a commissioner on the application of *B* to value the land and directs *A* to pay into Court Rs 100 being the commissioner's fee within a specified time If *A* fail to make the payment within the prescribed time the Court may proceed under this rule The payment of the commissioner's fee is an act necessary to the further progress of the suit within the meaning of this rule (*x*)

Procedure to be followed under this rule—Rule 2 applies to cases where the hearing is adjourned *no matter for what purpose* and the parties or any of them *fail to appear* at the adjourned hearing The present rule is directed to a case where the

(*s*) Kri t ... (19) 4 Cal L J 467 111 I C 430 (8) A C 341 ... Sh ... (19) 46 I ... 68 I C 14 (3) A R 7 ... D ... (19) 1 Lat 1 ... 83 ( ) A I 4

(*t*) Sree ... mutty (1) C W N 490

(*u*) J ... T ... (19) 9 Lah L J 1 ... 100 I C 4 ( ) A I 88

(*v*) J ... (19) ... P 31 ... (1914) 41 (1 9 6 3 I C 6

(*w*) Myl ... (1) 6 I ... A R 191

(*x*) ... Mahomed (1 90) 13 M 3 510 ... (1 9) 1 Mad 403 See Tulshi ... (19) 3 All L J 513 ... 44 (3) A A 604

hearing is adjourned at the instance of a party *for some one or other of the purposes specified in the rule* and the party *fails to p rform the specified act or acts* for which the adjournment was granted within the time allowed by the Court (*y*) In such a case the rule says the Court *may* notwithstanding such default proceed to *decide* the suit forthwith These words do not mean that the Court may dismiss the suit if the plaintiff is in default or pass a decree against the defendant if the defendant is in default ( ) What they mean is that the Court may *further adjourn* the hearing or it may without granting any further adjournment *proceed to try the suit* and take such evidence as may be tendered by the parties and decide the suit on the merits (*a*) Thus where an adjournment is granted to the plaintiff to amend the plaint but the plaintiff fails to amend the plaint and the Court refuses a further adjournment the Court should not dismiss the suit for default but *decide it on the merits* (*b*) The word forthwith means without granting any further adjournment [contrast the words at once pronounce *judgment* in O 15 r 4] Where the adjournment is not for the purpose of performing any act necessary to the further progress of the suit in other words it is a general adjournment default of appearance at the adjourned hearing comes within r 2 above and not under this rule (*c*)

Remedy—Where a suit is disposed of under the first part of r 2 above it is open to the party aggrieved by the order to proceed under O 9 r 9 or O 9 r 13 as the case may be see notes to r 2 above One of the modes directed by Order 9 But where a case is decided under the present rule the decision amounts to a decree and the remedy of the party aggrieved i by way of appeal (*d*) or by way of review (*e*) As to what points may be taken in appeal and what in review see the undermentioned case (*f*)

Case where default under this rule is coupled with default of appearance under rule 2—If the hearing of a suit is adjourned on the application of the plaintiff to enable him to *produce his evidence* or *to perform any other act* as mentioned in this rule and the plaintiff *does not appear* at the adjourned hearing should the Court proceed under this rule or under rule 2 ? The High Court of Madras has held that the Court should in such a case proceed under r 2 and dismiss the suit *for default* so that the plaintiff may have an opportunity to apply under O 9 r 9 to set aside the dismi al (*g*) A similar view has been taken by the High Court of Bombay (*h*) The High Court of Lahore has held that if there are no sufficient materials on the record the Court should proceed under r 2 above (*i*) but if there are sufficient materials it should proceed to decide the suit under this rule (*j*) In Allahabad the balance of authority seems to be in favour of the view that the Court should proceed under r 2 and not under this rule (*k*)

(*y*) *Krista Kishore* v *Pan haram* (19 8) 47 C l L J 467 111 I C 430 (8) A C 341 *Mah t Damodar* v *Raj Kumar* (19) 1 Pat 188 196 69 I C 837 ( ) A P 48

(*z*) *Sukh* v *P m Lot n* (1919) 41 All 663 51 I C 8 0

(*a*) *S tara* v *Tulshi* (1901) 23 All 46 *Ram* v *ain* v *J gteo* (1911) 33 All 690 10 I C 903 S e howe r *gend Kuma* v *ab n Ma dal* (1909) 36 Cal 189 191 19 1 I C 41 *Pichamma* v *Sreeram l* (1918) 41 Mad 86 9 43 I C 566

(*b*) (1919) 4 Pat L J 2 51 I C 189 *supra*

(*c*) *A thim lam* v *Secretary of St te* (19_8) 54 Mad L J 3 1 *Ma g I ray* v *Sa a I e* (19 6) 4 Rang 409 99 I C 71 ( ) A R 46 *Chandanam* v *Samsagany* (1928) 6 Rang 766 115 I C 668 (29) A R 73 *M l Chand* v *Pia i Lal* (19 9) 27 All L J 391

(*d*) *Lalt I rasad* v *and Kishore* (1899) _ All 66 *G a Bibi* v *Chanta* (1911) 34 All 1 3 1 I C 603 *I ichamma* v *S ee m l* (1819) 41 Mad 86 9 43 I C 566 *S kkhu* v *l am Lota* (1919) 41 All 663 51 I C 8 0 *Ma Chon* v *Ma ng M n t* (19) 5 Rang 833 101 I C 619 ( ) A R 148

(*e*) *Pi a uma* v *Sreeramulu* (1919) 41 Mad 86 29 43 I C 566

(*f*) *Pichamma* v *Sreeran ulu* (1918) 41 Mad 86 29 293 43 I C 566

(*g*) *Chandramathi* v *araya swami* (1910) 33 Mad 41 5 I C 23 *I chamma* v *Sreer m l* (1918) 41 Mad 296 43 I C 566 [F B] overruling *agan da* v *Krishna m rth* (1911) 34 Ma l 97 6 I C 33

(*h*) *Bas ya* v *Allayya* (19_5) 7 Bom L R 4 87 I C 710 (25) A B 3_8 *Shrima t* v *Smith* (1890) 20 B m 736

(*i*) *Hargopal* v *Harish Cha der* (1919) Punj Rec no 48 p 1 0 47 I C 596 *Sher Al* v *Ma gu* (1919) Punj Rec no 150 p 37 5 I C 9

(*j*) *Jha da S gh* v *Sa lig* (19) 5 Lah. 218 73 I C 433 ( ) A L 545

(*k*) *Ga esh Lal* v *Debi Das* (1925) 47 All 140 146 85 I C 470 (5) A A 67 *P m Adh* v *P m Bharose* (1925) 47 All 181 183 8 I C 97 (25) A A 14 B t see *Badam* v *athu* (1903) 5 All 194 *G ra B bi* v *Gha ta* (191) 34 All 1 3

The Patna High Court has held that this rule does not apply unless the hearing is commenced (*l*) O 1

To whom time has been granted —Where a party has paid the process fee for summoning witnesses but the witnesses are not served and the Court adjourns the hearing *to enable its officer to serve the summonses* the adjournment does not amount to granting of time within the meaning of this rule and the rule does not apply (*m*)

Execution proceedings —The provisions of this Order do not apply to execution proceedings (*n*)

ORDER XVIII

Hearing of the Suit and Examination of Witnesses

1 [S 179, Expln] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin O r

Right to begin

Right to begin —The right to begin is to be determined by the rules of evidence As a general rule the party on whom the burden of proof rests should begin Sections 101 114 of the Indian Evidence Act I of 1872 deal with burden of proof Section 102 of the Act provides that the burden of proof lies on that party who would fail if no evidence at all were given on either side Thus if *A* sues *B* for the recovery of a piece of land of which *B* is in possession the burden of proof lies on *A* for if no evidence were given on either side *B* would be entitled to retain his possession

Unless the defendant admits the facts alleged by the plaintiff — Facts mean *all* material facts Thus where a defendant admits only *some* of the facts alleged by the plaintiff it does not give him the right to begin (*o*)

Preliminary issue raised by defendant that suit does not lie — Where the defendant raises a preliminary issue that the suit is barred as *res judicata* the defendant has the right to begin (*p*)

Preliminary issue raised by respondent that appeal does not lie — In such a case according to the Bombay High Court the appellant has the right to begin The decision was put on the ground of established practice in the Bombay High Court (*q*)

2 [S 179, 1st para , S 180 1st and 2nd paras] (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove

Statement and production of evidence

(*l*) [illegible] (19) [illegible] 131 36 10 [illegible] 16

(*m*) [illegible] (1915) [illegible] Rec no 51 [illegible] 31 [illegible] 93

(*n*) [illegible] (1 5) 18 [illegible]

(*o*) [illegible] C L P [illegible]

(*p*) [illegible] (1) [illegible] 451

(*q*) [illegible] (1 1) 8 [illegible]

hearing is adjourned at the instance of a party *for some one or other of the purposes specified in the rule* and the party *fails to perform the specified act or acts* for which the adjournment was granted within the time allowed by the Court (*y*) In such a case the rule says the Court *may* notwithstanding such default proceed to *decide* the suit forthwith These words do not mean that the Court may dismiss the suit if the plaintiff is in default or pass a decree against the defendant if the defendant is in default ( ) What they mean is that the Court may *further adjourn* the hearing *or* it may without granting any further adjournment *proceed to try the suit* and take such evidence as may be tendered by the parties and decide the suit on the merits (*a*) Thus where an adjournment is granted to the plaintiff to amend the plaint but the plaintiff fails to amend the plaint and the Court refuses a further adjournment the Court should not dismiss the suit for default but *decide it on the merits* (*b*) The word forthwith means without granting any further adjournment [contrast the words at once pronounce *judgment* in O 15 r 4] Where the adjournment is not for the purpose of performing any act necessary to the further progress of the suit in other words it is a general adjournment default of appearance at the adjourned hearing comes within r 2 above and not under this rule (*c*)

Remedy—Where a suit is disposed of under the first part of r 2 above it is open to the party aggrieved by the order to proceed under O 9 r 9 or O 9 r 13 as the case may be see notes to r 2 above One of the modes directed by Order 9 But where a case is decided under the present rule the decision amounts to a decree and the remedy of the party aggrieved is by way of appeal (*d*) or by way of review (*e*) As to what points may be taken in appeal and what in review see the undermentioned case (*f*)

Case where default under this rule is coupled with default of appearance under rule 2—If the hearing of a suit is adjourned on the application of the plaintiff to enable him to *produce his evidence* or *to perform any other act* as mentioned in this rule and the plaintiff *does not appear* at the adjourned hearing should the Court proceed under this rule or under rule 2 ? The High Court of Madras has held that the Court should in such a case proceed under r 2 and dismiss the suit *for default* so that the plaintiff may have an opportunity to apply under O 9 r 9 to set aside the dismissal (*g*) A similar view has been taken by the High Court of Bombay (*h*) The High Court of Lahore has held that if there are no sufficient materials on the record the Court should proceed under r 2 above (*i*) but if there are sufficient materials it should proceed to decide the suit under this rule (*j*) In Allahabad the balance of authority seems to be in favour of the view that the Court should proceed under r 2 and not under this rule (*k*)

(*y*) *Krista Kishore* v *Pancharam* (19 8) 47 Cal L J 467 111 I C 430 (8) A C 341 *Mahant Damodar* v *Raj Kumar* (192) 1 Pat 188 196 69 I C 837 ( ) A P 485

(*z*) *Sukhu* v *Ram Lotan* (1919) 41 All 663 51 I C 8 0

(*a*) *Sitara* v *Tulshi* (1901) 23 All 46 *Ram Naran* v *Jagdeo* (1911) 33 All 690 10 I C 903 See however *Nagendra Kumar* v *Nabin Mandal* (1909) 36 C 1 189 191 19 I I C 741 *Pichamma* v *Sreeramulu* (1918) 41 Mad 86 99 43 I C 566

(*b*) (1919) 4 Pat L J 51 I C 189 *supra*

(*c*) *Authmulan* v *Secretary of State* (19 8) 54 Mad L J 3 1 *Ma ng I a* v *S* *I e* (19 6) 4 Rang 403 99 I C 717 (7) A R 46 *Chand iam* v *Sams ga y* (19 8) 6 Rang 766 115 I C 668 (9) A R 73 *Mul Chand* v *Piari Lal* (1929) 27 All L J 391

(*d*) *Lalta Prasad* v *Nand Kishore* (1809) All 66 *Chura Bibi* v *Chanta* (1911) 34 All 1 3 1 I C 603 *Pichamma* v *Sreeramulu* (1819) 41 Mad 86 9 43 I C 566 *Sukhu* v *Ram Lotan* (1919) 41 All 663 51 I C 850 *Ma Chon* v *Ma ng Myint* (19) 5 Rang 833 101 I C 615 (7) A R 148

(*e*) *Pichamma* v *Sreeramulu* (1918) 41 Mad 86 99 43 I C 566

(*f*) *Pichamma* v *Sreeramulu* (1918) 41 Mad 86 99 93 43 I C 566

(*g*) *Chandramathi* v *Narajanswami* (1910) 33 Mad 41 5 I C 93 *Pichamma* v *Sreeramulu* (1918) 41 Mad 86 43 I C 566 [F B] overruling *Nagarada* v *Krishnamurthi* (1911) 34 Mad 97 6 I C 33

(*h*) *Basappa* v *Allayya* (19 5) 27 Bom L R 47 87 I C 710 (25) A B 3 8 *Shrimati* v *Smith* (1890) 20 Bom 736

(*i*) *Hargopal* v *Harish Chander* (1919) Punj Rec no 48 p 1 0 47 I C 596 *Sher Ali* v *Mangu* (1919) Punj Rec no 150 p 39 5 I C 29

(*j*) *Jhanda Singh* v *Sadiq* (19 4) 5 Lah 218 73 I C 453 (24) A L 545

(*k*) *Ganesh Lal* v *Debi Das* (1923) 47 All 146 8 I C 470 (5) A A 267 *Ram Adhin* v *Ram Bharos* (192) 47 All 181 18 8 I C 7 (5) A A 19 But see *Badam* v *Nath* (1903) 25 All 194 *Gaura Bibi* v *Ghasita* (191) 34 All 123

The Patna High Court has held that this rule does not apply unless the hearing is commenced (l)

To whom time has been granted —Where a party has paid the process fee for summoning witnesses but the witnesses are not served and the Court adjourns the hearing *to enable its officer to serve the summonses* the adjournment does not amount to granting of time within the meaning of this rule and the rule does not apply (m)

Execution proceedings —The provisions of this Order do not apply to execution proceedings (n)

ORDER XVIII

Hearing of the Suit and Examination of Witnesses

Right to begin

1 [**S 179, Expln**] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin

Right to begin —The right to begin is to be determined by the rules of evidence As a general rule the party on whom the burden of proof rests should begin Sections 101 114 of the Indian Evidence Act I of 1872 deal with burden of proof Section 102 of the Act provides that the burden of proof lies on that party who would fail if no evidence at all were given on either side Thus if *A* sues *B* for the recovery of a piece of land of which *B* is in possession the burden of proof lies on *A* for if no evidence were given on either side *B* would be entitled to retain his possession

Unless the defendant admits the facts alleged by the plaintiff — Facts mean *all* material facts Thus where a defendant admits only *some* of the facts alleged by the plaintiff it does not give him the right to begin (o)

Preliminary issue raised by defendant that suit does not lie — Where the defendant raises a preliminary issue that the suit is barred as *res judicata* the defendant has the right to begin (p)

Preliminary issue raised by respondent that appeal does not lie — In such a case according to the Bombay High Court the appellant has the right to begin The decision was put on the ground of established practice in the Bombay High Court (q)

Statement and production of evidence

2 [**S 179 1st para, S 180 1st and 2nd paras**] (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove

(l) *Mithabir Lal v. Sital ...* (1 8) ... 36 107 I C ... 16

(m) *H ... v. Narain Singh* (1915) ... Rec no 51 p 31 ... I C 938

(n) *Tirth ... v. ... appayya* (1 35) 19 Mad 131

(o) *Agh ... v. Pr m Ch ... d* (1980) ... C L R 274

(p) *Fatmabai v. Aishabai* (18 8) 1 Bom 451

(q) *Lud m... v. K ... soorji* (1884) 8 Bom ... 7 ... 83

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case

(3) The party beginning may then reply generally on the whole case

The other party shall then state his case —Where there are two sets of defendants and their interests are practically the same the rule is that after the plaintiff has closed his case both the defendants should state th ir case before any evidence is given by either defendant (r)

Some of the defendants supporting plaintiff's case —Where there are several defendants and some of them support the plaintiff s case the rule is that the plaintiff and such of the defendants as support his case wholly or in part must address the Court and call their evidence in the first place and then the other party that is the other defendants should address the Court and call their evidence (s)

Hearing of arguments —If in a case where a party having an opportunity of addressing the Court does not do so the judgment cannot be set aside because it was delivered without hearing arguments (t)

E idenc where several issues

3 [S 180 3rd para] Where there are several issues the burden of proving some of which lies on the other party, the party beginning, may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party , and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence and the other party may then reply specially on the evidence so produced by the party beginning , but the party beginning will then be entitled to reply generally on the whole case

Witnesses to be examined in open Court

4 [S 181] The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge

Evidence of witnesses —It is the duty of the Judge to examine every witness tendered unless it appears clearly that the object of summoning a large number of witne ses is to obstruct or d lay justice (u) It is not right for the Judge to select a certain number of witnes es and send away the rest because he thinks that they would only prove the same facts as those already deposed to (v) or because he is satisfied on the evidence already recorded (w) If he does so the Appellate Court may remand

( ) *P D k h a* (190) 29 Cal 3

( ) *H ji I l v S ltan Mahomel Khan* (1908) 3 Bom 599

(t) *H mi v D r4 D tta* (19 3) 4 Lah 361 7 I C 398 (4) A L 107

(u) *Ramdh i v Rajballab* (18 0) 6 B L R App 10

( ) *Jes t v J t S gj e* (1841) M I A 4 4

(w) *Brij Soondur v Ki oon lssa* (18 4) 3 W R 63

the case with a direction to him to take the evidence of the witnesses tendered by the party but not examined by the Judge (x) O 1
rr 4

Evidence shall be taken in open Court —As to the examination of witnesses on commission see Order 26 below

5 [S 182] How evidence shall be taken in appealable cases In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative and, when completed, shall be read over in the presence of the Judge and of the witness and the Judge shall, if necessary, correct the same, and shall sign it

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Presence of parties —Where evidence is taken in the absence of the opposite party it will be rejected by the Court of appeal if the objection to the reception of the evidence was taken before the Court trying the suit If no such objection was taken the appellate Court will not remand the case especially if the other evidence in the case is sufficient to support the decision of the lower Court (y) See Indian Evidence Act 1872 s 167

Shall be read over —There is a difference of opinion whether if the deposition is not read over to the witness as required by this rule or interpreted to him as required by r 6 below it is admissible in evidence in trials for perjury and forgery it being held in some cases that the deposition is not admissible in evidence (z) while in others that it is (a) The former view proceeds on the ground that the deposition not being read over or interpreted to the witness it does not prove itself under s 80 of the Evidence Act 1872 and that it cannot be proved in any other way having regard to the provisions of s 91 of that Act. The latter view proceeds on the ground that though the deposition does not in such a case prove itself under s 80 of the Evidence Act it may be proved in any other way *e g* by the Judge who took it down and that s 91 of the Act is no bar to such proof

Where a witness understands English and the deposition is read over by him instead of being read over to him it is a substantial compliance with the rule (b)

Signature of witness —The rule does not require a witness to sign his evidence (c)

Signature of Judge —A prosecution for perjury cannot be sustained if the deposition is not signed by the Judge The signing of the deposition by the Judge is made essential to the application of s 80 of the Evidence Act 1872 by the section itself (d)

(x) *Khuda Baksh v Imam Ali* (1887) 9 All 339
(y) *Rammarau v Ragasamy* (18 5) 6 M I A 3
(z) *Empress v Mawdob* (1881) 6 Cal 6 [deposition not even signed by the Judge] *Kamalnatha v Emperor* (190) 28 Mad 308 *Emperor v Jogendra Nath* (1914) 4 Cal 40 I C 571 *Ban v King Emperor* (1919) 4 M L J 561 50 I C 987 *Emperor v Abdul Ali* (1924) 51 Cal 236 81 I C 803 (4) A I C 704
(a) *Elah Baksh v Emperor* (1916) 45 Cal 825 45 I C 58 *Kyra v Emperor* (1911) 34 Mad 141 7 I C 414 *Meerappo v Lariah* (191) Mad W N 37
(b) *Ramesh Chandra v Emperor* (1919) 46 Cal 895 901 50 I C 660
(c) 46 Cal 895 901 50 I C 660 *supra*
(d) *Empress v Mayadob* (1881) 6 Cal 6

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6 [S 183] Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given

When deposition to be interpreted

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Shall be interpreted—See notes to r 5 above **Shall be read over**

7 [*New*] Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and as occasion may require, interpreted and corrected as if it were evidence taken down under that rule

Evidence under section 138

8 [S 184] Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes and such memorandum shall be written and signed by the Judge and shall form part of the record

Memorandum when evidence not taken down by Judge

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Where evidence not taken down by Judge—If the evidence is taken down not by the Judge but by some other person the Judge also should make or cause to be made a memorandum as provided by this rule even if the evidence was taken down by the other person in the presence and under the personal direction and superintendence of the Judge as required by r 5 above If evidence is dictated to a typist by a Judge and no memorandum is made by him the provisions of this rule and of rr 5 and 14 are not complied with But the case is then one not of illegality but of irregularity (e)

9 [S 185] Where English is not the language of the Court but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English the Judge may so take it down

When evidence may be taken in English

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

(e) *Promod Nath v Haridas* (19.3) 5 Cal 1054

10 [S 186] The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing

Any particular question and answer may be taken down

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

11 [S 187] Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon

Questions objected to and allowed by Court

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Where no objection is taken —If evidence has been admitted *without objection* in the Court of first instance it must not be rejected by the appellate Court (*f*)

12 [S 188] The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination

Remarks on demeanour of witnesses

Remarks on demeanour of witnesses —See the undermentioned case (*g*)

13 [S 189] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length, but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record

Memorandum of evidence in unappealable cases

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

14 [S 190] (1) Where the Judge is unable to make a memorandum as required by this Order he shall cause the reason of such inability to be recorded and shall cause the memorandum to be made in writing from his dictation in open Court

Judge unable to make such memorandum to record reasons of his inability

(*f*) *Ch[illegible] v Dinkar* (18[illegible]) 11 Bo[illegible] 3[illegible]0 *Baldnarain* v *Omrao* (1[illegible]0) 15 [illegible] 519 5[illegible]9

(*g*) *Emperor* [illegible] *C D* (1922) 44 All. 4[illegible]1 66 I C 1005 ('22) A.A [illegible] [a criminal case]

6 (2) Every memorandum so made shall form part of the record

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl. (4)]

Power to deal with evidence taken before another Judge

15 [S 191] (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it

(2) The provisions of sub rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24

Chartered High Courts—This rule so far as it relates to the manner of taking evidence does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Power to examine witness immediately

16 [S 192] (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him and the Judge shall, if necessary, correct the same and shall sign it, and it may then be read at any hearing of the suit

Chartered High Courts—This rule so far as it relates to the manner of taking evidence does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Notice—For form of notice see App H form No 6

17 [S 193] The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit

Court may recall and examine witness

18 [*New*] The Court may at any stage of a suit inspect any property or thing concerning which any question may arise

Power of Court to inspect

View by Judge —This rule does not entitle a Judge to put his own view on inspection *in the place* of evidence Thus in an action of deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff s the conclusion of the Judge on a view by him of the two articles—such as two rival omnibuses that the defendant s article is calculated to deceive is not sufficient by itself to support an injunction. The Judge must be satisfied by *independent evidence* that there is at least a reasonable probability of deception (*h*)

ORDER XIX

Affidavits

1 [S 194] Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing on such conditions as the Court thinks reasonable

Power to order any point to be proved by affidavit

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit

2 [S 195] (1) Upon any application evidence may be given by affidavit, but the Court may at the instance of either party, order the attendance for cross examination of the deponent

Power to order attendance of deponent for cross examination

(2) Such attendance shall be in Court unless the deponent is exempted from personal appearance in Court or the Court otherwise directs

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(*h*) *London General Omnibus Co Ld v Lavell* [1901] 1 Ch 135

3 **3** [S 196] (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated

Matters to which affidavits shall be confined

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same

Grounds of belief—The grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief (i)

ORDER XX

Judgment and Decree

r 1 **1** [S 198] The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders

Judgment when pronounced

See s 33 above

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (a)]

Evidence taken before another Judge—As a general rule judgment must be given upon evidence taken by the Judge before himself and not upon evidence taken before another person (j) In the three following cases the Judge may give judgment upon evidence recorded by some other Judge or person —

(1) Under O 18 r 15 when the Judge who has heard the evidence is prevented by death transfer or other cause from concluding the trial of the suit

(2) Under O 26 r 1 where the evidence has been taken by a *commissioner* of a witness residing *within* the jurisdiction who is exempted under the Code from attending the Court or is unable to attend from sickness or infirmity

(3) Under O 26 r 4 where the evidence has been taken by a *commissioner* of a witness residing *beyond* the jurisdiction and of other persons *specified* in the rule

Notice to parties—Notice should be given in the manner prescribed by s 140 A judgment delivered without notice to parties is not a judgment pronounced within the meaning of this rule (k)

Judgment not pronounced—A judgment not pronounced in Court does not operate as a judgment it operates only as minute or memoranda made by the Judge

(i) *Padmabati v Rasik Lal* (1910) 37 Cal 259 6 I C 666
(j) *Nara bhai v Naroshanka* (1867) 4 B H C A C 98
(k) *Khar k v Lachman* (19) 47 All 33?, 86 I C 869 ('25) A A 93

who wrote it (*l*) The posting of a notice on the notice board of the Court announcing the result of a case is not a sufficient compliance with this rule (*m*)

Non compliance with rules 1 2 and 3 —Where a judgment is not pronounced dated or signed in conformity with the requirements of the Code it constitutes a mere irregularity within the meaning of s 99 it affords no ground for reversal in appeal of the decree based on it (*n*)

Power to pronounce judgment written by judge's predecessor

2 [S 199] A Judge may pronounce a judgment written but not pronounced by his predecessor

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (5)] The High Court of Bombay has held that where a Judge of the High Court dictates his judgment to a shorthand writer but does not see or approve the transcript the transcript cannot be treated as his judgment but a letter from him to the Prothonotary stating his final decision and the exact order made and asking that it should be communicated to the parties in Court may be treated as a judgment although it gives no reasons (*o*)

Written by his predecessor —It does not matter that the judgment was written by the Judge's predecessor after he had taken leave or left the judicial post which he occupied when he heard the case or after he had been transferred (*p*) The fact that the transferred officer himself pronounces the judgment does not make any difference (*q*)

May pronounce —The word may leaves a Judge the option to pronounce a judgment according to his own view of the case though it may be different from the judgment written by his predecessor who heard the case (*r*)

Non compliance with rules 1 2 and 3 —See notes to r 1 above under the same head

Judgment to be signed

3 [S 202] The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl ( )]

Shall not afterwards be altered —A decree cannot be altered by a Court even with the consent of parties except in the mode prescribed by this rule (*s*) When a District Judge delivered a judgment in open Court but suspended the [illegible] of the decree pending the production by the plaintiff of a certificate of [illegible] h ll

(*l*) *Mahomed Ali v Asadu [illegible]* (1867) 9 W 1 1 F B]

(*m*) *Nagi h v Seeh m* (10 1) 41 Mad 1 J 48 65 I C 8 (21) A M 690 *Dahi v Hargovan* (1906) 30 Bom 455

( ) *Fort Gloster Jute Manufacturing Co v Ch [illegible]* (1919) 46 Cal 9 8 51 I C 40

(*o*) *Mather Steam Light Tramway Co Ltd v La q* (19) 51 Bom 61 100 I C 941 (27) A B 113

(*p*) *Su K v Ch nd e he* (190) 31 Cal 93 *Satyendra Nath v K [illegible] Kumari* (190) 35 Cal 6 *Srimotya v Loknath* (19 0) 5 Pat L J 147 55 I C 43 *G Shankar v pa* (190) Bom L 1) 1 *Secretary of State* (1913) 35 All 6 19 I C 8 *Lawati v Chet Singh* (19 0) 4 All 36 61 I C 93 *Diwan v Jats* (1916) Punj L r no 80 p 49 35 I C 934 *Kesh v Budh Ram* (1919) Punj L r no 80 p 19 49 I C 4

(*q*) *Day P m J* (1916) Punj Lee n 80 [illegible] 4 3 I C 95

( ) *Lachman Prasad v P m Ki ha* (1911) 33 All 36 8 I C 1046

(*s*) *Kala v [illegible]* (19) 4 Lal 1 See also *Subr ma ia v Correa* (19 5) 45 Mad L J 1 1 86 I C 3 (25) A M 45

that it was not competent to the Judge to cancel the judgment and deliver another judgment inconsistent with the first (t) Where it is held by one Judge that the Court fee paid on a plaint is sufficient his successor has no power to alter that judgment and hold that it is insufficient (u)

Amendment.—S. 152 enables the Court to correct clerical or arithmetical mistakes or errors arising from accidental slips in judgments decrees or orders

Review—See s 114 and O 47 r 1

Non compliance with rules 1 2 and 3—See notes to r 1 above under the same head

4 [S 203] (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon

Judgment of Small Cause Courts

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision

Judgments of other Courts

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl. (5)].

Judgments of Small Cause Court—Where the judgment of a Small Cause Court after setting out a number of issues merely stated I find all the issues for the plaintiff it was held that it was not a sufficient compliance with the provisions of sub rule (1) and the judgment was set aside and the case remanded to the lower Court for being disposed of according to law (v) The judgment must convey some indication that the Judge has applied his mind to the evidence on the record (w)

Court invested with Small Cause Court powers—A Court invested with Small Cause Court powers is governed by sub r (1) and not sub r (2) (x)

Unintelligible judgment—If a judgment is unintelligible the appellate Court may set it aside and remand the case to the lower Court for the recording of judgment according to law after hearing afresh the arguments of pleaders (y)

5 [S 204] In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit

Court to state its decision on each issue

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl. (5)].

Object of judgment—The proper object of a judgment is to support by the most cogent reasons that suggest themselves the final conclusion at which the Judge has conscientiously arrived That object is defeated by the Judge elaborately recording

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(t) *Kisha K war v Ganga Prasad* (1909) 31 All 153 1 I C 8?0

(u) *H rih v M hemari* (19?4) 3 Pat 654 8 I C 813 ('25) A P 4

(v) *Moide n v Moideen* (19?) 49 Mad L. J 354 90 I C 968 ('2) A M 1?29

(w) *Kund n Lal v Sh e Dayal* (1923) 10 Lah. L. J 218

(x) *Na aya v Bhagu* (1907) 31 Bom 311 *Ma q Sa v Ma Uma* (19?3) 1 Rang ? 4 76 I C 600 ('?3) A R 5

(y) *H bhagwan v Ahmad* (19??) 4 Lah. L. J 55 ( ) A L 1??

the fluctuations of his mind from day to day in reference to the witnesses the evidence and the arguments. It is a substantial objection to a judgment that it does not dispose of the question as it was presented by the parties e g when it finds a particular signature to be a forgery which both sides admit to be genuine (z)

6 [S 206, 1st and 2nd paras, S 221] (1) The decree shall agree with the judgment, it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit

Contents of decree

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (5)]

How decrees should be drawn up—Decrees should be drawn up in such a way as to make them self contained and capable of execution without referring to any other document (a)

Sub rule (3)—This sub rule corresponds to s 221 of the Code of 1882

Power to amend decree—See s 152 and notes thereto

7 [S 205] The decree shall bear date the day on which the judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree

Date of decree

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (5)]

Date of decree—The period of limitation for an appeal from a judgment runs from the date on which it is pronounced, and not from the date on which it is written and signed (b)

8 [*New*] Where a Judge has vacated office after pronouncing judgment but without signing the decree a decree drawn up in accordance with such judgment may be signed by his successor or if the Court has ceased

Procedure where Judge has vacated office before signing decree

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(z) Sri R ghu adha v n B o.o Kishore (15 6) 3 I A 154

(a) Joyta a v Mahomed (18) 8 Cal. 9 5

(b) parmal v Lachmiasran (1922) 1 Pat. ; 51 I C 8 9 ('23) A P 1 9

that it was not competent to the Judge to cancel the judgment and deliver another judgment inconsistent with the first (t) Where it is held by one Judge that the Court fee paid on a plaint is sufficient his successor has no power to alter that judgment and hold that it is insufficient (u)

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Court to state its decision on each issue

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Object of judgment—The proper object of a judgment is to support by the most cogent reasons that suggest themselves the final conclusion at which the Judge has conscientiously arrived That object is defeated by the Judge elaborately recording

(t) *Kishan Kunwar* v *Ganga Prasad* (1909) 31 All. 1 3 I C 870

(u) *Harihar* v *Mahesvari* (19?4) 3 Pat 6 4 8? I C 813 (?) A P 47

(v) *Moideen* v *Moideen* (19?5) 49 Mad L. J 3?4 90 I C 968 ( ) A M 1?9

(w) *Kundan Lal* v *Shiv Dayal* (1928) 10 Lah. L J 48

(x) *Naray* v *Bhagu* (1907) 31 Bom 314 *Maung Sa* v *Ma Uma* (19?3) 1 Rang 2 4 76 I C 600 (?3) A R. 5

(y) *Harbhagwan* v *Ahmad* (19??) 4 Lah L J 55 (?2?) A L 12?

the fluctuations of his mind from day to day in reference to the witnesses the evidence and the arguments. It is a substantial objection to a judgment that it does not dispose of the question as it was presented by the parties e g when it finds a particular signature to be a forgery which both sides admit to be genuine (z)

6 [S 206, 1st and 2nd paras, S 221] (1) The decree shall agree with the judgment, it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit

Contents of decree

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (5)]

How decrees should be drawn up —Decrees should be drawn up in such a way as to make them self contained and capable of execution without referring to any other document (a)

Sub rule (3) —This sub rule corresponds to s 221 of the Code of 1882

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7 [S 205] The decree shall bear date the day on which the judgment was pronounced and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree

Date of decree

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (5)]

Date of decree —The period of limitation for an appeal from a judgment runs from the date on which it is pronounced and not from the date on which it is written and signed (b)

8 [New] Where a Judge has vacated office after pronouncing judgment but without signing the decree a decree drawn up in accordance with such judgment may be signed by his successor, or if the Court has ceased

Procedure where Judge has vacated office before signing decree

(z) Sri Raghunadha v Sri Brozo Kishore (1876) 3 I A 154
(a) Joytara v Mahomed (188) 8 Cal. 9 5
(b) ...garmal v Lachmusara (1922) 1 Pat. 771, 5 I C 8 9 ('23) A P 1 9

to exist, by the Judge of any Court to which such Court was subordinate

Chartered High Courts—*This rule does not apply to Chartered High Courts* in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (5)]

9 [S 207] Where the subject-matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers

Decree for recovery of immovable property

Decree for possession of land—A decree for possession of land carries with it possession of account books and other papers relating to the management of the land (c)

10 [S 208] Where the suit is for movable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had

Decree for delivery of movable property

Decree for delivery of movable property—This rule contemplates suits for the recovery of *specific* movable property referred in arts 48 and 49 of the Limitation Act (*d*) The decree holder cannot execute the decree without having recourse to the procedure prescribed by O 21 r 31 he has not an option not to take delivery of the property and to fall back upon the money portion of the decree (*e*)

11 [S 210] (1) Where, and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments with or without interest, notwithstanding anything contained in the contract under which the money is payable

Decree may direct payment by instalments

(2) After the passing of any such decree the Court may, on the application of the judgment debtor and with the consent of the decree holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment debtor, or the taking of security from him, or otherwise, as it thinks fit

Order after decree for payment by instalments

(c) *Sri Bhavani v Devrao* (188) 11 Bom 485
(d) *Murugesa v Jotharam* (1899) — Mad 4 8
(e) *Bal Mukunda v Bengal Nagpur Ry* (19) 55 Cal 6 103 I C 40 (7) A C 6

Old section —This rule corresponds with s 210 of the Code of 1882 except in the following particulars —

(1) The words shall be postponed in sub rules (1) and (2) are new

(2) The words notwithstanding anything contained in the contract under which the money is payable in sub rule (1) are also new see notes below under those words

In so far as the decree is for the payment of money —This rule applies to money decrees only and not to mortgage decrees (*f*)

Sufficient reason —The possibility of the judgment debtor obtaining a cross decree in another pending litigation has been held not to be sufficient cause for post poning payment of the decretal amount (*g*)

Notwithstanding anything contained in the contract under which the money is payable —These words are new They have been added to overrule the decision of the Bombay High Court in *Ragho* v *Dipchnad* (*h*) In that case it was held that if *A* executed a bond to *B* payable by instalments with a proviso that if default was made in payment of any one of the instalments the whole amount should become due and payable forthwith and if on default being made by *A* in payment of any one instalment *B* sued *A* to recover the whole of the balance due the Court could not at the time of passing the decree order the amount decreed to be paid by instal ments for to do so it was said, would be inconsistent with the terms of the bond Under the present rule the Court has the power to order payment of the amount decreed by instalments notwithstanding the terms of the bond

Interest —Where a decree is made payable by instalments under sub rule (1) the *rate* of interest is in the discretion of the Court (*i*)

Summary Suit —It is irregular for the Court in a summary suit instituted under O 37 where the defendant has failed to obtain leave to appear and defend to pass an order at his instance for the payment of the decretal amount by instalments (*j*)

Sub rule (2) —Sub rule (1) applies where an application is made by the judgment debtor *at the time of passing* the decree Sub rule (2) applies where an application is made *after* the passing of the decree In the latter case no order can be made for pay ment by instalments nor can payment be postponed except with the consent of the decree holder Sub rule (2) has been altered by Burma Schedule Notification and an order can be made for payment by instalments under the altered rule even without the consent of the decree holder but after notice to him (*k*)

Taking of security —Immovable property given by the judgment debtor as security under sub rule (2) may be realized by the decree holder in execution and he is not obliged to have recourse to a regular suit for the purpose O 34 r 14 does not apply to a charge created by the decree itself or one created by the act of parties subsequent to the decree. It applies only to a charge existing prior to the decree (*l*)

Limitation —An application by a judgment debtor under this rule for payment of the amount of a decree by instalments should be made within 6 months from the date of the decree [Limitation Act 1908 Sch I art. 175]

Execution of decree payable by instalments —In the case of an *ordinary* instalment decree that is a decree payable by instalments on certain specified dates

(*f*) *Shankrapa* v *Danapa* (1881) 5 Bom 604

(*g*) *Chandi Ram* v *Tirgwan Das* (1926) 7 Lah 313 97 I C 769 ('26) A L 604

(*h*) (1880) 4 Bom 96

(*i*) *Cursetjee* v *Shebbi* (1879) 3 Bom 0 *Pestonji* v *Jamsedji* (1926) 50 Bom 6 94 I C 9 ('26) A B 30

(*k*) *Sa* ... *v* *Ma* ... (1926) 4 Ran 47 97 I C. 103 ('26) A R. 192

(*l*) *Official Receiver* v *Saraswathi* ... (1925) 49 Mad L J 643 92 I C 42 ('26) A M 194

the period of limitation as regards each instalment (which is 3 years) runs from the date on which the instalment becomes due (m) In the case of a decree payable by instalments *with a proviso* that if default be made in payment of any one of the instalments the whole of the decretal amount should become due and recoverable in execution, limitation runs from the date of the *first* default (n) But if the judgment-debtor pays the over due instalment and the decree holder accepts it without protest limitation will run from the date of the *next* default Strictly speaking the *first* default being waived it ceases to be a default *in law* and the *next* default then becomes the *first* default (o)

12 [Ss 211, 212] (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree—

Decree for possession and mesne profits

(a) for the possession of the property,

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits,

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the decree holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree holder through the Court, or

(iii) the expiration of three years from the date of the decree

whichever event first occurs

(2) Where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry

Inquiry as to mesne profits no longer a proceeding in execution—The provisions relating to mesne profits in the Code of 1882 were contained in ss 211 212 and 244 Those provisions have now been re cast The definition of mesne profits is relegated to s 2 cl 12 At the same time an important alteration has been made as regards procedure in determining the amount of mesne profits. Under the Code of 18__ the amount of mesne profits was to be determined in execution proceedings (p) [see C P C 1882 s 244 cls (a) and (b)] Under the present rule the amount must be determined by the decree and not in execution An application for ascertainment of mesne profits under this rule is not a proceeding in execution but a proceeding in

(m) Limitation Act 1908 Sch I art 75 ( )
( ) *S i b Ch i v Hyder* (18 9) 4 Cal 81
(o) *K M am v I I* (1903) 2 Bom 1 *M n Mohu v Du ga* (1888) 15 Cal 0 *I d dhu Lal v I ekh b* (1880) 11 All 48_
K Kavalasa v Kara am (1881) 3 Mad 6
(p) *K dar ath v An t Prasad* (192_) 5 I A 183 4 Pat. 50 88 I C 4 (1925) A PC 11

continuation of the original suit (*q*) Such an application cannot be dismissed for default under O 9 r 3 for that would involve dismissal of a claim which has already been decreed (*r*) O

Decree for possession and mesne profits—In a suit for the recovery of possession of immovable property the plaintiff may claim mesne profits which have accrued due during a period *prior to the institution of the suit* He may also claim mesne profits which have accrued due *subsequent to the institution of the suit* The decree to be passed in such a case will now be as follows —

1 That the defendant do put the plaintiff in *possession* of the property specified in the schedule annexed to the decree [To this extent the decree is *final*]

2 That the defendant do pay to the plaintiff the sum of Rs with interest thereon at the rate of per cent per annum to the date of realization on account of mesne profits which have accrued due *prior to the institution of the suit* [To this extent the decree is *final*]

Or [where accounts have to be taken of the mesne profits]—

That an inquiry be made as to the amount of mesne profits which have accrued due *prior to the institution of the suit* [To this extent the decree is *preliminary* sec s 2 Expln]

3 That an inquiry be made as to the amount of mesne profits *from the institution of the suit* until the point of time specified in cl (c) of the section [To this extent the decree is *preliminary*] See Sch I App D Form No 23

The inquiry referred to above may be held before an officer of the Court appointed in that behalf who must report to the Court the result of the inquiry After that is done and the parties are heard on the report a *final* decree will be passed in respect of the mesne profits

Where decree silent as to mesne profits—Where a preliminary decree is silent as to mesne profits the Court has no power to direct such enquiry by its final decree (*s*)

Mesne profits where no date fixed—Where a preliminary decree awards possession and mesne profits but is silent as to the date up to which mesne profits are awarded the decree holder is entitled to mesne profits up to the date of delivery of possession to him (*t*)

Joint Hindu family—This rule applies not only where the plaintiff sues for possession of the *whole* of an immovable property but also where he sues for possession of a *portion* thereof But the portion must be a *specified* portion that is a portion to the profits of which the plaintiff is *exclusively* entitled Hence the provisions of the rule do not apply to a suit for partition by a member of a joint Hindu family for until partition no member is entitled to a *specific* share of the property (*u*) This does not mean that a member of a joint Hindu family is not entitled in a suit for partition to claim his share of the rents and profits of the joint property from which he may have been wrongfully excluded He is entitled to such share (*v*) but the Court in dealing

(*q*) [illegible] (19) 47 All 543 8 I C 3 ( ) A A 589 [illegible] ( ) [illegible] (11) Bom 300 109 I C 3 ( ) A B 36 [illegible] [illegible] (19 6) 5 Pat 3 9 I C 6 9 (6) A I 141 2 [illegible] (19 8) 51 M [illegible] 665 1 2 I C 5 ( ) A M 5

(*r*) [illegible] (19 6) 5 Pat. 3 9 I C 6 3 (6) A 1 141

(*s*) [illegible] (1919) 4 Mad 96, 37 51 I C 110 [illegible] Trust (1) 8 Cal 1 190 8 I A 19 307

(*t*) [illegible] (19) 8 Cal 1 3 8 I A 19 [illegible] *Hemendra* (19) 6 I A [illegible] Cal L J 63 (1929) A I C 3

(*u*) [illegible] (19) 14 Cal 493 14 I A 3 [illegible] (19) 16 C L J 40 16 I A 1

(*v*) [illegible] (1 95) 19 Bom 532

2 upon his claim must be guided not by the provisions of this rule but by the rules of Hindu law relating to partition (w) See notes to r 18 below

Procedure—Where an appellate Court disagreeing with the lower Court finds that the plaintiff is entitled to possession it should pass a preliminary decree for possession and direct an inquiry as to mesne profits it is not proper merely to remand the case to the lower Court for disposal (x) The Madras High Court has added a clause to this rule as to which see the case in footnote (y)

Mesne profits—The expression mesne profits is defined in s 2 cl (12) as meaning those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession

The claim for mesne profits is virtually a claim for damages Hence there is no rigid rule for determining the amount of mesne profits and the amount must be assessed in every case by a proper exercise of judicial discretion (z) Mesne profits are in the nature of damages which the Court may mould according to the justice of the case Hence in calculating mesne profits payments of revenue and cesses made by the defendant should be deducted (a) But the costs of collecting the rents of profits should not be allowed to the defendant unless he entered on the property in the exercise of *a bona fide claim of right* (b)

Wrongful possession by the defendant is the very essence of a claim for mesne profits and the very foundation of a decree therefor and this rule cannot apply if the possession of the defendant has not been wrongful (c) Hence a defendant cannot be rendered liable for mesne profits during the period the property was under attachment by virtue of an order made under s 146 of the Criminal Procedure Code (d) Where a defendant has been in wrongful possession for a certain period and is subsequently *dispossessed* by a third party the defendant can only be charged with mesne profits for the period for which he was in wrongful possession. He cannot be charged with mesne profits that have accrued due subsequently to his dispossession though the person who dispossessed him may not have done anything to recover the rents or profits (e) The reason is that if a defendant is dispossessed by a third party he cannot be said to have even impliedly received the profits nor could he with ordinary or extraordinary diligence have received them But where a defendant who has been in wrongful possession *abandons* the land without giving notice to the plaintiff he will be held liable for mesne profits (f)

Where a person buys immovable property from a defendant pending a suit against him for recovery of the property and for mesne profits and a decree is eventually passed against the defendant the plaintiff is entitled to recover mesne profits not only from the defendant but from the purchaser pendente lite (g) The purchaser however is liable only from the date on which he entered into possession (h)

(w) *Ramasamy* v *Subrama a* (1923) 46 Mad 47 74 I C 804 (3) A M 147
(x) *Subba* v *Krishnamach ri* (19) 45 Mad 449 68 I C 869 (22) A M 112
(y) *Timmaraju* v *Naranmla* (19 8) 54 M d L J 66 109 I C 5 (8) A M 5
(z) *Grish Ch nder* v *Shoshi* (1900) Cal 951 2 I A 110 *Surja* v *P ut* (190) 29 C 1 62 *Sh mbhu Nath* v *Sat h Cha d a* (19 0) Cal W N 369 66 I C 49
(a) *Dakhi* v *Saroda* (1894) 1 Cal. 14 0 1 A 160 *Kachar* v *Oghadbhai* (1893) 1 Bom 3
(b) *Du g r* v *J l Ram* (190) 4 All 3 6 *D k h a* v *S od* (1893) 0 I A 160 21 Cal 14 *F j* *S sh la ta* v *I j* *Sarat Chandra* (1921) 34 Cal. L. J 415 430 0 I C 6 (1) A C. 619 *Altaf Ali* v *L lji Mal* (18 7) 1 All. 518
(c) *Khub Lal* v *Raghubans* (1929) 7 Pat 491 (9) A I 56
(d) *Chh gm ll* v *Amanat lla* (1924) 51 C L 853 858 860 83 I C 5 9 (4) A C 1010 *Ind rj t S gh* v *Radhey S gh* (18 4) 1 W R 69 (R ceiv r in possession) *K li Cha an* v *Ashutosh* (191) 3 Cal. L. J 140 38 I C 660
(e) *Abbas* v *Fasaih ud-d* (18) 4 Cal. 413
(f) *Ki hna and* v *I r t b Nara* (1884) 10 Cal. 8 11 I A 88
(g) *M d por Zem ndari Co Ltd* v *Nar ah Na n* (191) 39 Cal. 2 0 11 I C 933
(h) *D mod r* v *Mul* (19 1) 6 Pat. L. J 166 61 I C 4 (1) A.P 102

If one of three zamindars lets the lands on a patni lease and the patnidar lets them O 20
for cultivation and a suit is brought by the other zamindars against him and the patnidar for possession of their shares and mesne profits and a decree is passed for them the mesne profits recoverable from the zamindar defendant should be based upon the rent received by him from the patnidar and not upon the produce value of the land but the mesne profits recoverable from the patnidar should be based upon such value The liability of the zamindar defendant is not in such a case joint and several with the patnidar (i)

Interest forming part of mesne profits—It will be seen from the definition of mesne profits that mesne profits consist of *two* items namely (1) profits of the property and (2) *interest* on such profits Hence if a decree awards mesne profits but says nothing about interest that is interest on the profits it must be construed as including not only the profits but the interest on such profits This was decided by their Lordships of the Privy Council in *Girish Chunder v Shoshi Shikareswar* (j) If the profits were payable from month to month the interest thereon would be calculated month by month and if they were payable from year to year the interest would be calculated year by year Calculating in this manner the interest on the profits must be allowed up to the date of ascertainment of the aggregate amount of mesne profits (k) but in no case should it be allowed for a period longer than three years from the date of the decree (l) The reason is that the item of interest we are now considering forms an integral part of mesne profits and since mesne profits cannot be allowed for a period longer than three years from the date of the decree so also the interest forming part thereof cannot be allowed for a longer period It must not however be supposed that because mesne profits are defined as meaning profits *plus* interest on such profits therefore the Court must always allow interest on such profits Mesne profits as stated above are in the nature of damages which the Court *may* award according to the justice of the case And since the item of interest now under consideration forms part of mesne profits it is equally in the discretion of the Court whether to allow such interest or not (m) For the same reason the Court may while allowing the claim for interest direct the interest to be calculated not month by month or year by year but in a manner less advantageous to the plaintiff The mode of calculation indicated in the beginning of this paragraph applies only to those cases where the decree is silent as to the mode in which interest is to be calculated

After the aggregate amount of mesne profits is ascertained the plaintiff may apply to the Court for a final decree for the amount so ascertained and for interest on that amount and the Court may award interest at such rate as it thinks fit (n) The date from which interest may be allowed is the date of the preliminary decree and not the date on which the amount is ascertained (o) The rate of interest allowed is usually 6 per cent (p) See 34

Application for ascertaining future mesne profits—The right to apply for ascertainment of *future* mesne profits arises not on the date of the decree directing an inquiry as to such profit but on the happening of any one of the three events specified in sub rule (1) ( ) (q) The application is an application in the suit and if the suit is pending the law of limitation does not apply (r)

(i) *G rud v Hem d* (1909) 6 1 A 30 50 Cal L J 363 (9) A PC 300

(j) (1900) [illegible] 1 951 96 1 A 110 p [illegible] (1903) All 5 [illegible] (19) 44 All 5 9 6 [illegible] 19 ( ) A A 11

(k) [illegible] (1903) 5 All 5 [illegible] (1903) 30 [illegible] 1 506

(l) *Girish Chunder v Shoshi Shikareswar* (1900) [illegible] 1 A 110

( ) *Girish Chunder v Shoshi Shikareswar* (1900) Cal 9 1 96 1 A 110

( ) *Girish Chunder v Shoshi Shikareswar* (1906) 33 Cal 3 J 334 33

( ) [illegible] v *Lalit Prasad* (1924) All L J [illegible] 31 (1924) A A 801

(r) [illegible] *Chand Mohan* (190) 1 C W N 45 34 Cal 9 [illegible]

(q) [illegible] *Jagat* (19) 4 Pat 57 84 I C (4) [illegible] 1 51

( ) *Ihal* [illegible] v *Jogul Ram* (1926) 5 Pat 2[illegible]3 9 I C [illegible] 9 (1926) A 1 141 *Sheal* [illegible] (19) [illegible] 600 10[illegible] I C 34 (1923) A B 34

12 **Notice through Court** —The notice of relinquishment of possession should be given through the Court But where a judgment debtor gives such notice *directly* to the decree holder and the latter does not object that it should be sent through the Court he is not entitled to mesne profits after the date of the notice (*s*)

Three years from the date of the decree' — Decree means a decree capable of execution. Thus if an appeal is preferred from a decree for mesne profits and the decree is confirmed in appeal the period of three years is to be computed from the date of the appellate decree (*t*) Similarly if a decree for mesne profits is taken to the Privy Council and is confirmed the period of three years is to be counted from the date of the King's order in Council (*u*) See notes to s 36 What decree may be executed

When a decree awards possession with mesne profits to be ascertained in an inquiry but specifies no time down to which mesne profits are to be computed the decree cannot be construed as giving mesne profits for a period longer than three years from the date of the decree (*v*) The plaintiff therefore is not entitled to mesne profits for more than three years from the date of the decree though possession was not delivered to him until after the expiration of the three years note the words whichever event first occurs in sub r (1) cl (c) But in no case can mesne profits be awarded to the plaintiff for any period subsequent to an offer by the defendant to restore him possession (*w*)

Limitation —As regards mesne profits accrued due *prior* to the institution of the suit the defendant is only liable for the mesne profits accrued due during the *three years before the date of the suit* A claim for mesne profits during a period preceding the three years next before the date of the suit is barred under the Limitation Act 1908 sch. I art 109 (*x*)

Court Fee —Where in a suit for recovery of immovable property and for mesne profits antecedent to as well as subsequent to the institution of the suit the decree directs the profits to be ascertained in execution the court fee is payable with respect to the claim for such profits but the fee cannot be claimed until the amount actually due on account of the profits has been ascertained (*y*)

Burden of proof —The burden of proving the amount of mesne profits *actually received* is on the person who has received them while that of proving the amount of profit that *might with ordinary diligence have been received* is on the person claiming them (*z*)

Order supplementing preliminary decree —Where after the passing of a preliminary decree for accounts an order is made determining the period and the mode of accounting the order itself is a preliminary decree and appealable as such (*a*) See notes to s 97 Two preliminary decrees

Appeal —Under the Code of 1882 [s. 244] the amount of mesne profits was determined in execution proceedings and the decision determining mesne profits being an order in execution proceedings was appealable as a decree Under the present rule the amount of mesne profits is to be determined by the decree itself and a party aggrieved

(*s*) *Shambhu Nath v. Satish Chandra* (1910) C I W N 369 66 I C 49

(*t*) *Radha Nath v. Chand Char* (1903) 30 Cal 660 *Raja Sankata v. Raja Sat Chandra* (1921) 34 Cal L J 415 70 I C 6 (1921) A C 699

(*u*) *Bhup Indor v. Bijai* (1901) 23 All 15 I A 09 *Nandkumar v. Bala* [illegible] (1918) 3 Pat L J 116 43 I C 855

(*v*) *Lakshmiram v. Kushorda* (1900) 4 Bom 149 [illegible] v. S[illegible] (1900) 4 Bom 315 [illegible] Nath v. *Jogendra* Nath (1908) 3 C I 101

(*w*) *Raja S[illegible] v. Raja S[illegible] Chand* (1921) 34 C L J 41 [illegible] 9 C I C 6 (1921) A C 699

(*x*) [illegible] (1934) 10 C L 85 11 I A 84 *Abbas v. Fa[illegible]* (180) 4 C I 413

(*y*) [illegible] (1906) 5 Pat L [illegible] 91 I C 979 (1906) A [illegible] 14 [illegible] Nath v. [illegible] (1906) 33 Cal 1 3

(*z*) [illegible] v. [illegible] (1904) 4 Mad 800 9 I C 133 (1935) A M 145 *Mahomed Abdul* [illegible] *Mahomed* [illegible] (1904) [illegible] M I J 30 9 I C 139 (1935) A M 9

( ) [illegible] v. [illegible] (1923) Cal W N [illegible] I C 3 3 (1924) A C 160

by the determination as to mesne profits may now prefer an appeal from the decree (b)

Mesne profits and jurisdiction —See notes to s 6 and s 38

Res judicata —Where after the passing of a preliminary decree under this rule the plaintiff applies in execution for ascertaining the mesne profits wrongly believing that such profits are to be ascertained in execution proceedings and the application is dismissed the dismissal does not operate as *res judicata* so as to bar a subsequent application *in the suit* for ascertaining the mesne profits (c)

Decree in administration suit

13 [S 213] (1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit

(2) In the administration by the Court of the property of any deceased person if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being within the local limits of the Courts in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent, and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code

Judicature Act 1875 s 10 —The words of the present rule are almost the same as s 10 of the Judicature Act of 1875

Administration suit —Where a person dies leaving a will his estate is administered by his executor and where he dies intestate it is administered by his administrator The administration of the estate of a deceased person consists first in paying his funeral expenses next his debts and then the legacies under his will (if any) The residue of his estate is then divided among the *residuary legatees* under his will or amongst his heirs if he has left no will In an administration suit the Court takes upon itself to a large extent the functions of an executor or administrator and administers the estate of the deceased

(b) [illegible] (1901) 3 All 1 [illegible] (1918) [illegible] 1 [illegible] (191) [illegible] (19) 5 [illegible] 360 109 I C 31 [illegible] 36

(c) [illegible] (19) 46 Mad L J 46 91 I C 633 [illegible] 413

13 **The following persons may maintain an administration suit —**

(1) A *creditor* of the deceased when his claim is not paid off by the legal representatives of the deceased (*d*)

(2) A *legatee* whether specific or pecuniary where the legacy is not paid to him by the legal representatives of the deceased.

(3) The next of kin of the deceased for their share in the estate of the deceased.

(4) An *executor or administrator* when there are disputes amongst the legatees or next of kin as to the amount of the property left by the deceased and the amount to which the legatees or next of kin are entitled

Forms of plaint in administration suit—See Sch I App A forms Nos 41 to 43

Preliminary decree—This rule provides that in an administration suit the Court shall pass a *preliminary decree* before passing the final decree directing accounts to be taken and enquiries to be made For forms of preliminary decree see Sch. I App D forms Nos 17 and 19 and for forms of final decree see forms Nos 18 and 20

Insolvent estate—Sub rule (2) provides that when it appears in an administration suit that the estate of the deceased is insolvent the rules laid down in the Presidency towns Insolvency Act 1909 as to Presidency towns and in the Provincial Insolvency Act 1920 as to the other parts of British India where that applies shall apply so far as regards (1) the respective rights of secured and unsecured creditors (2) debts and liabilities proveable and (3) the valuation of annuities and future and contingent liabilities Note that this sub rule does not apply *all* the rules and principles of insolvency to insolvent estates but only the rules in respect of the three heads enumerated above (*e*)

Rights of secured creditors under the Presidency towns Insolvency Act—See s 48 of the Act and cls 9 to 17 of Sch II to the Act

Rights of secured creditors under the Provincial Insolvency Act—See s 47 of the Act

Debts and liabilities proveable under the Presidency towns Insolvency Act—See sections 46 and 48 and Schedule II of the Presidency towns Insolvency Act 1909

Debts and liabilities proveable under the Provincial Insolvency Act—See ss 45 and 46 of the Act

Suit to recover assets improperly applied by Administrator General—This section does not apply to a suit brought by a creditor of the deceased against the Administrator General (to whom letters of administration have been granted) and against other creditors of the deceased to recover assets alleged to have been improperly paid by the Administrator General to those creditors in priority to the plaintiff (*f*)

Effect of decree in administration suit upon prior attachments—A decree in an administration suit is a decree in favour of all creditors of the deceased and as all of them are included in the same decree it would be inequitable that one should be in a better position than another under that decree The assets are therefore divided amongst all creditors pro rata Even a creditor who has obtained an attachment on the estate of the deceased prior to the decree in the administration suit is not entitled to priority over the other creditors An attachment does not create a charge upon the property attached and the Court will stay all proceedings in execution after the passing of the decree in the suit (*g*)

(*d*) See *Cooper* v *Hillsell* (1886) 1 Ch D 691 *Worraker* v *Pryer* (1876) 2 Ch. D 109

(*e*) *Re D'Epineull* (18) 20 Ch. D 217 *Narajee* v *Adm Gen of Madras* (1915) 38 Mad 500 503 22 I C 66

(*f*) *Narajee* v *Adm Gen of Madras* (1915) 38 Mad 500 22 I C 566

(*g*) *Soobul Chunder* v *Russick Lall* (1888) 15 Cal 202

14 [S 214] (1) Where the Court decrees a claim to **O 20** pre emption in respect of a particular sale of property and the purchase money has not been paid into Court, the decree shall—

Decree in pre emption suit

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that on payment into Court of such purchase money, *together with the costs (if any)* decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase money and the costs (if any) are not so paid, the suit shall be dismissed with costs

(2) Where the Court has adjudicated upon rival claims to pre emption, the decree shall direct—

(a) if and in so far as the claims decreed are equal in degree that the claim of each pre emptor complying with the provisions of sub rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre emptor failing to comply with the said provisions would, but for such default, have taken effect, and,

(b) if and so far as the claims decreed are different in degree, that the claim of the inferior pre emptor shall not take effect unless and until the superior pre emptor has failed to comply with the said provisions

Difference between the old section and the present rule—This rule corresponds with s. 214, C. P. C. 1882, except in the following particulars:—

1 The words "whose title thereto shall be deemed to have accrued from the date of such payment" are new See notes below under those words

2 Sub rule (2) is also new See notes below "Sub rule (2) Rival pre-emptors."

Pre emption—The right of pre emption can only be exercised in respect of *immovable* property A and B, both Mahomedans, are co sharers of a house If B sells his share to X for Rs 5,000, A is entitled to pre empt B's share on payment of Rs 5,000, that is to say, A as co sharer may require B to sell his share to him *in preference* to X The same rule applies if A and B are owners of *adjoining* houses If B refuses to sell his share to A, A may institute a suit for pre emption against B and X It has been held by the High Court of Allahabad that if the sale by B to X has been completed before

14 the date of the suit *B* having no longer any interest in the property he is not a necessary party to the suit (*h*) If a decree is passed for *A* and if he has not paid the amount of purchase money into Court *the decree should specify a day on or before which the purchase money* should be paid into Court If the amount is paid within the time fixed by the Court *A* will be entitled to enter into possession of *B*'s share But if he fails to pay the amount within that time he will lose the benefit of the decree (*i*). If a decree is passed for *A* with costs *A* may pay into Court the purchase money *less* the costs (*j*) As to extension of time for payment see notes below

It is important to note that the right of pre emption is a *personal* right. This leads to the following results —

1 If the pre emptor that is the person entitled to pre emption transfers the right to a third party the right is lost and the transferee cannot maintain a suit for pre emption (*k*)

2 It is not settled whether if the pre emptor dies during the pendency of the suit for pre emption the right according to Sunni Mahomedan Law is extinguished (*l*) or whether it survives to his heirs or to his legal representatives (*m*)

3 If the pre emptor transfers the right of pre emption *during the pendency* of the suit for pre emption the right of pre emption is lost and the suit will be dismissed And even if he obtains a decree *and transfers the decree* the right of pre emption will be lost and the Court will not allow execution of the decree But if he obtains a decree and transfers not the *decree* but the *property* which is the subject of pre emption the right of pre emption is not lost and *he* may execute the decree though execution will not be allowed to the *transferee* (*n*)

Whose title thereto shall be deemed to have accrued from the date of such payment. —These words have been added to make it clear that the title to the property vests in the plaintiff on payment of the purchase money and that it is not necessary to complete the title that there should be a document in writing and registered as required by the Transfer of Property Act in the case of a sale of immovable property The object of inserting these words in the rule is to supersede the opinion expressed *by the High Court of Madras that since the passing of the Transfer of Property* Act the title to a pre empted property could not vest in the plaintiff without an instrument of transfer (*o*)

The plaintiff's title accrues on payment of the purchase money and not from the date of the sale (*p*) No registered document is necessary to transfer the property (*q*) from the date of payment though he cannot obtain possession by reason of the defendant being himself in possession in another capacity (*r*) or by reason of a usufructuary mortgagee being in possession (*s*)

Mesne profits —Upon a pre emption decree the property and the right to mesne profits therefrom vest in the pre emptor only from the date when he pays the amount of the purchase price *finally* decreed until that time the original purchaser retains possession and is entitled to the rents and profits (*t*)

(*h*) *I m* ... *rup* v *S tal* (1904) 6 All 549
(*i*) *Jai Kuar* v *Bhola Nath* (18) 14 All 5 0 *Jaggar N th* v *Jokh* (1896) 18 All 3 ... 10 All 400 *Bhagw* v *Coru* (1910) [un] Rec no ... C 9 4
(*j*) *K p* v *H l* (19 1) 2 Lah 94 6 I C 50 ( ) A I 14
(*k*) *C* ... v *Lalma* (18 3) All 150 183
(*l*) *Muh mm A* v ... (1899)) All 69
(*m*) *S yed Jia* ... v *Su ram* (191) 36 Bom 144 ... I C 0 *Sa m* v *Syed S raj* (1917) 41 Bom 636 653 4 I C 3...
( ) *I* ... (1885) 7 All 10
( ) *I m am* ... (1901) 4 Mad 443 463
(*p*) ... v ... (19 4) 5 Lah 496 85 I C. 19 ( ) A I. 0
(*q*) *I m Lal* v *H rpal* (19 9) 7 All L J 423, 11 I C 113 (9) A.A—3
(*r*) *S* ... v *Mad* (1914) 1 All L J 8 1 3 I C 8 6
( ) *Ragh* ... *S gh* v *Jodha S gh* (19 3) 44 All 4 ... 73 I C 646 (3) A A 50
(*t*) *De* ... *dan* v *Sri Ram* (1 90) 1 All 34 ... v *Ramd* ... (1917) 44 I A 50 44 Cal. 6 5 39 I C ...

Extension of time for payment into Court—The High Court of Allahabad has held that a plaintiff who has obtained a decree can appeal within the period of limitation whether or not he has made the payment on or before the day fixed (*u*). The mere filing however of an appeal does not operate as an extension of the time for payment (*v*). The appellate Court however may if it thinks fit extend the time for payment (*w*). When the appellate Court has in the exercise of its discretion extended the time for payment the High Court will not interfere in second appeal (*x*). See notes to s 148 Act directed or allowed by a decree of Court.

Sub rule (2) Rival pre emptors—Sub r (2) prescribes the form of decree to be passed when there are rival pre emptors. It is based upon the undermentioned rulings of the Allahabad High Court (*y*).

Pre emption under the Mahomedan law—The Mahomedan law is the only system prevalent in British India which provides substantive rules relating to the right of pre emption in a systematic form (*z*). The Mahomedan law of pre emption is applied by the Courts of British India to Mahomedans except in the Madras Presidency the Punjab and Oudh. In the Madras Presidency the right of pre emption is not recognised by the Courts even as between Mahomedans on the ground that it places a restriction upon liberty of transfer of property and is therefore opposed to equity and good conscience (*a*). Pre emption in the Punjab is regulated by the Punjab Laws Act 1872 and in Oudh by the Oudh Laws Act 1876. See Mulla's Principles of Mahomedan Law 9th Ed pp 157 159.

Pre emption by custom—The Sunni Mahomedan law of pre emption applies by custom to Hindus in Behar (*b*) and Gujarat (*c*).

Pre emption by contract—A right of pre emption is occasionally given in mortgage deeds to the mortgagee so that in case of a sale of the equity of redemption by the mortgagor the mortgagee shall have the refusal of the property and in such a case the price may or may not be fixed beforehand (*d*).

Vendor's title in pre emption suit—A pre emptor is not entitled in a pre emption suit to put the vendor to proof of his title to the property which he purports to sell. The reason is that the principle of pre emption is substitution. A pre emptor is therefore bound to take the title which the vendee was ready to take (*e*).

15 [S 215] Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree may pass a preliminary decree declaring the proportionate shares of the parties fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved and directing such accounts to be taken and other acts to be done as it thinks fit.

Decree in suit for dissolution of partnership.

Preliminary decree directing accounts to be taken—The preliminary decree directing accounts to be taken should always contain a declaration of the rights of the

(*u*) *Kod* [illegible] *Singh* v. *J* [illegible] *Singh* (1891) 13 All 3 [illegible] *Khan* [illegible] *Kale Khan* (1894) 16 All 1 [illegible] *J* [illegible] v. *Nath* [illegible] *Jokh* (1896) 18 All 3 [illegible] 6.
(*v*) (1 [illegible] 6) 18 All 3 [illegible] 6 *supra*.
(*w*) [illegible] *Kod* [illegible] (1 [illegible] 01) All 44.
(*x*) [illegible] *Singh* [illegible] *Singh* (1 [illegible] 3) 45 All 4 6 [illegible] 145 [illegible] 3) A [illegible] 516.
(*y*) *K* [illegible] *M* [illegible] (1 [illegible] 4) 6 All 3 [illegible] v. *Sh* [illegible] *Prasad* (1 [illegible] 4) 6 All 455 [illegible] *Nath* v. *Math* [illegible] (1 [illegible] 9) 11 All 164.
(*z*) *Z* [illegible] (18 [illegible] 3) 5 All 110 113.
(*a*) *Ib* [illegible] *M* [illegible] (1 [illegible]) 6 M H C 6.
(*b*) *F* [illegible] *Emamuddi* [illegible] (18 [illegible]) B L R [illegible] Vol 3 *Jud* [illegible] *J* [illegible] *Koer* (19 [illegible]) 35 C [illegible] 5 5.
(*c*) *Go* [illegible] *das* [illegible] (1869) 6 B H C A C 63.
(*d*) *O* [illegible] v. *Tr* [illegible] (1 [illegible]) 9 Madras.
(*e*) [illegible] *Kwari* (19 [illegible]) 3 All [illegible] C 10 [illegible]

parties and it should be in form No 21 Sch I App D (*f*) After the accounts are taken a final decree is passed directing that the partnership assets be applied, first in payment of the partnership debts next in payment of the cost of the suit and lastly in payment to each partner of the amount found due to him on taking the accounts. If it turns out on taking the accounts that there is a balance due to the defendant a decree may be passed in favour of the defendant (*g*) See Sch. I App. D form No —

Appeal —A preliminary decree in a suit for the dissolution of a partnership or the taking of partnership accounts is appealable under s 96 But the appeal must be filed within the period prescribed by the law of limitation. If no appeal is preferred within the period of limitation the party aggrieved by such decree is precluded by virtue of the provisions of s 97 from disputing its correctness in an appeal from the final decree See s. 97 and notes thereto

Letters Patent appeal —Where a commissioner appointed to take accounts applies to the Court for directions and an order is made giving the directions the order being merely one regulating procedure and not a final adjudication of the rights of the parties is not a judgment within the meaning of cl 13 of the Letters Patent of the High Court of Rangoon and is not appealable as such (*h*)

Decree in suit for account between principal and agent

16 [S 215A] In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not herein before provided for, where it is necessary in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such account to be taken as it thinks fit

Shall pass a preliminary decree directing accounts —The provisions of this rule must be strictly followed If the fact of agency is established it is the duty of the Court to direct an account to be taken of the dealing between the parties before passing the final decree It is not proper to pass a final decree at the hearing (*i*) But the Court must be satisfied before directing an inquiry into accounts that the taking of accounts is necessary (*j*)

Whether decree can be passed in favour of defendant —In a suit for account between principal and agent a decree can, if necessary be passed in favour of the defendant on payment of the necessary Court fee (*k*) See notes to r 19 below

Appeal —See notes to r 15 above Appeal.

Stay of proceedings —Where an appeal is pending against a preliminary decree the Appellate Court may make an order under O 41 r 5 staying the inquiry into accounts pending the hearing of the appeal (*l*) See notes to O 41 r 5 Stay of proceedings under a decree

Special directions as to accounts

17 [*New*] The Court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account

(*f*) Th[illegible] Kumarea v S[illegible]bba oya (189[illegible]) [illegible]0 M [illegible] 313
(*g*) Jam Cha[illegible] v [illegible] laql (19[illegible]4) [illegible] All [illegible] J [illegible]83 83 I C 8 0 ([illegible]4) A A 8 4
(*h*) [illegible] v Beng Seng & Co (19[illegible]4) 2 Rang 469 84 I C [illegible]91 ([illegible]5) A R 43
(*i*) Raghunath v La[illegible] (190[illegible]) 7 All 3[illegible]
(*j*) [illegible] Chand a v [illegible] Chand a (19[illegible]) 5 Cal 66 90 I C 914 ([illegible]5) A C 106
(*k*) Parmanand v Jagat (1910) 3[illegible] All 5[illegible] 163
(*l*) See Lalakish[illegible] v Kh[illegible] (1904) 31 Cal [illegible]

is to be taken or vouched and in particular may direct that in taking the account the books of account, in which the accounts in question have been kept, shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised

Decree in suit for partition of property or separate possession of a share therein

18 [*New*] Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54,

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required

Receiver not rendered functus officio—A receiver appointed in a suit for partition does not after the passing of the decree under sub-rule (1) become *functus officio* as regards agricultural land comprised in the suit The Court may therefore grant an interim injunction restraining a party from interfering with the receiver's possession (*m*) See s [illegible] and notes thereto

Giving such further directions—These words are wide enough to include a direction for an inquiry into future mesne profits. But under the rule the direction should be in the preliminary decree If no such direction is included in the preliminary decree the Court has no power to direct an inquiry into future mesne profits by its final decree (*n*)

Joint Hindu family—In a suit for partition of joint Hindu family property the property not being of the kind referred to in sub rule (1) a preliminary decree may be passed as provided by sub rule (2) (*o*) See notes to r [illegible] above Joint Hindu family

Decree when set off is allowed

19 [S 210] (1) Where the defendant has been allowed a set off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount

(*m*) *Sha* [illegible] *D* [illegible] (19[illegible]) 6 Lah 4[illegible] 89 I C 93 ([illegible]5) A I [illegible] 445 r [illegible] (19[illegible]5) Lal L J 4 86 I C [illegible] ([illegible]) A L 35
([illegible]) *Gh* [illegible] *madsa* (1919) 4 Mad [illegible] 96 51 I C 140
(*o*) See *M*[illegible]*mmat Lorand* v *Mst* [illegible]*kal* (19[illegible]) 6 Lah [illegible] 95 I C [illegible] 01 ([illegible]) A L 403

is due to the defendant, and shall be for the recovery of any sum
20 which appears to be due to either party

(2) Any decree passed in a suit in which a set off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set off had been claimed

Appeal from decree relating to set off

(3) The provisions of this rule shall apply whether the set off is admissible under rule 6 of Order VIII or otherwise

Appeal from decree relating to set off—This rule corresponds with s 216 of the Code of 1882 except as regards the provision as to the Court to which an appeal should lie from a decree passed in a suit in which a set off is claimed. The second paragraph of s 216 ran as follows —

The decree of the Court with respect to any sum awarded to the defendant shall have the same effect and be subject to the same rules in respect of appeal or otherwise as if such sum had been claimed by the defendant in a seperate suit against the plaintiff

The present rule provides that appeals from decrees relating to set off shall lie to the Courts to which appeals in respect of the original claim would lie

Decree for defendant where set off is claimed—It has been held by the Allahabad High Court that in a suit by a principal against his agent for account the Court can grant a decree to the agent for the amount found due to him on the taking of accounts between the parties (p) The ground on which the decision is based is that a suit for accounts against an agent necessarily involves an undertaking by the principal to pay to the agent any sum that may be found due to him Commenting on this case Phillips J in a Madras case (q) said This I think is taking a somewhat large view of the intention of a plaintiff in such a suit for it could rarely be his intention to bring a suit in order that a decree might be given against him See notes to O 8 r 6 The amount claimed to be set off must be legally recoverable

20 [S 217] Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense

Certified copies of judgment and decree to be furnished

ORDER XXI

Execution of Decrees and Orders

Of execution of decrees in general—The present order is the longest Order in the whole Schedule It consists of 103 rules It is proposed here to give a summary of these rules and at the same time a description of the different modes of execution and the procedure to be observed. The references to the rules given in this summary are to the rules of the present Order

(p) *I rmanand* v *J gat Na* (1910) 32 All. 5_5 6 I C 163 See also *I m Chan* *I ulagi* (19"4) 22 All L. J 83 83 I C 800 ("4) A A 854

(q) *Na mk* v *Zamindar of Tiruvur* (1919) 4 Mad 873, 8 9-850 53 I C 734 [the def ndant s claim for excess ... in this case time-barred].

A obtains a decree against *B* for Rs 5 000 Here *A* is the decree holder *B* is the judgment debtor and Rs 5 000 is the judgment debt If *B* fails to satisfy the decree *A* may apply for execution of the decree against *B*'s person or against his property or both (r 30) But the Court may in its discretion refuse execution *at the same time* against the person and property of the judgment debtor (r 21) Execution against the person of the judgment debtor consists in arresting him and detaining him in jail Execution against the property of a judgment debtor consists in attaching and selling his property and paying the decree holder the amount of the judgment debt out of the sale proceeds

Application for execution —All proceedings in execution are commenced by an application for execution (r 10) The application for execution must be in writing [r 11 (2)] and should contain the particulars set forth in rr 11 (2) to 14 The only exception is where the decree is for the payment of money and the judgment debtor is in the precincts of the Court when the decree is passed in which case the Court may order immediate execution on the *oral* application of the decree holder at the time of passing the decree [r 11 (1)] If the application complies with the requirements of rr 11 (2) to 14 the Court will direct execution to issue (r 24) If he does not the Court may reject it or may require it to be amended (r 17) If the application is rejected the decree holder may present another application properly framed

Who may apply for execution —The application for execution must be made by the decree holder If the decree is transferred by the decree holder the transferee may apply for execution (r 16) If the decree has been passed jointly in favour of more persons than one any one of such persons may apply for execution (r 15) If the decree holder is dead his legal representative may apply for execution (r 16)

Against whom execution may be applied for —If the judgment debtor is living execution will be applied for against him If he is dead execution may be applied for against his legal representative In the latter case the decree may not be executed against the person of the legal representative but only against the property of the judgment debtor which has come to the hands of the legal representative and has not been duly disposed of by him (s 50) As to notice to the legal representative see the next paragraph

Notice before ordering execution —The law does not require any notice to be issued to the party against whom execution is applied for except in the following two cases —

1 Where the application for execution is made more than one year after the date of the decree or more than one year after the date of the last order made on any previous application for execution

2 Where execution is applied for against the legal representative of the judgment debtor

In these two cases the Code provides that the Court executing the decree *shall* issue a notice (r 22) There is one case in which it is *discretionary* with the Court to issue a notice before making an order for execution and that is where the decree is for *money* and execution is sought against the *person* of the judgment-debtor (r 37)

Execution against person of judgment debtor —

(1) *Decrees for the payment of money* —*A* obtains a decree against *B* for Rs. 5000 and costs [This is a money decree] *B* fails to pay the amount of the judgment-debt. *A* applies for execution of the decree against *B*'s *person* [r 11 (2) cl. (j)]. The decree being a money decree the Court *may* instead of issuing a warrant for *B*'s arrest issue a notice calling upon him to appear and show cause why he should not be committed to the civil prison in execution of the decree (r 37) If *B* appears and satisfies the Court that he is unable to pay the amount of the decree from poverty or other sufficient cause

and if there are no circumstances which disentitle *B* to the indulgence of the Court the Court may make an order disallowing *A* s application for *B* s arrest and detention [r 40 (1)] If *B* does not appear the Court should issue a warrant for his arrest if the decree holder so desires (r 37) If *B* appears but fails to show cause to the satisfaction of the Court the Court should cause him to be arrested [r 40 (3)]

Where a warrant of arrest is issued it should be executed by an officer of the Court appointed in that behalf (rr 24 25) If when the officer goes to execute the warrant *B* offers payment of the amount of the judgment debt (which must always be specified in the warrant) the officer should receive the payment and the warrant should not then be executed (r 38) But if no payment is made *B* should be arrested and brought before the Court as soon as practicable (s 55) If no notice was issued prior to his arrest under r 37 it is open to *B* to show that he is unable to pay the amount of the decree from poverty or any other sufficient cause [r 40 (1)] If the Court is satisfied that *B* is unable to pay the amount of the decree from poverty or any other sufficient cause and if there are no other circumstances which would disentitle *B* to the indulgence of the Court the Court will make an order directing *B* s release [r 40 (1)] Otherwise the Court will make an order committing *B* to prison [r 40 (5)] The prison will be a civil prison (s 55) and the term of detention in prison is six months if the amount of the decree exceeds Rs. 50 and six weeks if the amount of the decree does not exceed Rs 50 (s 58) If while in prison, *B* pays the amount mentioned in the warrant to the officer in charge of the prison or the decree is otherwise fully satisfied as by attachment and sale of the property he will be released from detention (s 58) Otherwise he will be detained in prison until expiration of the term of his detention unless the decree holder requests the Court to release him from detention or omits to pay the subsistence allowance of the judgment debtor A judgment debtor released from detention in any one of the above cases cannot be re arrested in execution of the same decree [s 58 (2)] though the judgment debt has remained unpaid. This does not mean that his liability to pay the debt ceases for the decree still subsist and *A* may yet execute the decree against *B* s *property* [s 58 (2)] though not against his *person*

No woman can be arrested in execution of a money decree [s 56]

(ii) *Decrees other than those for the payment of money*—A judgment debtor may be arrested and imprisoned not only in execution of a decree for the payment of money but also in execution of other decrees (rr 31 32 33) The procedure to be followed in these cases is as follows If the application is in proper form the Court will issue a warrant for arrest of the judgment debtor (r 24) If the judgment debtor is arrested in execution of the warrant he must be brought before the Court as soon as practicable (s 55) The Court will then make an order committing him to the civil prison. If while in jail the decree is fully satisfied he will be released from detention [s. 58 (1)]. Otherwise he will be detained in prison until expiration of the term of his detention, unless the decree holder requests the Court to release him from detention, or omits to pay the subsistence allowance of the judgment debtor as provided by r 39

Execution against property of judgment debtor—This subject may be considered under two heads namely (1) attachment and (2) sale The rules relating to attachment may be stated first and then the rules governing sale for attachment precedes sale Attachment is levied and the sale of the property attached is effected by an officer of the Court under a warrant issued from the Court

Before considering the rules relating to attachment and sale it is to be observed that there are certain kinds of property which are not liable to attachment or sale in execution of a decree These are described in s 60 Subject to these exceptions all saleable property which belongs to the judgment debtor or over which he has a disposing power which he may exercise for his own benefit is liable to attachment and sale in execution of a decree against him (s. 60)

I Attachment—Attachable property belonging to a judgment debtor may be divided into two classes (1) movable and (2) immovable

As to attachment of movable property—See rr 43 to 53

Attachment of immovable property—If the property be immovable the attachment is to be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and prohibiting all other persons from taking any benefit from such transfer or charge The order must be proclaimed at some place on or adjacent to the property and a copy of the order is to be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court house (r 54)

Where an attachment has been made any private transfer of the property attached whether it be movable or immovable is void as against all claims enforceable under the attachment (r 64)

If a claim is preferred to any property attached in execution of a decree by any *person other than a party to the suit* the procedure prescribed by rr 58 to 63 must be followed If any questions arise in the course of execution proceedings between *the parties to the suit* or their representatives they should be dealt with under s 47

If during the pendency of the attachment the judgment debtor satisfies the decree through the Court the attachment will be deemed to be withdrawn (r 55) Otherwise the Court will order the property to be sold (r 64) If the property attached is current coin or currency notes the Court may direct payment to the decree holder in satisfaction of his decree (r 56) for it is not necessary to sell coin or currency notes

II Sale of attached property—If the property attached be movable property which is subject to speedy and natural decay may be sold at once (r 43) Every sale in execution of a decree should be conducted by an officer of the Court except where the property to be sold is a negotiable instrument or a share in a corporation which the Court may order to be sold through a broker (r 76)

After the property whether movable or immovable is attached the first step to be taken with a view to its sale is to cause a proclamation to be made stating the time and place of sale and specifying the property to be sold the revenue (if any) assessed upon the property the encumbrances (if any) to which it is liable the amount for the recovery of which the sale is ordered and such other particulars as the Court considers material for a purchaser to know in order to judge of the nature and value of the property (r 66) No sale should take place until after the expiration of at least thirty days in the case of immovable property and of at least fifteen days in the case of movable property calculated from the date on which a copy of the proclamation has been fixed on the Court house of the Judge ordering the sale unless the judgment debtor consents in writing to the sale being held at an earlier date (r 68) The Court may in its discretion adjourn the sale from time to time but if the sale is adjourned for longer period than seven days a fresh proclamation should be made unless the judgment debtor consents to waive it (r 69)

It is important to note that no holder of a decree in execution of which property is sold can bid for or purchase the property without the express permission of the Court (r 72)

Irregularity in the conduct of sale of attached property—No sale of *immovable* property can be set aside on the ground of irregularity in publishing or conducting the sale unless upon the facts proved the Court is satisfied that the party seeking to set aside the sale has sustained substantial injury by reason of such irregularity (r 90) As regards *movable property* the rule is that a sale of movable property is not liable to be set aside in any case on the ground of irregularity in publishing or conducting the sale The only remedy open to the party who has sustained any injury by reason of such irregularity is to institute a suit for compensation against the person responsible for the

irregularity But if such person be the purchaser himself the party sustaining the injury may sue for the recovery of the specific property and for compensation in default of such recovery (r 78)

Disposal of sale proceeds—The sale proceeds of property sold in execution of a decree are applied in the manner prescribed by s 73

Resistance to delivery of possession to purchaser—Where immovable property is sold in execution of a decree and the purchaser is resisted or obstructed in obtaining possession of the property he may make an application to the Court complaining of such resistance or obstruction The Court will thereupon fix a day for investigating the matter and summon the party against whom the application is made to appear and answer (rr 97 103)

Payment under decree

Modes of paying money under decree

1 [S 257] (1) All money payable under a decree shall be paid as follows, namely —

(a) into the Court whose duty it is to execute the decree, or

(b) out of Court to the decree holder, or

(c) otherwise as the Court which made the decree directs

(2) Where any payment is made under clause (a) of sub rule (1), notice of such payments shall be given to the decree holder

Retrospective effect of rules contained in this Order—A comparison of this Order with the corresponding Chapter of the Code of 1882 will show that several changes have been introduced in matters of procedure so far as they relate to the execution of decrees. In this connection it is important to note that changes in matters of procedure are retrospective in effect and apply to pending proceedings (r)

Money payable under a decree—It is money payable under a *decree* that may be paid into Court under this rule Costs of an application awarded by an *order* under s 47 cannot be said to be money payable under a *decree* Hence such costs ought to be paid to the party direct and not into Court (s)

Where an order has been made for the payment of money into Court on a certain date and the Court is closed on that day a payment made on the following day is good payment for the purposes of the order (t)

Decree directing payment to decree holder—Payment into Court is a valid compliance with a decree even though the decree directs payment to the decree holder (u)

When rule does not apply—This rule does not apply where a decree is by its terms incapable of execution as where it is provided by a consent decree that if the decretal amount is not paid it may be recovered by suit (v)

(r) *Hazrat ... v ...* (1894) 18 Bom ... *Balkrishna v Bapu* (1895) 19 Bom 204

(s) *Sha ... v Secretary of State* (1899) 1 ... Mad 1 0

(t) *A ... v S ... miyoppa* (1923) 71 Mad 285

(u) *... v ...* (1911) 35 Bom ... 71 C 972 ... (1923) 45 M ... L J 596 87 I C 260 (1923) A M 743 [payment to Court on re-opening day]

(v) *K... Bihari v Bindeshri* (19..) 51 All ... 115 I C 796 (29) A A 7

Notice of payment into Court—Sub r (2) which requires notice to be given to the decree holder where payment is made into Court is new Payment of the decretal amount into Court operates as a satisfaction of the decree to that extent though no notice of payment is given to the decree holder as provided by sub r (2) Similarly where a decree is assigned by the decree holder and the judgment debtor pays the decretal amount into Court without notice of the assignment the payment operates as a satisfaction of the decree to that extent though no notice of payment is given to the decree holder and the assignee is not entitled to execute the decree (w) But where interest is awarded by the decree on the decretal amount the decree holder is entitled to interest until he receives notice of the payment into Court (x)

Payment out of Court to decree holder

2 [S 258] (1) Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder the decree holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly

(2) The judgment debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified, and if, after service of such notice, the decree holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree

S 257A C P C 1882 omitted in this Code—With reference to the present rule it is important to note that s 257A of the Code of 1882 has been omitted in this Code That section ran as follows —

Agreement to give time to judgment-debtor

Every agreement to give time for the satisfaction of a judgment debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree and such Court deems the consideration to be under the circumstances reasonable

Agreement for the satisfaction of judgment-debt

Every agreement for the satisfaction of a judgment debt which provides for payment directly or indirectly of any sum [illegible] the sum due or to accrue due under the decree [illegible] void unless it is made with the like sanction.

Any sum paid in contravention of the provisions of this section shall be [illegible] to the satisfaction of the judgment debt and the surplus if any shall be [illegible] by the judgment debtor

(w) Tata Iron & St I Co Ltd v Vaidyanath (1923) Pat 34 61 C 85 (1923) A I 118 | (x) [illegible] v Sherbet [illegible] I C 410

2 This section was first enacted by Act XII of 1879 with a view to protect judgment debtors from undue pressure by decree holders It gave rise to conflicting decisions and as interpreted by the majority of the High Courts was found in practice to be of little service to judgment debtors It has been therefore omitted in this Code with the result that—

(1) agreements *to give time* to the judgment debtor and

(2) agreements for the satisfaction of a judgment debt which provide *for the payment of any sum in excess of the decretal amount* may now be entered into between the decree holder and the judgment debtor *without the sanction* of the Court and if otherwise valid they may be enforced as any other agreement

Points of difference between old section 258 and the present rule—The present rule corresponds with s 258 of the Code of 1882 except in the following particulars —

(1) The words of any kind have been inserted in sub r (1) See notes below Decree of any kind

(2) In para 3 of s 258 the words as a payment or adjustment or the decree followed the word recognized These words have been omitted [see sub r (3)] to make it clear that the Court cannot recognise an uncertified payment or adjustment *for any purpose whatever* See notes below Uncertified payment and limitation

Scope and application of the rule—This rule provides that—

(1) where any money payable under a decree of any kind is *paid out of Court* or

(2) where a decree is otherwise *adjusted* in whole or in part to the satisfaction of the decree holder

the decree holder *shall* certify such payment or adjustment to the Court whose duty it is to execute the decree so that the same may be recorded by that Court

If the decree holder fails to inform the Court of the payment or adjustment *it is open* to the judgment debtor to protect himself from execution of the decree by applying to the Court within 90 days from the date of the payment or adjustment (y) to issue a notice to the decree holder to show cause why the payment or adjustment should not be recorded as certified If the payment or adjustment is not certified by either party it shall not be recognised by any Court executing the decree This will appear from the following

Illustration

A obtains a decree against *B* for Rs 2 000 It is subsequently agreed between *A* and *B* that *A* should accept Rs 1 000 in full satisfaction of the decree *B* pays *A* Rs 1 000 out of Court but *neither the payment nor adjustment is certified to the Court* *A* applies for execution of the full amount of the decree *notwithstanding* receipt by him of Rs 1 000 *B* objects to execution on the ground that the decree has been adjusted and payment has been made The payment not being certified cannot be recognized by the Court *executing the decree* and the Court must direct execution to issue It will not avail *B* that *A* had agreed to certify the payment to the Court but has omitted to do so See notes below under the head Fraud

History of sub rule 3—The Codes of 1859 (s 206) and 1877 (s 258) provided that a payment or adjustment made out of Court should not be recognized by any Court *executing the decree* unless it had been certified to that Court The Code of 1877 was amended in the year 1879 and the amendment provided that an uncertified payment or adjustment should not be recognized by *any Court* and the same provision

(y) Limitation Act 1908 Sch I art 174

occurred in the Code of 1882 (z) In the year 1888 the section was again altered by providing that an uncertified payment or adjustment should not be recognized by any Court *executing the decree* and this is the form in which the rule now stands

Sub rule (3) —Sub rule (3) provides that an uncertified payment or adjustment shall not be recognized by any *Court executing the decree* The words by any Court executing the decree indicate the extent to which an uncertified payment or adjustment should not be recognized by a Court These words show that the prohibition to take cognizance of an uncertified payment or adjustment is limited to the Court which is called upon to *execute the decree* It is in execution proceedings alone that an uncertified payment or adjustment cannot be recognized by a Court The rule does not prohibit a Court from taking cognizance of such payment or adjustment in proceedings other than execution proceedings An uncertified payment or adjustment may therefore be recognized by a Court *trying a suit* for a relief based upon such payment or adjustment (a) This gives rise to the following questions —

1 Whether if the Court orders execution in the case put in the above illustrations (p 636) *B* can maintain a *suit* against *A* for a declaration that the decree has been adjusted and for an *injunction* restraining *A* from executing the decree ?

2 Whether if *A* executes the decree notwithstanding the adjustment and *B* s property is sold in execution *B* can maintain a *suit* against *A to set aside the sale* on the ground that the decree having been adjusted *A* ought not to have caused the same to be executed ?

3 Whether if *A* executes the decree notwithstanding the adjustment *B* can maintain a *suit* against *A* to recover *damages* for breach of the contract represented by the adjustment ? In other words whether if *B* is compelled to pay in execution of the decree the full amount of the decree namely Rs 2 000 he is entitled to recover back that sum from *A* as damages for breach of the contract on *A* s part not to execute the decree ?

Each of suits referred to above would involve recognition of an *uncertified* adjustment and *B* s success in each would depend *inter alia* upon the recognition of such adjustment by the Court trying *the suit* Now it has been made sufficiently clear that the prohibition against the recognition of an uncertified adjustment is confined to Courts *executing decrees* and does not extend to Courts *trying suits* Therefore a Court trying any of the above suits would not be precluded from recognizing the adjustment though the adjustment has not been certified But this circumstance is not of itself sufficient to entitle *B* to a decree for in the first two cases there is an initial difficulty in *B* s way That difficulty is the bar of s 47 which enjoins that all questions relating to the execution discharge or satisfaction of a decree shall be determined by the Court *executing the decree and not by a separate suit*

As regards the first question it is quite true that if *B* brought a suit for an injunction restraining *A* from executing the decree the Court trying the suit *would recognize* the adjustment though it had not been certified But the Court cannot try the suit at all for such a suit is barred under s 47 the principal question in the suit being whether *A* should be restrained from *executing* the decree This being a question relating to execution cannot be tried in a separate suit (b) Hence the answer to the first question is in the negative

(z) *Haji Abdul R hman* v *Khoja Khaki Aruth* (188) 11 Bom 6 [F B]

(a) *Swami ao* v *Ka hinath* (1891) 15 Bom 419 *Kaly* v *Kamta* (1891) 13 All. 33) *Ghana h m* v *Kasl iram* (189) 16 Bom 589 *Iswar Chand a* v *Haris Ch d a* (1909) 5 Cal. 13 The operation of sub-r (3) is not excluded because a party proceeds by way of suit instead of proceeding by an application as required by s 47 *Moru* v *Ha an* (1919) 43 Bom 240 48 I C 135

(b) *Ar. n* v *Matuk Lal* (1894) 21 Cal 43 *B gulu* v *Bapa na* (189) 15 Mad 302, *Deno Lundhu* v *Hari* (1904) 31 Cal. 480 *Ram Labhaya* v *Muk ndamal* (19) 2 Lah. 319 67 I C 593 ( ) A L. 4 3 [F B]

2 This section was first enacted by Act XII of 1879 with a view to prot[illegible] debtors from undue pressure by decree holders It gave rise to conflicting d[illegible] as interpreted by the majority of the High Courts was found in practice to [illegible] service to judgment debtors It has been therefore omitted in this Code with th[illegible] that—

(1) agreements *to give time* to the judgment debtor and

(2) agreements for the satisfaction of a judgment debt which provide *for the p[illegible]ment of any sum in excess of the decretal amount* may now be enter[ed] into between the decree holder and the judgment debtor *without t[he] sanction* of the Court and if otherwise valid they may be enforc[ed] as any other agreement

Points of difference between old section 258 and the present rule—Th[e] present rule corresponds with s 258 of the Code of 1882 except in the followin[g] particulars —

(1) The words of any kind have been inserted in sub r (1) See notes below Decree of any kind

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Scope and application of the rule —This rule provides that—

(1) where any money payable under a decree of any kind is *paid out of Court* or

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the decree holder *shall* certify such payment or adjustment to the Court whose duty it is to execute the decree so that the same may be recorded by that Court

If the decree holder fails to inform the Court of the payment or adjustment *it is open* to the judgment debtor to protect himself from execution of the decree by applying to the Court within 90 days from the date of the payment or adjustment (y) to issue a notice to the decree holder to show cause why the payment or adjustment should not be recorded as certified If the payment or adjustment is not certified by either party it shall not be recognised by any Court executing the decree This will appear from the following

Illustration

A obtains a decree against *B* for Rs 2 000 It is subsequently agreed between *A* and *B* that *A* should accept Rs 1 000 in full satisfaction of the decree *B* pays *A* Rs 1 000 out of Court but *neither the payment nor adjustment is certified to the Court*. *A* applies for execution of the full amount of the decree *notwithstanding* receipt by him of Rs 1 000 *B* objects to execution on the ground that the decree has been adjusted and payment has been made The payment not being certified cannot be recognized by the Court *executing the decree* and the Court must direct execution to issue It will not avail *B* that *A* had agreed to certify the payment to the Court but has omitted to do so See notes below under the head Fraud.

History of sub rule 3—The Codes of 1859 (s 206) and 1877 (s 258) provided that a payment or adjustment made out of Court should not be recognized by any Court *executing the decree* unless it had been certified to that Court The Code of 1877 was amended in the year 1879 and the amendment provided that an uncertified payment or adjustment should not be recognized by *any Court* and the same provision

(y) Limitation Act 1908 Sch I art 174

occurred in the Code of 1882 ( ) In the year 1888 the section was again altered by providing that an uncertified payment or adjustment should not be recognized by any Court *executing the decree* and this is the form in which the rule now stands

Sub rule (3) —Sub rule (3) provides that an uncertified payment or adjustment shall not be recognized by any *Court executing the decree* The words by any Court executing the decree indicate the extent to which an uncertified payment or adjustment should not be recognized by a Court These words show that the prohibition to take cognizance of an uncertified payment or adjustment is limited to the Court which is called upon to *execute the decree* It is in execution proceedings alone that an uncertified payment or adjustment cannot be recognized by a Court The rule does not prohibit a Court from taking cognizance of such payment or adjustment in proceedings other than execution proceedings An uncertified payment or adjustment may therefore be recognized by a Court *trying a suit* for a relief based upon such payment or adjustment (*a*) This gives rise to the following questions —

1 Whether if the Court orders execution in the case put in the above illustrations (p 636) *B* can maintain a *suit* against *A* for a declaration that the decree has been adjusted and for an *injunction* restraining *A* from executing the decree ?

2 Whether if *A* executes the decree notwithstanding the adjustment and *B* s property is sold in execution *B* can maintain a *suit* against *A to set aside the sale* on the ground that the decree having been adjusted *A* ought not to have caused the same to be executed ?

3 Whether if *A* executes the decree notwithstanding the adjustment *B* can maintain a *suit* against *A* to recover *damages* for breach of the contract represented by the adjustment ? In other words whether if *B* is compelled to pay in execution of the decree the full amount of the decree namely Rs 2 000 he is entitled to recover back that sum from *A* as damages for breach of the contract on *A* s part not *to execute the decree* ?

Each of suits referred to above would involve recognition of an *uncertified* adjustment and *B* s success in each would depend *inter alia* upon the recognition of such adjustment by the Court trying *the suit* Now it has been made sufficiently clear that the prohibition against the recognition of an uncertified adjustment is confined to Courts *executing decrees* and does not extend to Courts *trying suits* Therefore a Court trying any of the above suits would not be precluded from recognizing the adjustment though the adjustment has not been certified. But this circumstance is not of itself sufficient to entitle *B* to a decree for in the first two cases there is an initial difficulty in *B* s way That difficulty is the bar of s 47 which enjoins that all questions relating to the execution discharge or satisfaction of a decree shall be determined by the Court executing the decree and *not by a separate suit*

As regards the first question it is quite true that if *B* brought a suit for an injunction restraining *A* from executing the decree the Court trying the suit *would recognize* the adjustment though it had not been certified But the Court cannot try the suit at all for such a suit is barred under s 47 the principal question in the suit being whether *A* should be restrained from *executing* the decree This being a question relating to execution cannot be tried in a separate suit (*b*) Hence the answer to the first question is in the negative

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(z) *Haji Abdul Rahim* v *Khoja Fakir Aruth* (1887) 11 Bom 6 [F B]

(*a*) *Sewmirao* v *Ibrahim* (1891) 15 Bom 419 *Kalyan* v *Kamta* (1891) 13 All. 339 *Ghanasham* v *Kashiram* (189) 16 Bom 559 *Iswar Chand* v *H s Chand a* (1898) 25 Cal. 18 The operation of sub-r (3) is not excluded because a party proceeds by way of suit instead of proceeding by an application as required by s 47 *Moru* v *Hasan* (1919) 43 Bom 40 48 I C 135

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2 *The answer to the second question* is also in the negative and for the same reasons The suit being one to set aside the sale in execution the principal question would be whether the *proceedings in execution* should be set aside and this question is also one relating to execution within the meaning of s 47 and the suit would therefore be barred under that section (c) It is therefore immaterial whether the purchaser at the sale in execution is a stranger or the decree holder himself There are two cases (d) both prior in date to the Allahabad decision cited above in which the property was purchased by a *stranger* and the suit was to set aside the sale on the ground that the decree had already been satisfied out of Court at the time the sale was held. In both these cases it was held that the person who bought the property having purchased it *bona fide* at an auction sale the sale to him could not be set aside But the question whether the suit was *barred* was not raised in either of those cases According to the Allahabad decision cited above the suit would be barred under s 47

The third question stands upon a different footing The suit therein referred to is one for the recovery of *damages* for breach of the contract represented by the adjustment The contract represented by the adjustment was to accept Rs 1 000 in full satisfaction of the decree and not to execute the decree for its full amount If notwithstanding the payment to *A* of Rs 1 000 in pursuance of the adjustment *A* causes the decree to be executed and *B* is compelled to pay the amount of the decree (that is Rs 2 000) in execution *B* may sue *A* to recover back that amount as *damages* for breach of the contract not to execute the decree Such a suit is not barred under s 47 for the principal question in the suit is not one relating to *execution* but to the contract its breach and the amount of damages suffered by *B* in consequence of the breach The answer to the third question is therefore in the affirmative (e) The Court trying the suit will take cognizance of the adjustment and will direct *A* by its decree to repay Rs 2 000 as and by way of damages to *B* though the adjustment has not been certified. It may here be noted that if after the decree is satisfied out of Court *A* assigns the decree to X and Y then proceeds to realize the decree by execution against *B* *B* has no cause of action against *X* and he is not entitled to recover from Y as damages the amount paid by him in execution to *X* even though Y took the assignment with the knowledge *that the decree had been satisfied (f)*

The effect of non certification on the rights of parties may be summarised as follows If the adjustment is not certified it will not be recognized by any Court executing the decree and if the decree holder applies for execution notwithstanding the adjustment the Court will direct execution to issue and the judgment debtor will not be heard to say that the decree has been adjusted Nor can he even by instituting a regular suit for injunction obtain a stay of execution for such a suit is barred under s 47 Nor is it open to him if his property be sold in execution to bring a suit to set aside the sale for such a suit also is barred under s 47 His only remedy is to sue the decree holder for damages sustained by him by reason of the breach of the contract represented by the adjustment He need not however wait until the decree against him *is executed* His cause of action arises on the *presentation of an application* by the decree holder to execute the decree Therefore where he has paid any money under the adjustment he may sue the decree holder to recover it as soon as the decree holder *applies* to the Court for execution (g)

(c) *Jaikaran v Raghunath* (1898) 0 All. 54

(d) *Yellappa v Ramchandra* (189) 1 Bom 463 *Mothura Mohun v Akhoy Kumar* (1888) 15 Cal 557

( ) *Hanmant v Subbabhat* (1899) 3 Bom 394 *Viraraghava v Subbakka* (18) 5 Mad 39 [F B] *Perumal mb v Illay* (1898) 1 Mad 409 *Krishnasami v Ranga* (189) 0 Mad 369 *Paromanand v Khepoo* (1884) 10 Cal. 3 4 *Gendo v Nihal Kunwar* (1908) 30 All 464 *Krishna v Sanimuthu* (1919) 4 Mad 338 50 I C 581 *Mahbub Ali v Mahmmad* (19 3) 50 All 111 104 I C. 419 (7) A.A 710 *Chetty Firm v Maung Tha Din* (19 9) 7 Rang. 310 (9) A R 69 *Ma Shwe Pa v Maung San Myo* (19 8) 6 Rang 573 (9) A R 316

(f) *Krishna v Sanimuthu* (1919) 4 Mad 338 50 I C 584

(g) *Medai Kalai* in the matter of (190) 30 Mad 545

Suit by judgment debtor based upon uncertified adjustment—The three kinds of suit referred to above deserve careful consideration for they are typical of the modes in which the question of an uncertified adjustment frequently arises But an uncertified adjustment may result in a conveyance as in the following case—A obtains a decree against B for possession of immovable property A then executes an ekrarnama whereby in consideration of Rs 150 paid to him by B he relinquishes an eight annas share of the property in favour of B Subsequently he sells the remaining eight annas share to B by a kabala Both the ekrarnama and kabala are duly registered but neither of them is certified to the Court A then applies for execution of the decree and obtains possession of the property B sues A upon the two documents for a declaration of his right to the property and for recovery of possession thereof Is the suit barred under s 47? It has been held that it is not barred and that B is entitled to a decree The suit is not one for an injunction and it cannot therefore be said to be directed to *interfere with the execution* of the decree In fact the decree has *already been executed* Nor is the suit one for setting aside a sale in execution for there has been no sale The suit is one for the recovery of property conveyed to B by two documents both of which are duly registered The document no doubt constitute an adjustment of the decree but as already explained in sub r (3) do not bar a *suit* upon an uncertified adjustment (h)

The law on the point may be stated in one sentence An uncertified payment or adjustment may be recognized by any Court *except a Court executing the decree* and a *suit* based upon such payment or adjustment is maintainable *unless it is barred by the provisions of s 47*

Suit by decree holder upon an uncertified adjustment—This is the converse case A obtains a decree against B for Rs 315 and costs B pays A Rs 200 and induces A to give up the cost and accept a bond for the balance to be paid at the end of eight months Neither the payment nor adjustment is certified to the Court This does not preclude A from *suing* on the bond for as stated above sub r (3) only prohibits a Court *executing a decree* from recognizing an uncertified payment or adjustment (i) Since the repeal of s 257A of the Code of 1882 it would not matter that *the bond provided for payment of a sum in excess of the balance* (j)

Money payable under a decree —A decree directing the sale of mortgaged properties in default of payment is a decree for the payment of money whether there is a direction to pay personally or not (k) Income received by a mortgagee decree holder from the mortgaged property in his possession and for which he has to account and give credit for the surplus is not money payable under a decree within the meaning of this rule (l)

The Madras High Court has held that a decree which gives the judgment-debtor an option of paying money in order to secure a *reconveyance is not* a decree under which money is payable within the meaning of this section (m)

"**Decree of any kind** —The words of any kind in sub-rule (1) did not occur in sec 258 of the Code of 18 ˜ or of 188. They were inserted by the Code of 1908 Under the Codes of 18 and 188. it was held by the High Court of Calcutta that sec 258 applied to the adjustment of any decree whatever may be the nature of the relief granted by the decree In the Calcutta case the decree was one for possession

(h) *Is ar Chand a v Ha is Chand a* (1898) 5 Cal 18

(i) *Sw m r a v Kashi ath* (1891) 15 Bom 419 *K ly n v Ka nta* (1891) 13 All 339 *Ch h m v Kash m* (189) 16 Bom 589 *T karam v A tbh t* (1901) 25 Bom 25 *Lalj v G ya* (1903) 25 All 31 *J j v A al* (1 94) 1 M d 38 s explained in *Venk ta v Kora* (1903) 26 M d 19 6

(j) See *Heera v Fento j* (1898) 2 Bom 193 *Dha ram v G1 j t* (1903) 27 Bom 96

(k) *V dh n d sa y v omarundram* (190.) 28 Mad 473

(l) *I lla l dd v Syed Muh mad Ali* (1916) 39 Mad 10 6 33 I C 6 5

(m) *Narayanasami v Ia gasami* (19 6) 49 Mad. 716 9 I C 731 (6) A.M 749

of immovable property (n) On the other hand it was held by the Madras High Court that the section referred only to decrees under which money was payable and did not apply to other decrees e g decrees for possession of immovable property (o) It was in this state of authorities that the words of any kind were inserted in sub-rule (1) The High Court of Calcutta claims that these words were added to give effect to its rulings and to supersede the Madras rulings (p) The Bombay High Court also holds that the rule applies to the adjustment of any decree as for instance a decree for partition (q) The High Court of Madras holds that the only effect of the addition of the words of any kind is that the decree is not required to be one exclusively for the payment of money as held by that Court under the Code of 1882 but that it may be a complex decree providing partly for the payment of money and partly for any other relief or reliefs g delivery of possession of immovable property in other words one of the reliefs granted by the decree must be for the payment of money and unless this is so the adjustment does not require to be certified under this rule The Madras High Court lays stress on the word the before the word decree and says that the words the decree could only refer to what precedes namely a decree under which money is payable (r) Thus if a decree provides for the payment of money as well as for partition of immovable property the adjustment must be certified as required by this rule (s) but not if it is exclusively for partition

Adjustment —A composition scheme between a judgment debtor and his creditors including the decree holder is an adjustment within the meaning of this rule and may be certified as such (t) An oral agreement not to proceed against the judgment debtor beyond a certain limit is an agreement varying the terms of the decree and is therefore an adjustment which cannot be proved if not certified (u)

Where the decree is adjusted in part —A obtains a decree against B and C A then enters into an agreement with B by which B is discharged from liability under the decree The agreement constitutes an adjustment of a part of the decree within the meaning of this rule (v)

Application for final decree —An application for a final decree in a suit on a mortgage is not an application for execution Therefore the Court to which an application is made for a final decree is not a Court executing the decree Hence such Court may recognize payments made by the mortgagor out of Court though the payments have not been certified (w)

Mode of certifying —Sub rule (_) says that if the decree holder fails to shew cause the Court shall certify payment The Court is not bound if the decree-holder does not appear to certify the payment without requiring proof The Court must be atisfied before it certifies payment that payment has been made (x) See notes below Uncertified payment and limitation

This rule applies only to parties who stand in the relation of decree holder and judgment debtor at the date of payment or adjustment —A obtains a d cree

(n) *Baba* v *Webb* (1881) 6 Cal 786
(o) *Sarcar n* v *Kanara* (1899) _ Mad 18
(p) *Sia k Niamat* v *Shaik Jal I* (28) A C 15
(q) *Gharry* v *Gourya* (19) 46 Bom _ 6 64 I C 490 (_) A B 380
(r) *Abdul Latif* v *B thula* (1914) 15 M L T 38 *I elu* v *Meenakshi* (1913) 2 M d L J 586 *Ramak h a* v *Balak ish a* (19 0) 43 M d 416 *Naraya a ami* v *R ngasami* (19 6) 49 Mad 416 95 I C 731 (26) A M 749
(s) (19 0) 43 Mad 476 *supra*
(t) *Ve katasami* v *Totil ngam* (19 5) 49 Mad L J 730 91 I C 1051 (6) A M 184
(u) *P jth of Kal h t* v *V nk tad* (19) 50 Mad 89 105 I C 248 ( ) A M 911
(v) *Mahomed Kh n Bahadur* v *Mahomed Munawar* (1908) 31 Mad 46
(w) *Mangar* v *Bhatoo* (19 0) 5 Pat. L J 6 I C 47 *I mji Lal* v *Karam S ngh* (1917) 39 All 53 40 I C 4 4
(x) *M u g Chet Pe* v *Na ay n Chettiar* (19 9) 6 Rang 18 111 I C 371 (9) A R 185

against *B* for Rs 5 000 *B* being unable to pay the amount of the decree in cash transfers certain immovable property to *C* in consideration of undertaking to pay the amount of the decree to *A* *C* pays the amount of the decree to *A* *out of Court* Subsequently *C* obtains an assignment of the decree from *A* and applies for execution against *B* The payment of the decretal amount by *C* to *A* *though not certified* is a bar to execution for the payment was made not by *B* the judgment debtor but by *C* a third party and this rule applies only where a payment is made out of Court by a *judgment debtor* to the decree holder (*y*) The High Court of Allahabad has applied the rule when the money is not payable under the decree to the decree holder and has held that where by a consent decree in a suit by *A* against *B* *B* agrees to pay a certain sum of money to *C* and he makes the payment such payment if not certified cannot be recognized by the Court executing the decree (*z*)

Fraud —There is an earlier decision of the Madras High Court which lends colour to the view that where a decree is adjusted to the satisfaction of the decree holder and he agrees to certify the adjustment to the Court but omits to do so and subsequently applies to the Court for execution of the decree the judgment debtor may object to the execution and prove the adjustment *in execution proceedings and the Court executing the decree* may take cognizance of the payment notwithstanding the provisions of this rule the reason given being that the suppression of the adjustment from the Court is not only a fraud upon the judgment debtor but a fraud upon the Court (*a*) But in later cases the same High Court has said that if that be the effect of that decision it is not good law (*b*) In a Bombay case (*c*) a decree for Rs 2 500 was adjusted by the judgment debtor paying and the decree holder accepting Rs 2 000 in full satisfaction of the decree but the adjustment was not certified to the Court The decree holder thereafter applied for execution of the decree He omitted to state in his application as required by O 21 r 11 (e) that the decree was adjusted It was held following an earlier decision of the same Court (*d*) that it was a case of fraud upon the Court and the application for execution was dismissed But these cases have been overruled by a Full Bench of the same High Court and it has been held that a Court executing a decree can in no case recognize a payment or adjustment not certified as required by this rule (*e*) The High Court of Calcutta has consistently held that it is not competent to a Court executing a decree to enquire into the fact of a payment or adjustment which has not been certified as required by this rule even if fraud is imputed to the decree holder (*f*) The same view has been taken by the Chief Court of the Punjab (*g*) by the High Court of Patna (*h*) and by the Chief Court of Oudh (*i*)

The law allows the judgment debtor 90 days to apply to have the payment or adjustment certified [Limitation Act Sch I art 174] If he does not make the application and the decree holder applies for execution within that period he may in answer to the application for execution apply to have the payment or adjustment certified but this must be within 90 days And it has been held that *objections* filed by a judgment debtor to the decree holder s application for execution may be treated as

(*y*) *P ma Ay n v Sree va a* (1896) 19 Mad 30 *I o us m v Let hma an* (191) 3 Mad 659 1 I C 65 per S n la a Ayyar J *B j bash v Ma k* (19) 31 C L W 9 1 104 I C 4 ( ) A C 634 *C tri* per Abdur Rahim J in Mad 6 9 *s pra*

(*z*) *Mal l o v M t Ha dan* (19 3) 45 All 04 71 I C 457 (3) A A 1

(*a*) *P n a r v I a yy* (189) 1 M d 3 6

(*b*) *I ernat l v Vell va* (1898) 1 M 1 409 *C g pally v C ga* (1900) 9 Mad 31 *I e ppa v I ayya* (190) 1 Mal I J 5 7 *I udrude v G l m* (1913) 36 Mad 35 1 I C 56

(*c*) *Ha v Bh va* (1916) 40 Bom 333 33 I C 3

(*d*) *Tr mbak v Har* (1910) 34 Bom 5 5 I C 940 per Heaton J

(*e*) *Mehb u a v Mehmedu ssa* (19) 49 Bom 548 9 I C 68 (5) A B 309 *C esh v I e hwa t* (19 3) Bom L R 93 I C 410 (3) A B 3

(*f*) *B oo Gor v J m t* (1911) 16 C W N 9 3 13 I C 63 *Jogend a v Asutosh* (1916) 4 Cal L J 46 3 I C 38

(*g*) *P m Ram v Ich a S ngh* (1919) P R no 13 p 349 53 I C 443

(*h*) *I mudd v P nd ba* (19 0) 5 Pat L J 0 55 I C 690

(*i*) *F t m ssa v Ashgar Husa* (19) Luck 1 0 108 I C 105 ( ) A O 193 L B.

an *application to certify* the payment or adjustment provided the objections are filed within 90 days of the adjustment (j) But the judgment debtor is not entitled to an extension of time even if fraud is established on the part of the decree holder Such extension he can claim only under s 18 of the Limitation Act and that section provides only for the case where an applicant has by means of fraud been kept *from the knowledge of his right* to make the application it does not provide for the case where he has by means of fraud been kept *from the exercise of his right* to make the application (k)

Uncertified payment and limitation—Sub r (3) of this rule provides that an uncertified payment *shall not be recognized* by any Court executing the decree The third paragraph of the old section provided that an uncertified payment or adjustment shall not be recognized *as a payment or adjustment of the decree* by any Court executing the decree It was accordingly held under that section that there was nothing to prevent an uncertified payment from operating as a part payment within the meaning of s 20 of the Limitation Act so as to extend the period of limitation for applying for *execution under that Act* (l) The words as a payment or *adjustment of the decree* have been omitted in sub r (3) Therefore under the present rule the Court cannot recognize an uncertified payment or adjustment *for any purpose whatever* It follows that an uncertified payment can no longer operate as a part payment so as to extend the period of limitation for an application for the execution of a decree (m) This may be explained by an illustration. *A* obtains a decree against *B* in January 1921 for Rs 4 000 *B* pays *A out of Court* Rs 2 000 in January 1923 but the payment is not certified *A* applies for execution of the decree for the balance in January 1925 that is more than three years after the date of the *decree* but within three years from the date of *payment* under the decree Under the old section the payment though not certified operated as a fresh starting point for limitation and the application was therefore not barred Under the present rule the payment not being certified cannot be recognized by the Court even for the purpose of limitation and the application must be rejected as barred by limitation

There was at one time a conflict of decision as to the meaning of certify and as to how payments made out of Court should be certified The High Courts of Calcutta (n) Madras (o) Bombay (p) and Rangoon (q) have held that where interest on the decretal amount has been paid by the judgment debtor out of Court or where part payment has been made of the decretal amount by the judgment debtor out of Court the decree holder may apply to certify the payment by an application made expressly for that purpose either prior or subsequent to the application for execution *or* he may certify the payment by a declaration in an application for execution of the decree that he has received such payment [O 21 r 11 (e)] The Allahabad High Court in a series of decisions (r) maintained that the payment or adjustment must be certified in a separate proceeding distinct from and prior to the application for execution but in the

(j) *Budrudeen* v *Gul m* (1911) 36 Mad 35 360 12 I C 56 *Mehbu i a* v *Mehmedun* (1925) 49 Bom 548 5 2 553 95 I C 68 (25) A B 309 *R dha Kant* v *M s mmat Pa b ti* (1921) 6 Pat L J 337 63 I C 535 (21) A P 13

(k) *Binoo Gora n* v *Ja mu at* (1911) 16 C W N 9 3 9 6 9 7 13 I C 63

(l) *Hurri Pershad* v *Nasib Singh* (1894) 21 Cal 54? *Tularam* v *B baji* (189) 1 Bom 1 *Rajeswa a* v *Hari* (1896) 19 Mad 16? *Roshan Singh* v *Mata Din* (1904) 6 All 36

(m) *Bh j n Lal* v *Cheda Lal* (1914) 12 All L J 8 4 I C 15 *Bi eswa* v *Ambika Charan* (1918) 45 Cal 630 4 I C 47 *Peare Mohan* v *Raghunath* (1928) 50 All 259, 107 I C 40 (28) A A 55

( ) *Eusuff eman* v *Sanchia L l* (1916) 43 Cal 07 34 I C 606 [payment of interest] *Bah j* v *Arjanmai* (19 1) 6 Cal W N 5 9 68 I C 80 ( ) A C 30 *Madan* v *Harulal* (19 1) 6 Cal W N 534 64 I C 2 (21) A C 643

(o) *Masilamani* v *Sethuswami* (1918) 41 Mad. 5 41 I C 01

(p) *Pa durang* v *Jagya* (1921) 45 Bom 91 59 I C 399 (21) A.B 411

(q) *Ma ing L w S n* v *Mau g Po The n* (1924) 2 Rang 393 84 I C 4 3 (5) A R 6 *Ma g Tin* v *Ma Mi* (1928) 5 Rang 833 110 I C I 3 (28) A R 6

(r) *Cokulchand* v *Bhika* (1914) 1 All. L J 387, 3 I C 53 *Bh j n Lal* v *Ch da Lal* (1914) 1 All. L J 8 5 4 I C 15 *Chattar S gh* v *Am r S ngh* (1916) 38 All 04 37 I C 590 *Baij Nath* v *I a L l* (1924) 46 All 635 83 I C 73 (24) A A 06

recent Full Bench case of *Joti Prasad* v *Srichand* (s) it has fallen into line with the other High Courts

In some cases the decree holder's certification has been treated as an application to take a step in aid of execution and as affording a fresh starting point of limitation under Article 182 (5) so that the application must be made within three years of payment (t) It is submitted that this is not correct The payment must be made within three years of the decree or of the last starting point of limitation to be effectual under section 20 of the Limitation Act (u) but it may be certified at any subsequent time by the decree holder (t)

Uncertified adjustment and estoppel —Since an uncertified adjustment cannot be recognized by the Court executing the decree it cannot operate as an estoppel against the decree holder *A* obtains a decree against *B* The decree is adjusted but the adjustment is not certified to the Court *A* receives payments under the adjustment and then applies for execution of the decree The adjustment being uncertified the fact that *A* has received payments under the adjustment does not estop him from applying for execution (u)

Restitution of uncertified payment on reversal of decree in appeal —If a decree is reversed in appeal the judgment debtor is entitled to recover back all payments made by him under the decree though the payments have not been certified The decree being reversed in appeal the payment whether certified or not is one made without consideration and the judgment debtor is entitled to a refund by an application to the Court of first instance (x) See s 144

Surety —A surety under sec 145 for the performance of a decree is bound so long as the judgment debtor is bound and is not discharged by a payment which has not been certified (y)

Joint decree holders —See notes to O 21 r 16 Payment by judgment debtor out of Court to one of several holders of a joint decree

Minor —An adjustment of a decree made by a guardian without obtaining the permission of the Court as required by O 32 r 7 cannot be certified under this rule ( )

Assignment of decree —The transferee of a decree cannot execute a decree without first making an application under r 16 below to the Court which passed the decree When such an application is made it is made to the Court *as a Court which passed the decree* and not *as a Court executing the decree* within the meaning of sub r (3) It is therefore open to the judgment debtor to object under rule 16 that the decree having been satisfied there was nothing to assign (a) But apparently if an order for execution is made in favour of the transferee after notice to the judgment debtor he cannot afterwards plead an uncertified payment for under rule 16 execution in favour of a transferee is subject to the same conditions as if the application were made by the decree holder (b)

(s) (19 8) 26 All L J 906 11 I C 3 (8) A A 6 91 B

(t) *Jati ira v Gag* (1918) 46 Cal . 45 I C 903 *M g L Sa v Ma g I o The n* (19 4) 2 Rang 393 84 I C 473 (5) A R 6

(t) *Mad n v Harnlal* (19 1) 6 C I W N 534 64 I C (21) A C 643 *Amar S gh v I m Dei* (19 5) 47 All 8 3 89 I C 435 (5) A A 80

(v) *Joti Pr ad v Srich nd* a pra *Praka gh v Allah bad Ba k* (19) 1 Luck 4 8 98 I C 353 ( ) A O

(w) *Trimbak v H ri* (1910) 34 Bom 5 3 I C 910 *Joge dra v Pronath* (1914) 19 Cal L J 1 6 1 I C 9 6

(x) *Va ud v I ish u* (188) 11 Bom 4

(y) *T b Peddy v Der Peddy* (19 6) 49 Mad 8 94 I C 5 (6) A M 6 4

(z) *A unachellam v I m dh* (1906) 29 Mad 309 *I t hakk tt y v Do a swam* (19 4) 4 Mad L J 498 8 I C 588 (5) A M 930 (payment to Manager of joint Hindu family)

(a) *P gh nath v G garam* (1923) 4 Bom 643 5 I C 893 (23) A B 404 *G paya v Krishnappa* (19 4) 26 Bom L R 491 80 I C 4 3 (4) A B 394

(b) *Br jabash v Ma ik* (19) 31 Cal W N 9 1 104 I C 4 ( ) A C 691

2 **Representative**—The word judgment debtor in this rule includes persons claiming under him Such persons therefore are as much precluded from setting up an uncertified adjustment in execution proceedings as the judgment debtor himself would be (c) Compare s 146

Limitation for application under this rule—A certificate of payment given by a *decree holder* to the Court is merely an intimation that he has received a sum of money and that the decree has in that way been wholly or partially satisfied (d) It is not an application for the Court has no judicial duty to perform with respect to it (e) Article 181 does not apply and a decree holder may therefore at any time certify a payment or an adjustment (f) The cases on the subject were reviewed by the Judicial Committee in *Prakash Singh* v *Allahabad Bank Ltd* (g) It was there held that certification to the Court under O 31 r 2 by a decree holder of a payment made to him out of Court even if made in the form of an application is not an application within art 181 of the Limitation Act 1908 so as to be barred unless it takes place within three years of the payment certified nor is there any article which limits the time Further certification under r 2 can take place when execution of the decree is barred but for the payment certified But if the *judgment debtor* requires notice to issue to the decree holder to show cause why the payment or adjustment should not be recorded as certified he must do so by an application made within 90 days from the date of the payment or adjustment See Limitation Act 1908 Sch I art 174 The judgment debtor may apply even if the decree is not drawn up (h) Where the right to apply is barred by limitation the judgment debtor is not entitled to agitate the matter as a proceeding under s 47 (i)

Oral adjustment—The High Court of Allahabad has expressed the opinion that where the agreement constituting an adjustment of a decree is oral s 92 of the Evidence Act 1872 is a bar to the proof of such agreement (j)

Appeal—An order allowing or refusing an application to record an adjustment of a decree or a payment made out of Court under a decree is a *decree* within the meaning of s 2 cl 3 read with s 47 and is therefore appealable under s 96 (k)

Criminal proceedings—The prohibition against the recognition of an uncertified payment or adjustment is confined to *civil Courts executing decrees* and does not extend to criminal Courts Hence an uncertified payment or adjustment may be recognised by criminal Courts and proof thereof is admissible in the investigation and trial of offences by those Court *A* holds a decree against *B* for Rs 1 000 *B* pays the full amount of the decree to *A* out of Court but the payment is not certified *A* then applies for execution of the decree but omits to state in the application for execution though required to do so by r 11 sub r (2) cl (e) of this Order that the full amount of the decree has been paid *A* is guilty of the offence of giving false evidence within the meaning of ss 191 and 193 of the Indian Penal Code and if the decree is executed he is also guilty of the offence of fraudulently causing a decree to be executed after it has been satisfied within the meaning of s 210 of the Penal Code In either case proof

(c) *Pi du a ga* v *Tythil ga* (190) 30 Mad 537

(d) *J ti I ra al* *S Cla id* (19 8) 26 All L J 966 11 I C 73 (8) A A 6 9 F B *J l m Cla d* v *I f l* (19 7) 54 Cal 143 86 I C 1051 ( ) A C 101?

(e) *Prakash Singh* v *Allal b d Bank* (19) 1 Luck 4 8 98 I C 3 3 ( ) A O 7

(f) *Tukaram* v *B baj* (189) 1 Bom 1 *Sl ikh Fl h Bux* v *Na rab L ll* (1919) 4 Pat L J 159 50 I C 364 *I d rang Jagya* (19 1) 45 Bom 91 59 I C 399 (1) A B 411 *Joti P d* v *Sri Ch nd* supra *Prakash Singh* v *Allahabad Ba k* supra

(g) (19 9) 56 I.A 0 8 Luck 694

(h) *Gir bala* v *Biswambhar* (19 4) 40 Cal L J 87 8 I C 746 (4) A C 1034

(i) *P dla I ant* v *Mu mmat I a b ti* (19 1) 6 Pat L J 3 7 63 I C 535 (1) A I 13

(j) *L chhman* v *Baba* (19) 44 All 4 641 I C 990 ( ) A A 13 follow d in *I ij k of* 50 *Valala ti* v *Venkatalri* (19) A M 911 Mad 80 10 I C 4 8 ( ) A M dissented from in *Ma Shwe I e* *Ma* 7 *San Myo* (19 8) 6 Rang 5 3 ( ) A R 316

(k) *Jamna* v *Math ra* (1894) 16 All 1 0 *Ran j* v *Bha j* (188) 11 Bom 5 *Venkayya* v *Lud jappa* (189) 18 Mad 6 *Jed na I* *Sheo ndan* (19) 1 Pat 644 68 I C 645 ( ) A P 00

of the uncertified payment may be admitted by a criminal Court (*l*) It must however be noted that a mere application for execution not followed by execution does not constitute an offence under s 210 of the Penal Code for it is of the essence of the offence under that section that the decree must have been caused to be executed (*m*)

Courts executing Decrees

3 [*New*] Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure

Lands situate in more than one jurisdiction

Land situate in more than one jurisdiction —This rule is new It gives effect to a ruling of the Calcutta High Court in the undermentioned case (*n*) The rule when amplified may be stated thus where immovable property attached in execution of a decree forms one estate of which a part is situate within the local limits of the jurisdiction of the Court executing the decree and the rest beyond such limits the Court executing the decree has the power to attach and sell *the whole estate* though only a part thereof is situate within the local limits of its jurisdiction

4 [S 223 5th para] Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in rule 6, and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself

Transfer to Court of Small Causes

5 [S 223, 6th para] Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed

Mode of transfer

(*l*) *Queen Empress* v *Dipaji* (1886) 10 Bom 288 *Madh b C* ... *let* v *Narod ep* (18..) 16 C 1 1 6 *Queen Empress* v *Pallala* (1886) 9 Mad 101 *Queen Empress* v *M tt ra man* (18..) 4 M 1 3 5

(*m*) *Shama Ch* ... (1896) 23 Cal. 9 1

(*n*) *Ram Lal* v *Rama S ndari* (18 6) 1 Cal. 0

Procedure where Court desires that its own decree shall be executed by another Court

6 [S 224] The Court sending a decree for execution shall send—

(a) a copy of the decree,

(b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed or where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied, and

(c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect

Clause (b)—The omission to transmit to the Court executing the decree the certificate referred to in cl (b) is not a material irregularity within the meaning of r 90 of this Order Hence it is not a good ground for setting aside a sale in execution (o)

Court receiving copies of decree etc to file same without proof

7 [S 225] The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge requires such proof

Proof of jurisdiction—The old section contained the words or of the jurisdiction of the Court which passed it after the words or of the copies thereof This gave rise of to a conflict of opinion whether a Court to which a decree was sent for execution had the power to inquire whether the Court that passed the decree had jurisdiction to pass it and to refuse execution if it found that the decree was passed without jurisdiction It was held in some cases that the Court had the power (p) and in others that it had not (q) The effect of the omission of these words is that a Court to which a decree is transferred for execution has now no power to question the jurisdiction of the Court which passed the decree under execution (r) It has been recently held by a Full Bench of the Calcutta High Court that where a decree presented for execution was made by a Court which on the face of it had no jurisdiction to pass it the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction (s) It is not clear whether the decision was intended to apply to a case where a decree passed by one Court is transferred for execution to another Court

(o) *Abbi bi kar* v *M h d n* (1897) 0 Mad 10
(p) *H j Muru* v *Purma a l* (1891) 15 Bom 216 219 *Bl agi a tappa* v *I' i h anath* (1904) 28 B m 3 8 See also *Leake* v *Da iel* (1868) 10 W R F B 10 11
(q) *Choganl l* v *Truman* (1883) 7 Bom 481 *Kasti rchet* v *Tama* (1884) 10 Bom 65
(r) *H ri* v *Narn grao* (1914) 39 Bom 191 3 I C 1 3 *Sh op t Rai* v *H rak Chand* (1919) I R No 2 p 6 46 I C 419 *Z m d r of Ett j pu am* v *Chid mbar m* (19 0) 43 M 1 6 5 63 688 59 I C 4 1
(s) *Gora Cha d* v *Praf lla* (19 6) 53 Cal 166 89 I C 695 (5) A C 90

8 [s 226] Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction

Execution of decree or order by Court to which it is sent

Subordinate Court—If a Munsiff in district *X* sends a decree passed by him for execution *direct* to a Munsiff in district *Y* the latter has no jurisdiction to execute the decree The proper course is for the Munsiff in district X to send the decree to the *District Court* of district Y and the latter Court may then under this rule transfer the decree for execution to the Munsiff in that district (t)

9 [s 227] Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction

Execution by High Court of decree transferred by other Court

Application for Execution

10 [s 230, 1st para] When the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the Officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof

Application for execution

Who may apply for execution—The person appearing on the face of the decree as the decree holder is entitled to execution unless it be shown by some other person under O 21 r 16 that he has taken the place of the decree holder (u)

Court by which decree may be executed—See s 38

Court which passed the decree—See s 37 as to the definition of "Court which passed a decree" and notes thereto

What decrees may be executed—See notes to s 36

If the decree has been sent to another Court—Where the decree of a District Court has been sent to the Court of a Munsiff for execution and has not been returned to the District Court the "proper Court" within the meaning of the Limitation Act 1908 art 182 (5) in which to apply for execution of the decree is the Court of the Munsiff (v)

11 [Ss 256 235] (1) Where a decree is for the payment of money the Court may, on the oral application of the decree holder at

Oral application

(t) Dev D l ... M h aj (189) ... C ... 64
(u) J... la v K... (1891) 18 Cal 639
... v ... (1909) 31 ... L. R ... 118 I C 631 (...9) A I ...
(v) M... aj ... v ... (1916) 43 I.A ... 39 Mad 640 35 I C ...

11 the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment debtor, prior to the preparation of a warrant if he is within the precincts of the Court

(2) Save as otherwise provided by sub rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely —

Written application

(a) the number of the suit,

(b) the names of the parties,

(c) the date of the decree,

(d) whether any appeal has been preferred from the decree,

(e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree,

(f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results,

(g) the amount with interest (if any) due upon the decree or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed,

(h) the amount of the costs (if any) awarded,

(i) the name of the person against whom execution of the decree is sought, and

(j) the mode in which the assistance of the Court is required, whether—

(i) by the delivery of any property specifically decreed,

(ii) by the attachment and sale, or by the sale without attachment, of any property,

(iii) by the arrest and detention in prison of any person,

(iv) by the appointment of a receiver,

(v) otherwise, as the nature of the relief granted may require

(3) The Court to which an application is made under sub rule (2) may require the applicant to produce a certified copy of the decree

Sub rule (1) corresponds with s 256 of the Code of 1882 and sub rule (2) with s 235

Difference between old section 256 and sub rule (1)—Section 256 of the Code of 1882 was as follows —

Power to direct immediate execution of decree for money not exceeding R 1 000

When a decree is passed for a sum of money only and the amount decreed does not exceed the sum of one thousand rupees the Court may when passing the decree on the oral application of the decree holder order immediate execution thereof by the issue of a warrant directed either against the person of the judgment debtor if he is within the local limits of the jurisdiction of the Court or against his movable property within the same limits

Sub rule (1) differs from s 256 in the following particulars —

1 Under s 256 immediate execution could only be issued if the amount of the decree did not exceed Rs 1 000 Under the present rule there is no limit to the amount of the decree But the decree must be one for the payment of money

2 As a general rule a decree holder seeking to arrest the judgment debtor must present an application *in writing* to the Court and the Court may then direct a warrant to issue for the arrest of the judgment debtor who as a rule cannot be arrested without a warrant S 256 of the Code of 1882 dispensed with a written application and enabled the Court to issue a warrant for the arrest of the judgment debtor on an *oral* application Sub rule (1) goes further and empowers the Court to order immediate arrest of the judgment debtor *prior to the preparation of a warrant if he is within the precincts of the Court*

3 Execution can no longer issue against the movable property of the judgment debtor on an *oral* application as it could under s 256

Privilege from arrest—The privilege from arrest under civil process conferred by s. 135 of this Code does not extend to a judgment debtor against whom an order has been made for immediate arrest under this sub rule See s 135 sub s (3)

Alterations in sub rule (2)—Sub rule (2) corresponds with s 235 of the Code of 1882 except in the following particulars —

1 In cl (g) the words together with particulars of any cross decree whether passed before or after the date of the decrees ought to be executed are new

2 In cl (j) sub cl (ii) the words or by the sale without attachment are new

3 Cl. (j) sub-cl. (iv) is new

The application shall be verified—An application for execution may be verified by any person acquainted with the facts of the case It may therefore be verified by a person who holds a general power of attorney from the decree holder notwithstanding that the decree holder may be residing within the jurisdiction of the Court (w) Where the application is made by a person other than the decree holder all that is necessary is that the Court should be satisfied that such person is acquainted with the facts of the case It is not necessary that it should be verified *after* the application for permission to verify it has been made nor is it necessary that the verification should be made in the presence of the Court (x)

The application shall state the date of the decree—The date of the decree means the date on which the judgment was pronounced (y) See O 20 r 7

The application shall specify the mode in which the assistance of the Court is required—Where an application did not specify the mode in which the assistance of the Court was required, it was rejected (z) See r 17 below

Sub rule (3)—This sub rule is new The Court may under this sub rule require the applicant to produce a certified copy of the decree Such copy however is not a necessary annexure to an application for execution An application therefore which is not accompanied by a copy of the decree cannot be said to be an application not in accordance with law within the meaning of art 18? ( ) of sch I of the Limitation Act (a)

Amendment of application—See r 17 below

12 [S 236] Where an application is made for the attachment of any movable property belonging to a judgment debtor but not in his possession, the decree holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same

Application for attachment of movable property not in judgment-debtor's possession

Failure to annex inventory—Where no such inventory as is required by this rule is annexed to the application for execution the application cannot be said to be one in accordance with law within the meaning of art 182 of the Limitation Act 1908 (b) When the decree is executed under s 52 against the legal representative of a deceased person no inventory is necessary (c)

13 [S 237] Where an application is made for the attachment of any immovable property belonging to a judgment debtor, it shall contain at the foot—

Application for attachment of immovable property to contain certain particulars

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers, and

(w) *B k v Ud t Nar n* (1904) 6 All L J [illegible]
(x) *Kh ana v Om d* (19 3) 9 Cal W N 687 80 I C 313 (4) A C 811
(y) *Colam v Golj* (1 93) 25 Cal 109
(z) *Sh Karamch d v Ghel h* (18 3) 19 Bom 34

( ) *F gh a d — I dan S gh* (1918) 40 All 09 43 I C 914
(b) *Abd l I afi Kh v Ma la* (1915) 3 All 5 9 I C 4 9
(c) *Bi dich t v B desaheb* (19 6) 4 Bom L I 13 93 I C 941 ( ) A B 5

(b) a specification of the judgment debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same

Clause (a) —In cl (a) the words and in case such property can be indentified or numbers are new

14 [S 238] *Power to require certified extract from Collector's register in certain cases* Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land, or its revenue, or as liable to pay revenue for the land and the shares of the registered proprietors

Alterations in the law —Under the old section in the case of an application for the attachment of land registered in the Collector's Office it was necessary that the application should be accompanied by a certified extract from the register of such office Under the present rule the Court *may at its option* require the applicant to produce such extract The object is to save the applicant the costs of procuring such extract

15 [S 231] *Application for execution by joint decree holder* (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or where any of them has died, for the benefit of the survivors and the legal representatives of the deceased

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application

Alterations in the rule —This rule corresponds with s 231 of the Code of 1882 except in the following particulars —

1 The words or his or their representatives which occurred in s. 231 after the words one or more of such persons have been omitted in view of the provisions of s 146 See notes below under the head Any one or more of such persons

2 The words unless the decree imposes any condition to the contrary occurring in sub-rule (1) are new See notes below under the same words.

5 **What is a joint decree**—A decree jointly passed in favour of more persons than one is a joint decree *A* and *B* obtain a decree against *C* for Rs. 5000 this is a joint decree It is not the less a joint decree because the shares of *A* and *B* in the decretal amount have been determined by the decree Thus if it is *determined* by the decree that the share of *A* is Rs 2000 and the share of *B* is Rs. 3000 the decree is still a joint decree But though the decree in such a case is a joint decree the interest of *A* and *B* being determined by the decree either of them may apply for execution to the extent of his interest (*d*)

Application by one of several decree holders for execution of the whole decree—Ordinarily *all* the decree holders in a joint decree must join in an application for execution of the decree The present rule provides for the case in which all decree holders are unable or are unwilling to join in the application and enables *one or more* of the decree holders to apply for execution of the *whole* decree for the benefit of them all. Where an application is made under this rule by *some only* of several joint decree holders the Court may in its discretion grant or refuse the application (*e*) Similarly it is in the discretion of the Court whether or not to give notice to the other decree holders or to the judgment debtor before making an order for execution under this rule it is not obligatory upon the Court to do so (*f*) If the application is allowed the Court will under sub r (2) make such order as it deems necessary for protecting the interests of the other decree holders and of the judgment debtor (*g*)

Unless the decree imposes any condition to the contrary—The provisions of this rule do not apply where by the terms of the decree execution has been made dependent on *all* the decree holders joining in the application (*h*)

Application by one of several decree holders for execution in respect of his share of the decree—The application under this rule by *one* of several holders of a joint decree must be for the execution of the *whole* decree and further it must also be for the benefit of the other decree holders as well as himself A joint decree cannot be executed by one of several joint holders in respect of what the applicant considers to be his *share* in the decree (*i*) Thus if a decree is passed for *A* and *B* for Rs. 5000 the decree is joint and neither *A* nor *B* can apply for execution of his proportionate share of the decree But one of several holders of a joint decree may apply for execution of the decree to the extent of *his interest* therein *if the extent of such interest is determined by the decree* Thus if in a suit for possession of land by *A* and *B* against *C* the Court has *declared* each of the plaintiffs to be entitled to a moiety of the land the Court may allow either plaintiff to execute the decree to the extent of his one half share though the decree is a joint decree (*j*)

The rule set forth above that one of several holders of a joint decree is not entitled to execution in respect of his share of the decree but that he must apply for execution of the whole decree applies only in those cases where the *whole* decree has remained unsatisfied That rule does not apply where a joint decree has been satisfied *in part* before the date of the application for execution In such a case execution cannot issue for the *whole* decree but only for so much thereof as has remained unsatisfied. This subject is considered in the next following paragraph

(*d*) *Hurrish Chunder* v *Kalisunderi* (1883) 9 Cal 48 10 I A 4
(*e*) *Shaikh Ahmed* v *Shahzada* (18 0) C L R 53
(*f*) *Durga Das* v *Dewraj* (1906) 33 Cal 306
(*g*) *Tarasundari* v *Behari Lal* (1868) 1 B L R A C 9
( ) *Fazl a d* v *Abdullah* (1884) 6 All 69
( ) *Collector of Shahjahanpur* v *Surjan* (18) 4 All B arsi Das v *Mahara* (19) 5 All 6 3 *Dalchand* v *Pas Shankar* (1901) 15 Bom 1 *Muthusami* v *The Val a* (19) 18 Mad 464 *M k* v *The M d p r Zamindary Co Ltd* (1919) 4 Pat L J 573 53 I C 603 *Gauri Shanka* v *Ku war J g* (1927) I k 9 97 I C 896 (26) A C 605
(*j*) *Hurrish Chunder* v *Kalisunderi* (1883) 9 Cal. 48 10 I A 4

An application for execution by a joint decree holder with regard to a certain portion of the decree giving up the rest the other decree holders being parties to the application and standing by is not illegal as contravening the provisions of this rule but there cannot be any subsequent execution for the balance of the same decree (*k*)

Payment by judgment debtor out of Court to one of several holders of a joint decree—A obtains a decree against *C* for Rs 5 000 *C* may pay the amount of the decree *into Court* (r 1) and the Court will then pay the amount to *A* on his application If *C* does not adopt that course and pays the amount to *A out of Court* (r 1) *C* must see that *A* the decree holder certifies the payment to the Court If *A* fails to certify the payment *C* may apply to the Court to record the payment as certified If *C* also fails to do so the Court executing the decree will not recognise the payment and will order execution (r 2) if *A* notwithstanding payment to him of the amount of the decree out of Court applies for execution of the decree against *C*

But if there are two or more decree holders and the payment is made by the judgment debtor to *one* of them the question arises whether the other decree holders have the right to execute the decree ? The following illustrations supply the answer —

I (1) *A* and *B* obtain a decree against *C* for Rs 5 000 *C* pays *B* his (*B* s) *share* of the decretal amount out of Court and the payment is certified to the Court *A* then applies under this rule for execution of the *whole* decree *A* cannot execute for more than his own share as the decree has been satisfied as to *B* s share (*l*)

(2) If in the above case the payment is not certified to the Court but *B* admits the payment *A* will be limited to his share in execution (*m*) But if *B* does not admit the payment the Court will allow execution to issue for the *whole* decree

II *A* and B obtain a decree against *C* for Rs 5 000 *C* pays the *whole* amount of the decree to *B* out of Court and the payment is certified to the Court *A* then applies for execution of the decree to the extent of his own share Is *A* entitled to execute the decree to the extent of his share in spite of the fact that *B* has certified satisfaction of the *whole* decree ? It has been held that he is for one of several joint decree holders is not competent to grant full discharge of the decree out of Court or to certify to the Court complete satisfaction of more than his own share of the decree without the concurrence of the other decree holders (*n*) But *A* has another remedy besides execution against *C* and that is a suit against *B* to recover his share from him for *B* has by his certificate admitted receipt of the *whole* amount of the decree (*o*)

Any one or more of such persons—This expression includes persons claiming under such person A transferee of a decree within the meaning of r 16 below is such a person (*p*)

Amendment—An application for execution of a joint decree by one only of the decree holders should state that the application is made on behalf of all the decree holders If the application contains no such statement it should be rejected Leave to amend cannot be granted for while O 21 r 17 allows a defect with reference to rr 11 to 14 to be amended it makes no mention of this rule (*q*)

(*k*) *Gopi ... v Mati Lal* (19 9) 36 Cal 1 (..8) A ... 9
(*l*) *Tarruk v Direndro* (1883) 9 Cal 831
(*m*) *Sult ... v S ... yammal* (189) 1 Mad 343
(*n*) *Tamma ... Singh v La ... hm ...* (1904) 26 All 318 *Moti ... v H ...* (1904) 6 All 334 *La ... v Ch ... bhuj* (1906) 8 All ... *... m ao Beg v Mukhtar Beg* (19 3) ... All 401 ... I C 637 (3) A ... A 494 *... v Dora swam ...* (19 4) 47 Mad L J 49 ... I C 558 (...) A M ...30
(*o*) *S ... v ... Krishna swamy* (1906) 9 M ... 1 3
(*p*) *... v F ...* (1899) 6 Cal ... 0
(*q*) *M ... v The Midnapur Zemindary Co Ld* (1919) 4 Pat L J 5 5 53 I C 803

Appeal —An order determining any question *mentioned or referred to in s. 47* is a decree (s 2) and is therefore appealable under s 96 The questions referred to in s. 47 are questions arising *between a decree holder on the one hand and the judgment debtor on the other* and relating to the execution discharge or satisfaction of the decree This is illustrated by the following cases —

(1) *A* and *B* obtain a decree against *C* *A* alone applies for execution of the whole decree *C* (the judgment debtor) contends that *A* alone should not be allowed to execute the whole decree Here the question being one *between the decree holder on the one hand and the judgment debtor on the other* any order made upon the application is appealable as a decree If *A* s application is allowed *C* may appeal from the order and if the application is disallowed *A* may appeal from the order (*r*)

(2) But if the objection to execution was raised not by *C* the judgment debtor but by *B* the other decree holder the question being *between the decree holders inter se* no appeal will lie from an order either granting or refusing the application (*s*)

Limitation —See Limitation Act Sch I art 182 Expln 1

16 [S 232] Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree holder in the decree, is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree holder

Application for execution by transferee of decree

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others

Alterations in the law —

1 The words or if a decree has been passed jointly in favour of two or more persons the interest of any decree holder in the decree have been added into the first paragraph to make it clear that the rule is not confined in *its application to a transferee of the whole decree* but extends to a transferee of the *interest* of any holder of a *joint decree* This was in fact the interpretation put upon the old section (*t*)

2 The words if that Court thinks fit which occurred in the old section in the first paragraph before the words the decree may be executed have been omitted. See notes below Right to execution does not depend upon discretion of Court

(*r*) *Lakshmi v Jo...a* (1894) 17 Mad 394
(*s*) *Lutanlal v Bai G...b* (1899) 3 Bom 623
(*t*) *M... v Balakrishna* (1896) 19 Mad 306

Decree —The expression decree in the first paragraph and the first proviso O 21 of this rule is not confined to a money decree It includes a mortgage decree (u) The second proviso is confined to money decrees

Rule of procedure —This rule regulates procedure and does not affect substantive rights The transferee of a decree cannot execute it until he has obtained an order under this rule but the transfer operates from the date of the transfer and the transferee is entitled without obtaining an order under this rule to object to an attachment of the decree made subsequent to the transfer (v) If a liquidator has transferred a decree before the company is dissolved he may execute a written assignment for the purpose of this rule after dissolution and after he has ceased to be liquidator (w)

Application for execution by transferee of decree —No order should be made under this rule for the execution of a decree on the application of a transferee of the decree unless—

I the decree has been transferred by *assignment in writing or by operation of law* [an oral assignment is not sufficient (x)]

II the application for execution is made to the Court which *passed the decree* and

III where the decree has been transferred by assignment *notice* of the application has been given to the transferor and the judgment debtor

The rule does not require an independent application by the transferee *for recognition as transferee* All that the rule enjoins is that a transferee seeking execution should give notice of the application *for execution* to the transferor and the judgment debtor (y) See notes below Transfer of decree against a company in liquidation On the other hand until an order for execution is made in favour of the transferee he has not acquired the status of decree holder See sec 2 (3)

I **Who may apply for execution under this rule** —The following persons and no others may apply for execution under this rule ( ) —

(a) The transferee of a decree under an assignment *in writing* [A transferee under an *oral* assignment has no *locus standi* to apply for execution under this rule (a)]

(b) The transferee of a decree by *operation of law* e g the legal representative of a deceased decree holder or the Official Assignee in the case of an insolvent decree holder or the purchaser of a decree at a court sale in execution of a decree against the decree holder (r 53) (b) A transfer of property by A to B which is the subject matter of a suit by A against C does not amount to a transfer by operation of law of a decree *subsequently* obtained by A against C so as to entitle B to apply for execution under this rule (c) A deed of transfer of property which is the subject matter of a suit may involve a transfer of the decree passed on the very day on which the deed is executed but the transfer in that case is not by operation of law but by an assignment in writing (d) A transfer by operation of law means a

(u) S e Sa j Tl Iur (19 0) 4 All 544 S I C 743 b e al o Jud \ I o B j l (18 8) 10 All 5 0
( ) To I l I na (19 8) 5 Pan 59 103 I C 8 3 (8) A R Sal g I \ Iagha th (1900) 33 Mal 6 3 I C 9 8
(w) I h ane \ I rpp (19) 51 M d 681 109 I C 563 ( ) A M 4 8
( ) J t f a \ th \ P y De I b (1916) 43 Cal 930 933 43 I A 104 11 34 I C 69
(y) Ta a \ d a v b a (1904) 14 Mad L J 393 4 malai \ Pam e (1908) 18 Mad L J 4 5
(z) I ith I v Mah I r (19 4) 6 Pom L R 333 335 80 I C 49 (4) A R 4 6
( ) Par ta \ D gan bar (1891) 1 Pom 0
(b) See C Su dar v Hem Chu der (18 9) 16 Cal 3
( ) M t p e Z m da v C Ld \ Ela m (19 4) 51 Cal 03 80 I C 8 1 (1924) A C 661
(d) A I P om tha (19 0) 5 C I W N 63 5 I C 8

16 transfer on death or by devolution or by succession Therefore the legal representative of a deceased decree holder cannot be substituted on the record of the execution proceeding but he must make an application under this rule (e) This rule does not recognize an equitable assignment of a decree The dicta in a Bombay case recognizing such an assignment (f) have not been accepted by other High Courts (g)

(c) A transferee under an assignment in writing or by operation of law from the transferee mentioned in cls (a) and (b) whether by immediate or mesne assignment (h)

Explanation I—The expression transferee in cls (a) (b) and (c) is not confined to a transferee of the *whole* decree but includes a transferee of a *portion* of the *decree* (i) or where the decree is a joint one the transferee of the *interest of any one* of the decree holders in the decree (j) The mortgagee of a decree by an assignment in writing by way of mortgage is a transferee of a fractional interest in the decree and is entitled to execution under this rule (k) On the other hand if a decree awards a substantial relief *plus* costs the decree is one and indivisible and it can be transferred only as a whole (l)

Illustrations of Explanation I

1 *A* who holds a decree against *B* for Rs 5 000 transfers his interest in the decree to the extent of Rs 2 500 to X Here X is in the position of a joint decree holder [r 15 above] The application for execution may be made by *X* or it may be made by *A* the decree holder or by *A* and X both together In any case the application must be for execution of the *whole* decree *Kishore* v *Gisborne & Coy* (1890) 17 Cal 341 *Gyamonee* v *Radha* (1880) 5 Cal 592 and not merely for the portion transferred.

2 *A* and *B* obtain a decree against *C* for Rs 5 000 *A* assigns his interest in the decree to X Here X occupies the double character of a *transferee* within the meaning of this rule and of a transferee of an interest in a *joint decree* within the meaning of r 15 Hence any application that *X* may make for execution will be governed by the provisions both of this and the preceding rule *Dwar Bux* v *Fatik* (1899) 26 Cal 250

Explanation II—A person to whom a party to a suit agrees to *transfer any decree that may be passed* in the suit is not a transferee within the meaning of this rule

Illustration

A sues *B* to recover Rs 5 000 During the pendency of the suit *A* agrees with *C* to transfer to him any decree that may be passed in his favour in the suit A decree is subsequently passed for *A* *C* is not a transferee within the meaning of this rule and he is not entitled to execute the decree against *B* The word decree holder in this rule means a person in whose favour a decree has already been passed When *A* agreed to assign to *C* there was no decree in existence *Bisroonulla* v *Ramachandra* (1906) 17 Mad. L J 391

(e) *Akl j v Surend a* (1926) 30 C W N 3 96 I C 378 (1926) A C 9 *Baijnath* v *Ramlilh o* (19) 49 All 09 104 I C 116 (1927) A A 16 F B *Palt ppa* v *Vall mma* (1927) 50 Mad 1 93 I C 6 (1927) A M 161 *M a Mahommed* v *Sujjad M a* (1928) 3 Luck 1 6 10 I C 611, (1928) A O 30

(f) *P ma andas* v *Vall bdas* (1887) 11 Bom 506

(g) S *Basro ruttil* v *R machand a* (1906) 1 Mad L J 391 and (1904) 51 Cal 03 11 80 I C 831 (1924) A C 661 *P M l k Fazl r Rah man* v *Mast h k la* (1926) 5 Pat 511 96 I C 446 (1926) A P 0

(h) See *Amar Ch nd a* v *G r I rosu o* (1900) C I 483 *Ganga* v *Yakub* (1900) C I 6 0

(i) *Kishore* v *G b ne d Co* (1891) 1 Cal 341 *F d o s le k l cl l* (1910) 33 Mad 80 3 I C 444 d utted 1 *Molhan Cla d* v *Ca g l m* (1911) I R no 15 P 55 33 I C 654 *M thiah* v *Gor d la* (1921) 44 M 3 910 63 I C 33 (1921) A M 99 (F B)

(j) *Muth araja a* v *Balk sh a* (1906) 19 M J 308

(k) *I S hai* v *Mada Lal* (1926) 43 All 43 93 I C 3 6 (1926) A A 346

(l) *Rama h d a* v *Abd l* (1913) 3 All 408 19 I C 304 *Ahmad Sh h* v *Fa jdar* (1922) Lah L J 1 55 I C 953

Explanation III —A person who is entitled under a decree to an assignment of a previous decree obtained by *A* against *B* but who has not obtained such assignment is not a transferee of the previous decree so as to entitle him to apply for execution of it But he will be entitled to apply if he has obtained an assignment *before* the date of the application (*m*)

Explanation II —A person to whom the holder of a decree for possession of immovable property sells *a portion of the property* is a not a transferee *of the decree* within the meaning of this rule and he is not therefore entitled to execute the decree A transfer of property is not the same thing as a transfer of a decree (*n*)

Explanation I —A transferee of a decree awarding maintenance is entitled to execution under this section The reason is that though a right to future maintenance cannot be transferred having regard to the provisions of s 6 cl. (d) of the Transfer of Property Act 1882 there is no objection to a transfer of such right when it is awarded by a decree The transferee therefore of such a decree is entitled to recover by execution maintenance that has fallen due He cannot of course attach maintenance before it has fallen due (*o*) See s 60 sub s (1) cl (n) and notes thereto on p 201 above

Benamidar — A obtains a decree against *B* *C* purchases the decree from *A* in the name of *D* Here *C* is the real transferee and *D* is *benamidar* or ostensible transferee Is *D* entitled to take out execution of the decree? Yes according to the High Court of Allahabad (*p*) No according to the High Court of Calcutta but if he has succeeded in taking out execution (as where it is not brought to the notice of the Court that he is a *benamidar*) the application for execution made by him will save a subsequent application by *C* from the bar of limitation (*q*)

Where the alleged transferee of a decree is found to be the *benamidar* of a judgment debtor the Court is bound by the second proviso to this rule to refuse to allow the decree to be executed against the other judgment debtors in favour of the alleged transferee (*r*)

It has been held in some cases that the mere fact that an order for execution has been made on the application of a *benamidar* does not preclude the real transferee from applying under this rule to continue the execution proceedings himself but the real transferee will be bound by proceedings in execution up to that date (*s*) The High Court of Madras has held that where a decree has been transferred by assignment in writing the transferee alone can apply for execution under this rule though he may be a mere *benamidar* and that the real transferee is not entitled to apply under this rule (*t*) But in a latter case in which the real transferee his benamidar the ostensible transferee and the original decree holder or transferor were all dead and there was a contest between their legal representatives the Madras High Court said that rule 16 was not exhaustive and that the Court had power to inquire who was the real owner entitled to execution (*u*)

II Application for execution by a transferee should be made to the Court which passed the decree —A transferee of a decree must apply for execution

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(*m*) *P du v S l* (19 5 9 Bom L R 1109 90 I C 561 (5) A B 4 2

( ) *H sraj P l v Sukh aj Ku w r* (190) 27 All W N 80 *l th l v M had e* (19 4) 6 Bom L R 333 80 I C 49 (4) A B 4 6 *Ce v H ma t* (19 6) 8 Bom L R 01 96 I C 833 (6) A B 406

(*o*) *t ad Al H t r Al* (1911) 38 C 1 13 6 I C 8 6 See h wev r *J doors v B nk t h nulu* (1910) 33 Mad 80 3 I C 444

(*p*) *Kamta Pras d v Indomi* (1915) 3 All 414 29 I C 593

(*q*) *Abd l v Chukhun* (18 9) 5 C L R 53 *Gour Sundar v Hem Ch der* (1889) 16 Cal 355 *B llushen v Ledmat* (1893) 20 Cal 388 395

(*r*) *A abat Ila v A bat Ila* (1915) 28 I C 906

(*s*) *Ma kham v Tatayya* (1898) 1 Mad 398 *Abdul v Ch kha* (18 8) 5 C L. I 53

(*t*) *P l uppa Subr ma a* (19 5) 48 Mad 533 88 I C 409 (5) A M 01 followed *G rdial v G baksh* (19) 8 Lab 33 100 I C 545 ( ) A L 110

(*u*) *B da Kris m v I urrala* (19) 53 Mad L. J 963 103 I C 405 ( ) A M 903

16 to the Court which passed the decree though the decree has been sent for execution to another Court (t) The Court to which a decree has been transmitted for execution has no jurisdiction to make an order for execution on the application of a transferee of the decree If such an order is made it is illegal and it must be set aside in appeal (v) As to the definition of Court which passed the decree see s 37 and notes thereto

III Notice shall be given to the transferor and the judgment debtor— The notice which is required by the first proviso is not notice of the assignment but notice of the application for execution of the decree (x) The provisions of the rule as to notice are mandatory and if execution is issued without notice the proceedings in execution are void (y) The object of the notice is to enable the transferor and the judgment debtor to raise such objections as regards the assignment as may be available to them *e g* that the consideration money was not fully paid or that the transferee is a *benamidar* for some of the judgment debtors ( ) The object of issuing notices to the transferor and the judgment debtor is to determine once and for all and in the presence of all parties concerned the validity of the assignment (a) It cannot be said that notice is necessary each time the assignee comes in to get the decree executed (a) *for after the first order in his favour he has acquired the status of a decree holder* The transferee cannot accept the assignment and at the same time plead fraud to escape paying the consideration for the assignment (b) If the property of the judgment debtor is attached without hearing his objections the attachment is illegal even if the Court subsequently hears his objections and confirms the attachment after such hearing (c) Where the judgment debtor is dead the notice required by this rule should be given to his legal representative (d) Where no notice is given as required by this rule it is in the discretion of the Court to grant time to the transferee to enable him to serve the notice ( ) The Patna High Court has held that the notice required by this rule need not be in writing (f)

Where on an application by the transferee of a decree to have his name substituted as decree holder no objection is taken by the judgment debtor as to the validity of the transfer the judgment debtor will be precluded from questioning the validity of the transfer on an application by the transferee for execution of the decree (g) Similarly where no objection is taken by the judgment debtor that no notice was given to the transferor he will be precluded from raising that objection at a subsequent stage of the execution proceedings (h)

There is nothing to preclude a transferee of a decree from applying under s 39 to the Court which passed the decree to send the decree for execution to another Court (i) But the notice required by this rule must be issued by the Court which *passed the decree* and not by the Court to which the decree is sent for execution (j)

(v) *Framj v Patansha* (18) 9 B H C 49 *Kali v Ilahi Bakhsh* (1880) All 83

(w) *Amar Chandra v Guru Prosu o* (1900) 27 Cal 488 *Tameshar v Thaku Prasad* (1903) All 443

(x) *Mussammat Gulab v Syed* (19 1) 6 Pat L J 358 6 I C 30 ('21) A P 180 *Mussammat Bhagwanta v Dew n Zamir* (19 4) 3 Pat 596 8 I C 66 (4) A I 5 6

(y) *Gulr v Daya Ram* (1887) 9 All 46 *Mussammat Gulab v Syed* (1921) 6 Pat L J 358 6 I C 30 ('21) A I 180 *Not n Das v Lachhman* (19 1) Lah 2 0 63 I C 884 ('21) A L 143 *Umamoy e v J tan B wa* (19) 54 Cal 6 4 10 I C 193 ( ) A C 81

(z) *Sheo Prasad v J E Lall* (1925) 4 Pat 1 0 1 86 I C 564 ('25) A I 449

(a) *Brijabala v Ma L* (1907) 31 Cal W N 9 1 104 I C 4 ( ) A C 694

(b) *Hard tta v Nigahia* (19) 4 Lah L J 59 9 I C 546 ( ) A L 396

(c) *Kas um Goolam v Dayabhai* (191) 36 B m 58 1 I C 547

(d) *Kh Prabhas v Horma sha* (183) 11 B m

(e) *Mahar ja S r Rame hw r v Harihar* (19) 5 Pat L J 390 5 I C 50

(f) *Mussammat Bhagwanta v Dewa Zamir* (1924) 3 Pat 596 8 I C 66 ( ) A P 6

(g) *Taj S gh v Jaga L l* (1916) 34 All 35 I C 934 *Dwarka Das v M Amm d* (19) 4 All 86 80 I C ( ) A A 11

(h) *B ajl l v E M Atk nson* (1920) 5 Pat L J 63 5 I C 0

(i) *Chathoth v Said Ahinde* (1903) 6 M

(j) *Na do L l v Ch tterput* (190) 9 Cal 3

The High Court of Calcutta has held that the mere issue of a notice under this rule does not operate as a revivor within the meaning of arts 182 and 183 of the Limitation Act (*k*) but the High Courts of Allahabad and Madras have held that it does According to these Courts a mere application by the transferee for substituting his name for that of the decree holder operates as a revivor of the decree and gives a fresh starting point of limitation for executing the decree (*l*) And the Madras Court has held that an application by the transferee to bring the representative of the deceased judgment debtor on the record to serve him with notice under this rule has the same effect (*m*)

Execution does not depend upon discretion of Court—In the old section the words were and *if that Court thinks fit* the decree may be executed &c It was accordingly held under that section that the Court had a discretion to grant or refuse an application for execution made by a transferee (*n*) The words if that Court thinks fit have been omitted in this rule Therefore if the conditions specified in this rule are satisfied a transferee of a decree is entitled to execution as of right like the original decree holder

Transfer of decree for the payment of money against two or more persons to one of them—This subject may be considered under the following two heads —

1 Where the whole decree has been transferred

2 Where the decree is a joint one and part only of the decree has been transferred

First as regards transfer of the whole decree—Where a decree for the payment of money has been transferred by assignment or by operation of law to one of several judgment debtors the decree is wholly extinguished The transferee cannot *execute* the decree against the other judgment debtor but his remedy against them is by a *regular suit* for contribution as if the decree had been satisfied by him The object of the second proviso to the rule is not to deprive the judgment debtor transferee of all relief but to impose upon him the duty of proceeding by what was considered a more appropriate procedure that is a suit for contribution (*o*) The provision of this rule cannot be evaded by the judgment debtor who satisfies the decree taking a transfer of the decree in the name of a *benamidar* (*p*)

Illustrations

(a) *A* obtains a decree against *B* and *C* for Rs 5 000 *B* satisfies the decree by paying Rs 5 000 to *A* In such a case *B* is bound to pay to *B* his (*C* s) share of the judgment debt If *C* fails to contribute his share *B* s remedy is by way of *suit* against *C* to recover the amount [This illustration is merely introductory]

(b) *A* obtains a decree against *B* and *C* for Rs 5 000 *B* purchases the decree from *A* Here *B* s position is exactly the same as in ill (a) that is to say the decree must be taken as having been satisfied by *B* *B* cannot therefore execute the decree against *C* and his only remedy is to bring a suit aginst *C* for contribution *Saroop Chunder* v *Troylokhonath* (1866) 9 W R 230

(c) *A* obtains a decree against *B* and *C* for Rs 5 000 *A* dies and on his death the decree passes to *B* as his heir The position is the same as in ill (b) *Banarasi* v *Maharani* (1883) 5 All 27

(*k*) *M ohar Das* v *Futteh Chand* (1903) 30 C 1. 9 9

(*l*) *P t n Si gh* v *Tota S gh* (190) 29 All 301 *A nam la* ... *Rama e* (1908) 18 Mad I J 4 *Moh* ... *S gh* v *J gat S gh* (19 8) 50 All 6 1 109 I C 41- (1928) A. A 299

(*m*) *Mahal nga* v *Kupp na h riar* (190) 30 Mad 541

(*n*) *Megh* v ... *y* v *P dh* (18 0) 4 B I R 4 (00 *Pa vata* v *D gambar* (1 91) 15 Bom 30

(*o*) *A a t* v *Nagappa* (1904) 3 Bom 195 19

(*p*) *P mayya* v *Kri hnamurti* (191) 40 M 1 296 ... I C 95

16 (d) A obtains a decree against B and C for Rs 5 000 B pays the amount of the decree to A At B's request A transfers the decree to F F being merely a *benamidar* for B is not entitled to execute the decree against C It is competent to C in such a case to show that B and not F paid the amount of the decree to A and such payments may be proved even if it has not been certified under O 21 r 2 *Ponnusami* v *Lachmanan* (1912) 35 Mad 603 12 I C 657 *Ramaya* v *Krishnamurti* (1917) 40 Mad. 296 3 I C 952 *Raghunath* v *Gangaram* (1923) 47 Bom 643 75 I C 893 (23) A B 401, *Ganpaya* v *Krishnappa* (1924) 26 Bom L R 491 80 I C 473 (24) A B 391 *Sadogopa* v *Sellama* (1922) 43 Mad. L J 761 72 I C 861 (22) A M 510

Next as regards transfer of a portion of a joint decree —Where a decree has been passed jointly in favour of two or more persons and the interest of any decree holder in such decree has been transferred by assignment or by operation of law to one of several judgment debtors the decree is extinguished to the extent of the interest so transferred, and execution can only issue for the rest of the decree

Illustration

A and B obtain a decree against C and D for Rs 5 000 A's share of the decree is Rs 2 000 A dies and on his death his interest in the decree passes to C as his heir The decree is extinguished to the extent of Rs 2 000 and neither B (as *decree holder*) nor C (*as transferee of A's interest in the decree*) can execute the decree against D for more than Rs 3 000 *Pogose* v *Fukurooddeen* (1876) 25 W R 343 *Banarsi* v *Maharani* (1883) 5 All 27

Decree for the payment of money —The expression decree for the payment of money in the second proviso to the rule does not include mortgage decrees (q) Such a decree is not a decree for the payment of money until a personal decree is passed against the mortgagor (r)

It has been held by the High Court of Bombay that the expression decree for the payment of money against two or more persons means a *personal* decree for the payment of money against two or more defendants Hence the proviso does not apply where the decree is not against the defendants *personally* A obtains a decree against B as the legal representative of X and against C as the legal representative of Y for Rs 20 000 *to be paid out of the estate of X and Y* A dies leaving B as his heir and on his death the decree passes to him by operation of law The decree not being a personal decree against B and C B is entitled as transferee of A's decree to have the decree executed against the estate of Y (s) The High Court of Madras has dissented from this view According to that Court the fact that one of the defendants is directed by the decree to pay the amount of the decree out of the family property in his hands does not make the decree any the less a decree for payment of money against him (t)

Again the expression decree for the payment of money against two or more persons means a decree against two or more persons *jointly* Hence the rule laid down in the second proviso does not apply where the decree is not passed against the defendants *jointly* In a suit by A against B and C A obtains a decree against B for Rs. 90 and against C for Rs 30 A then assigns the decree to C The decree not being a joint decree C may execute the decree passed against B for Rs 90 (u)

Award —The Calcutta High Court has held that a transferee of an award filed in Court under the provisions of the Arbitration Act 1899 is entitled to apply for execution under this rule (v) See notes to r 29 below

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(q) *Lalbihari Singh* v *Manager Court of Wards* (1911) 14 Cal L J 632 12 I C 0 *Rajarathna* v *Ramachandra* (1924) 47 Mad 918 82 I C 441 (24) A M 901 *Chidambara* v *Subbaraya* (1926) 49 Mad 93 I C 58 (26) A M 623

(r) *Chidambara* v *Subbarayar* (1926) 49 Mad 508 93 I C 9 (26) A M 6 3

(s) *Lakhmichand* v *Sundrabai* (190) 31 Bom 394

(t) *Sadogopa* v *Sellammal* (1922) 43 Mad L J 761 I C 861 (22) A M 510

(u) *Anant* v *Nagappa* (1908) 32 Bom 195

(v) *Gladstone Wyllie & Co* v *Joseph* (1922) Cal W N 666 77 I C 868 (24) A C 11

Transfer pending execution—The Patna High Court has held that if a O 21
decree holder applies for execution and pending execution assigns his interest in the decree an application by the transferee for execution is not a fresh application for execution but one to continue the pending execution proceedings and no notice under this rule is necessary (u) But quaere whether the judgment debtor is not entitled to object to the validity of the assignment It has already been stated that the legal representative of a decree holder cannot be substituted on the record of the execution proceeding but must make an application for execution under rule 16 (x) Under the Code of 1882 the definition of decree holder included a person to whom a decree is transferred whether by assignment or by operation of law and it was possible to hold that he could come in immediately to carry on a pending proceeding (y) Under the present Code the position is different and the transferee does not acquire the status of a decree holder until an order for execution is made in his favour [sec 2 (3)] The dictum in *Akhoy* v *Surendra* ( ) that the heirs could have applied immediately to carry on proceedings is perhaps an echo of decisions under the old Code In *Muthu Chettiar* v *Lodd Govindas* (a) section 146 was referred to But as that section begins with the words save as otherwise provided it is excluded by O 21 r 16 It is submitted that the conclusion arrived at in *Palaniappa* v *Valliammai* (b) is correct and that the transferee in a pending execution if he applies at all must apply for execution and not for substitution

Appeal—An order determining any question between the judgment debtor and the representative of the decree holder (s 47) is a decree (s 2) and is therefore appealable as such (s 96) A transferee of a decree is a representative of the decree holder within the meaning of s 47 Therefore an order refusing to recognize the transferee of a decree or dismissing his application for execution on the objection of the judgment debtor is a decree and appealable as such (c)

Suit by transferee—A transferee of a decree whose application is rejected under this rule on the ground that the transfer is not valid is not precluded from instituting a regular suit for a *declaration* of the validity of the transfer Such a suit is not barred by the provisions of s 47 (d)

Equities enforceable against original decree holder—See s 49 and notes thereto

Transfer of decree against a company in liquidation—Where a decree against a company in liquidation is transferred pending the winding up proceedings and the liquidator refuses to recognize the transferee the transferee may apply to the executing Court under s 47 (3) to be substituted for the original decree holder to enable him to prove his claim before the liquidator S 171 of the Indian Companies Act 1913 is no bar to the granting of such an application (e)

(u) *Musammat G lab* v *Syed* (19 1) 6 Pat L J 358 6 I C 30 (1) A P 1?0 *Mu mmat Bhag ta* v *Dewan Z mir* (19 4) 3 Pat 596 8 I C 66 (4) A P 576 *Mohan Singh* v *Jag t Si gh* (19 8) 50 All 6 1 10 I C 41 (8) A A 9

(x) *Kassum Gool m* v *Dayabhai* (191) 36 Bom ?8 1 I C 4 *Akhoy* v *Sure dra* (19 6) 30 Cal W N 3 96 I C 3 8 (6) A C 9 7 *B j th* v *I am Ph os* (19) 49 All 509 104 I C 116 ( ) A A 16 F B *I l ppa* v *Ut ma* (19) 50 Mad 1 99 I C 6 ( ) A M 184 *Mirza Mahommed* v *S jjit Mirza* (19 8) 3 Luck 1 6 10 I C 611 (8) A O 0

(y) *Ma motha* v *I lh l* (1910) 14 Cal W N 5 3 I C 3 4 *Dw rbuksh* v *Fat k* (1 ?) 6 Cal ?50 *K lya bhai* v *Ghan hamal* (18?0) 5 Bom ?9

(z) (19 6) 30 Cal W N 3 96 I C 3 8 (6) A C 9

(a) (19 1) 44 Mad 919 60 I C 337 1) A M 599 F B

(b) (19 7) 50 Mad I 99 I C 6 ( ) A M 184

(c) *B dri N a n* v *Jai Ki hen* (1894) 16 All 483, *Tameshar* v *Th kur* (1903) 25 All 3 *G ga Das* v *Yakub* (1900) 7 Cal 6 0 *S bbuthay mm l* v *Ch dambaram* (190) ? Mad 3?3 *Ha d it* v *N gah a* (19) 4 Lah L J ? 9 I C 546 (?) A L 396 *S eal o I B h d r* v *I ra ji* (19 4) 3 Pat 344 8 I C 49 (5) A P 16 where A and B each claiming to be the transferee of a decree applied for execution

(d) *P mm pal* v *Ch t l l* (1?03) 6 Mad 64

(e) *K h The I Ex l f I l a* (1919) 4 All 43 ?0 I C 115

Transfer of decree pending attachment—The attachment of a decree for the
7 payment of money does not prevent a valid transfer of the decree and the *transferee* is entitled to be substituted in place of the transferor and to apply under this rule for execution (*f*)

17 [S 245] (1) On receiving an application for the execution of a decree as provided by rule 11, sub rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it

Procedure on receiving application for execution of decree

(2) Where an application is amended under the provisions of sub rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented

(3) Every amendment made under this rule shall be signed or initialled by the Judge

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application

Provided that in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be correspond with the amount due under the decree

Changes in the law—This rule corresponds with s 245 of the Code of 1882 except in the following particulars —

1 The words "may allow the defect to be remedied" in sub rule (1) have been substituted for the words "may allow it [application] to be *remedied*" as being more comprehensive and covering the case of omission to produce a copy of the decree as now required by r 11 (3)

2 Sub rule (2) is new See notes below "Sub rule (2) limitation."

Sub rule (1)—This rule lays down the procedure to be adopted by the Courts on receiving an application for execution Sub r (1) empowers the Court to reject the application or allow an amendment The Court should in each case exercise its discretion and where an amendment ought to be allowed it should allow the amendment (g) Thus where an application is not signed it should not reject the application, but allow it to be amended (*h*) The amendment may be allowed even after the application

(*f*) H ... ram v K d ... 5 I4 (1928) Pat ... 6 ... 113 I C 6 3 ( ) A P 1

(*g*) F ... ker v ... 4 I (I ... 4) 10 Cal ... 41

(*h*) (... A Das v Fat ... h Ch ... ad (19 ...) Lah ... J J 101 ... I C 18 ... (A ... mad ... (19 ...) I L ... 1 ... 6) I C ... (22) A P ... 4 ... t reet wrongly ... ted

for execution is registered provided the execution of the decree has not at the date of the application for amendment become barred by limitation (i) But the High Court of Madras has held that where an application for amendment is made after the expiration of 12 years provided by s 48 the Court has a discretion either to accept or to reject it (j)

Sub rule (2) limitation—Article 182 of the Limitation Act provides *inter alia* that the first application for execution must be made within three years from the *date* of the decree If the decree has not been executed and it is necessary to make further application each successive application must be made within three years from the date of the last application But the last application in each case must have been one in accordance with law otherwise it will not be a fresh starting point for limitation An application which does not comply with the requirements of rules 11 to 14 of this order is not one in accordance with law (k) Sub rule (2) is therefore important with reference to limitation for if an application is defective with reference to rules 11 to 14 and is returned for amendment within a fixed time it will when so amended be an application in accordance with law as from the date when it was first presented Under the old section it was held that where an order was made for amending an application for execution and the amendment was made the application should be deemed to have been presented not on the date when it was *first presented* but on the date when it was *amended* The result was that if the *amendment* was not made *until after* the expiration of the period of limitation the application was time barred though the amendment was made within the time fixed by the Court (l) Those decisions are no longer law Compare s 149 On the other hand substantial compliance with rules 11 to 14 is all that is necessary and if the application does so comply with these rules it will be in accordance with law and will be effectual to stay the progress of limitation whether the Court admits or rejects or returns it for amendment (m) Sub r (2) applies only if the application is returned for amendment for *non-compliance with the provisions of rr* 11 *to* 14 and the application is subsequently amended Sub r (2) does not in terms apply to cases where an application is returned for amendment *for some other reason* (n)

Illustration

The last day for presenting an application for execution is 31st July 1925 The decree holder presents the application on that day The application does not comply with the requirements of O 21 r 11 (2) The Court may under this rule return the application for amendment and fix a date within which it should be amended If the application is amended within the time fixed by the Court it will be deemed to have been presented on 31st July 1925 Further it will be deemed to have been an application in accordance with law within the meaning of art 182 of the Limitation Act 1908 so as to give a fresh starting point of limitation

Where on an application for execution presented by an agent it is objected that the agent is not duly authorized and the agent thereupon files a power of attorney the Court should not dismiss the application but treat it as having been filed on the date on which the power of attorney was filed (o)

(i) *Ga d a Sr S Shya n* (1918) Cal L J 398 44 I C 5 1 *I Bah l r v I m Bah l r* (19 3) 1 t 3 8 1 I C 41 (3) A I 61 *Cha ras v Bh j* (19 3) 1 at 787 79 74 I C 144 (3) A I 09

(j) *Ve r v I aj a Jagad I* (19 3) 4 Mad I J 6 1 6 1 (0 (4) A M 367 S *ka v 4 nb* (19) 49 Mad L J 69 9 I (109 (6) A M 60

(k) *Ang v Troilokya* (1880) 1 Cal 631 633 *G pal Sah v J h Koer* (1896) 3 Cal 1 3

(l) *G pal S h v J l Koer* (1896) 3 C I 217 *Raghu atha v Ve kat* (1903) 26 Mad 101 S *Mo M th v M amm t 4 raj* (1910) 14 C I W 431 5 I C 5 9

(m) *P ta ber v D od* (19 6) 3 Cal 664 98 I C 166 (1926) A C 10 *Abd l K rim v Lak hm nar mi* (19 8) Mad L W 4 5 112 I C 36 (8) A M 440

(n) See *Bhagwat v Dwa ka* (19 3) 1 t 809 811 4 I C 1 4 (4) A 1 23

(o) *G ga Ram v D a Nath* (191) Punj Rec n 118 p 404 13 I C 5 6

Transfer of decree pending attachment.—The attachment of a decree for the payment of money does not prevent a valid transfer of the decree and the transferee is entitled to be substituted in place of the transferor and to apply under this rule for execution (*f*)

17 [S 245] (1) On receiving an application for the execution of a decree as provided by rule 11, sub rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with and, if they have not been complied with the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it

Procedure on receiving application for execution of decree

(2) Where an application is amended under the provisions of sub rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented

(3) Every amendment made under this rule shall be signed or initialled by the Judge

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application

Provided that in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree

Changes in the law—This rule corresponds with s 245 of the Code of 18[illegible] except in the following particulars —

1 The words may allow the defect to be remedied in sub rule (1) have been substituted for the word may allow it [application] to be remedied as being more comprehensive and covering the case of om[illegible]on to produce a copy of the decree as now required by r 11 (3)

2 Sub rule (2) is new See notes below Sub rule ( ) limitation

Sub rule (1)—This rule lays down the procedure to be adopted by the Courts on receiving an application for execution Sub r (1) empowers the Court to reject the application or allow an amendment The Court should in each case exercise its discretion and where an amendment ought to be allowed it should allow the amendment (*g*) Thus where an application is not signed it should not reject the application but allow it to be amended (*h*) The amendment may be allowed even after the applicat[illegible]

(*f*) *H*[illegible] *m* v *K* [illegible] (19[illegible]8) Pat [illegible] 113 I C 6 3 ([illegible]) A I [illegible]

(*g*) *Ja loor* v [illegible] (1[illegible]) 10 C [illegible] 41

(*h*) *G*[illegible] *Das* v *Kall*[illegible] (19[illegible]0) Lah [illegible] 104 [illegible] 16 [illegible] (19[illegible]) [illegible] 14 [illegible] 6 [illegible] A I [illegible] 4 [illegible] rest wrongly calcul ted]

for execution is reg stered provided the execution of the decree ha n [illegible] the application for amendment become barred by limitation (i) [illegible] Court of Madras has held that where an application for amendment i [illegible] expirat on of 12 years provided by s 48 the Court has a discre ion e [illegible] to reject it (j)

Sub rule (2) limitation—Article 182 of the Limitation A[illegible] that the first application for execution must be made within three year[illegible] of the decree If the decree has not been executed and it is necessar[illegible] application each successive application must be made within three year[illegible] the last application But the last application in each case mu[illegible] in accordance with law otherwise it will not be a fresh startin[illegible] An application which does not comply with the requirements o[illegible] order is not one in accordance with law (k) Sub rule (2) is t[illegible] reference to limitation for if an application is defective with r[illegible] and is returned for amendment within a fixed time it will when [illegible] cation in accordance with law as from the date when it was fir[illegible] old s ction it was held that where an order was made for am[illegible] execution and the amendment was made the application sh uld [illegible] presented not on the date when it was *first presented* but on th[illegible] The result was that if the *amendment* was not made *until aft r th*[illegible] of limitat on the appl cation was time barred thou h th am n[illegible] the time fixed by the Court (l) Thos decisions are no l n[illegible] On the other hand substantial compliance with rules 11 t[illegible] 14 [illegible] if the appl cation does so comply with these rules it will be in a[illegible] will be effectual to stay the progress of limitation wheth r the [illegible] or returns it for amendment (m) Sub r (2) applies only if t[illegible] for amendment for *non compliance with the provisions of rr 11* [illegible] tion is sub equently amended Sub r (2) does not in t[illegible] application is returned for amendment *for some other reas*[illegible]

Illustration

The last day for pres nting an application for ex[illegible] decree holder presents the application on that day Th[illegible] the requirements of O 21 r 11 (2) The Court may un[illegible] for amendment and fix a date within which it should be [illegible] is amended within the time fixed by the Court it will [illegible] on 31st July 192[illegible] Further it will be deemed to have be[illegible] with law within the meaning of art 182 of the Limitat[illegible] fresh starting point of limitation.

Where on an application for execution presented by [illegible] agent is not duly authorized and the agent ther[illegible] Court should not dismiss the application but treat it [illegible] date on which the power of attorney was filed (o)

(i) G[illegible] nd a[illegible] S i Sr S[illegible] m (1918) [illegible] L J 339 44 I C 5[illegible] Ra[illegible] Bah[illegible] Ram Bahad r (1923) 2 I [illegible] 71 I C 41 (23) A [illegible] 61 Cha[illegible] Bh gan (1[illegible]3) [illegible] at 87 92 [illegible] 144 ([illegible]3) A [illegible] 209

(j) V m[illegible] R ja[illegible] a lagad[illegible] (1923) 4 Mad[illegible] 6[illegible] [illegible] A M [illegible] Amlu (19[illegible]) 49 Mad L J 6[illegible] I C 109 (26) A M 2[illegible]

(k) A[illegible] Trou lya (1890) 17 C [illegible] 631 639 Gopal S[illegible] Koer (1896) 3 C [illegible] 21 2[illegible]3

(l) [illegible]

( ) [illegible]

( ) [illegible]

( ) [illegible]

18 **18** [S 246] (1) Where applications are made to a Court for the execution of cross decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

Execution in case of cross decrees

(a) if the two sums are equal, satisfaction shall be entered upon both decrees, and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment debts due by the original assignor as in respect of judgment debts due by the assignee himself

(3) This rule shall not be deemed to apply unless—

(a) the decree holder in one of the suits in which the decrees have been made is the judgment debtor in the other and each party fills the same character in both suits, and

(b) the sums due under the decrees are definite

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross decree in relation to a decree passed against him singly in favour of one or more of such persons

Illustrations

(a) *A* holds a decree against *B* for Rs 1 000 *B* holds a decree against *A* for the payment of Rs 1 000 in case *A* fails to deliver certain goods at a future day *B* cannot treat his decree as a cross decree under this rule

(b) *A* and *B* co plaintiffs obtain a decree for Rs 1 000 against *C* and *C* obtains a decree for Rs 1 000 against *B* *C* cannot treat his decree as a cross decree under this rule

(c) *A* obtains a decree against *B* for Rs 1 000 *C* who is a trustee for *B* obtains a decree on behalf of *B* against *A* for Rs 1 000 *A* cannot treat *C*'s decree as a cross decree under this rule

(d) A B C D and E are jointly and severally liable for Rs 1 000 under a decree obtained by F A obtains a decree for Rs 100 against F singly and applies for execution to the Court in which the joint decree is being executed F may treat his joint decree as a cross decree under this rule

Changes in the law —

1 The words where applications are made to a Court for the execution of cross decree in sub rule (1) are new They give effect to certain decisions noted below under the head Application of the rule

2 The words separate suits in sub rule (1) are new They have been added to show that for the purposes of execution a counter claim is not a separate suit (p)

3 Sub rule (4) and the illustration thereto that is ill (d) are both new This sub rule gives effect to the decisions noted under the head Sub rule (4)

Application of the rule —The meaning of sub rule (1) may be explained by the following illustration A holds a decree against B for Rs 5 000 B holds a decree against A for Rs 3 000 A and B each applies for execution of his decree to Court X which has jurisdiction to execute both decrees The decrees being cross decrees they will be set off against each other Hence B who is the holder of the decree for the smaller amount will not be allowed to take out execution of his decree Execution will only be allowed of A s decree to the extent of Rs 2 000 being the difference between the amount of his and B s decree If the decree held by B was also for Rs 5 000 neither party should be allowed to take out execution and satisfaction should be entered upon both decrees

This rule does not apply unless—

(1) the cross decrees are for the payment of two *sums of money*

(2) the decrees have been obtained in *separate* suits [see notes above under the head Alterations in the rule]

(3) both the decrees are capable of execution *at the same time* [ill (1)] and *by the same Court* and

(4) the decree holder in one of the suits in which the decrees have been passed is the judgment debtor in the other and each party fills *the same character in both the suits* [ills (b) and (c)]

If the cross decrees fulfil the above conditions it is also necessary that both decrees should be before the executing Court for execution and that applications should have been made for execution of both decrees If either decree holder omits to apply for execution of his decree the other decree holder may take out execution of his decree for its full amount (q) Note the words with which the rule begins

Cross decrees in separate suits —An order for payment of mesne profits made under s 144 is a decree by virtue of s 2 (2) Hence it has been held that there is no distinction for the purposes of this rule between a decree in a *suit* and a decree in a *proceeding under* s 144 A obtains a decree against B In execution of the decree B s property is sold and it is purchased by A The decree is reversed in appeal and A is directed to deliver possession of the property to B and to pay to B Rs 712 for mesne profits B applies for execution against A in respect of Rs 714 A claims to set off another decree obtained by him against B The set off may be allowed under this rule (r)

(p) St mor v C mpbell & Co [189] 1 Q B 314 31 per Esher M R

(q) Chajm L L v Dhoram (190) 4 All 481 Iswa MaN v I m A he (188) 1 Cal 18 4 23 I A 106 110 Io my v Dorasamy (1 09) Mad 336 1 I C 94

(r) Adwaita The Chitt gong Co Ld (19 3) 8 Cal W N 9 8 84 I C 4 (23) A C 10

8 Cross decrees for the payment of two sums of money —I s e B on a mortgage and obtains a decree for Rs 1 800 to be realized *by sale of the mortgaged property* B obtains a decree against A for Rs 2 000 Here A s decree though it is one for sale in enforcement of a mortgage and not strictly for the payment of money may be set off against B s decree by virtue of the provisions of r 20 of this order (s).

Where execution is taken out for the smaller sum —This rule provides that where application are made for the execution of cross decrees one for a larger amount and the other for a smaller amount execution should be taken out only for the difference This mean that the decree for the smaller amount cannot be executed at all and no separate execution should is ue of that decree (t) It is to be noted however that if the Court in contravention of the provisions of this rule allows execution to issue of the decree for the smaller sum and a sale is made in such execution the sale is not void the reason being that a purchaser under a sale in execution is not bound to inquire whether the judgment debtor had a cross judgment of a higher amount (u).

Same character in both suits —The provisions of this rule do not apply unless the decree holder in one suit is the judgment debtor in the other and each party fills the same character in both suits *A* holds a money decree against *B* *B* holds a decree for sale passed in a suit brought by him as mortgagee against *C* the mortgagor and *against A a purchaser of a portion of the mortgaged property from C* A applies for execution of his decree against *B* *B* is not entitled to set off his decree against A s decree The reason is that *A* does not fill the same character in both the suits The decree held by *A* is in his favour personally which he may execute against *B* by the arrest of his per on or the attachment of his property This cannot be said of *B* s decree against A for *B* is not ordered by the decree *personally* to pay any sum of money but is only given an option to pay if he wishes to save the property in which he is interested (v) If in the ca e put above *C* the mortgagor was the holder of the money decree against *B* instead of A and *C* applied for execution against *B* *B* (the mortgagee) could have set off his decree again t *C* (w) But a firm name is only a description of the individual partner and so a decree against a firm can be et off against a decree again t a partner (x)

Assignment of decree —If A who has obtained a decree against *B* attaches in execution of his decree a decree held by *B* against *C* *A* is an assignee of *B* s decree within the meaning of this rule (y) [See O 21 r 53 (3)] It has been held by the H n Court of Calcutta that a decree obtained against the assignor in a suit pending at the date of the assignment may be set off against the decree assigned if the assignee had notice of such suit ( ) A obtains a decree again t *B* for Rs 5 000 *B* then sues A for Rs 2 000 Pending *B* s suit C obtains a transfer of *A* s dec ree *with notice of the suit* A decree is then passed for *B* in his suit against *A* *C* applies for execution against *B* of the whole decree for Rs 5 000 He is not entitled to execute for more than Rs. 2 000 as the transf r was taken with notice of *B* s suit See notes to s 49

Sub rule (4) —This sub rule gives effect to the decisions in the undermentioned cases where it was held that the holder of a decree passed jointly and severally against several judgment debtors one of whom holds a decree against such decree holder may treat his joint decree as a cross decree (a) See ill (1) to the sub rule

( ) Se Kri h an Lek lapathi (1906) 9 Mad 318
(t) S S nth j (1903) 26 Mad 4
( ) Lera Mahl n v Ram Kishen (18) 14 Cal 19 13 I A 106
( ) Sheo Sha kar v Ch i Lal (1916) 38 All 663 36 I C 918
(w) Namr M I v Pa n (a d (1911) 33 All 40 8 I C 833
( ) Adm ut t G nt v S R ali (1927) J Bom I R. 396 101 I C 319 ( ) A I R 2
(y) Adwa it v The Chittagong Co Ltd (1923) 28 Cal W N 9 84 I C 4 ( ) A (10
(z) Kristo I ma i v Kela Nath (1899) 14 Cal 619
(a) Hu y Doyal v Din Doyal (1893) 9 Cal 479 Ram S kh Das v Tula Ram (1897) 14 All 339

19 [S 247] Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

Execution in case of cross claims under same decree

(a) if the two sums are equal, satisfaction for both shall be entered upon the decree, and,

(b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree

Object of the rule—The object of this rule is to prevent each side executing a decree in respect of sums due whether for costs or otherwise under the *same decree* (*b*)

Application of the rule—This rule is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature *A* a mortgagor sues *B* the mortgagee for redemption A decree is passed in the suit ordering that upon *A* paying to *B* Rs 1 000 (mortgage debt) on a day fixed by the Court *B* should reconvey the mortgaged property to *A* and that if such payment is not made within the time fixed by the Court the property should be sold. At the same time *A* is awarded costs Rs 100 to be paid *by B* Here both the sums being payable *under the same decree* the provisions of the present rule apply though *B* s remedy if *A* failed to pay the mortgage debt would be *by sale of the mortgaged property* and *A* s remedy if *B* failed to pay the costs would be *against B personally* Hence *A* being entitled to the *smaller* amount (Rs 100) cannot take out execution against *B* (*c*) *B* being entitled to the *larger* amount (Rs 1 000) is alone entitled to take out execution But he cannot take out execution for more than Rs 900 which is the same thing as saying that he must reconvey the property to *A* if *A* paid Rs 900 and he cannot insist on payment of the full sum of Rs 1 000 as a condition of reconveyance (*d*) The point to be noted is that in the case of cross claims under the same decree execution may be taken out only by the party entitled to the larger sum The party entitled to the smaller sum is not entitled to take out execution It follows from this that if *A* is entitled to recover from *B* mesne profits amounting to Rs 445 under a decree and *B* is entitled to recover from *A* under the same decree costs amounting to Rs 855 *A* being entitled to the smaller sum cannot take out execution against *B* though *B* s claim to execute his decree for costs is barred by limitation (*e*) It may also be noted that if the party entitled to the larger sum executed the decree for the full amount without deducting the smaller sum the party entitled to the smaller sum may be awarded a refund of that sum under s 151 of the Code (*f*)

20 [*New*] The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge

Cross-decrees and cross claims in mortgage suits

Object of the rule—This rule is new It is inserted in order to make it clear that the provisions as to cross decrees and cross claims apply to mortgage decrees The

(*b*) *Bhagwan v Rattan* (1894) 16 All 395 at 397 *Venkatanarayana v Pramila* (1923) 44 Mad L J 590 ⁷ I C 865 (1923) A M 638
(*c*) *Sundara v Gopal* (1900) 23 Mad 1 1
(*d*) *Bhagwan v Rattan* (1894) 16 All 39 *Ishri v Gopal* (1884) 6 All 351
(*e*) *Madappa v Jaki* (1916) 40 Bom 60 30 I C 693
(*f*) *Anandav Atal* (1919) ⁿ4 Cal W N 465 56 I C 3

rule shows impliedly that the expression decree for the payment of money and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge See in particular s. 34 s 73 and O 21 r 53

It has been held by the High Court of Allahabad that a simple decree for recovery of money can be set off against a decree for recovery of money by enforcement of a mortgage or charge (g) See notes to r 18 above Cross decrees for the payment etc

Simultaneous execution

21 [S 230 2nd para] The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor

Simultaneous execution against person and property—An order refusing execution at the same time against the person and property of the judgment-debtor amounts to a decree under s 2 cl (2) read with s 47 and it is therefore appealable (h)

But though the Court has a discretion to refuse simultaneous execution it cannot decline to order execution against the person of the judgment debtor on the ground that the decree holder should proceed in the first place against his property (i)

Notice to show cause against execution in certain cases

22 [S 248] (1) Where an application for execution is made—

(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him

(2) Nothing in the foregoing sub rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed if, for

(g) *Nagan Mal* v *Ram Chand* (1910) 33 All 240 8 I C 83

(h) *Chena* v *Chalabhai* (1883) 7 Bom 301

(i) *Hargobind* v *Hakim* (1926) 6 Lah. 318 93 I C 1 (1926) A L. 110

reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice O 21

Changes in the law —Sub rule (2) is new See note below Sub rule (2)

The Court shall issue a notice —It is not enough merely to take out a notice The notice must be *served* upon the judgment debtor or upon his legal representative (*j*)

Omission to give notice —This rule provides that except where notice is dispensed with under sub r (2) the Court executing the decree *shall* issue a notice to the person against whom execution is applied for if the application for execution is made more than one year after the date of the decree or if it is made against the legal representative of the judgment debtor This gives rise to the question whether the omission to give notice as required by this rule renders a sale in execution of the decree absolutely *void for want of jurisdiction* or whether the omission is a *mere irregularity* so as to render the sale merely *voidable* that is valid until it is set aside In *Gopal Chunder* v *Gunamoni Dasi* (*k*) the High Court of Calcutta held that a notice under this rule is necessary in order that the Court should *obtain jurisdiction* to sell the property by way of execution and that the omission to give notice is by itself sufficient to render the sale void This decision was approved by the Privy Council in *Raghunath Das* v *Sunder Das* (*l*) In *Raghunath Das's* case the judgment debtor became insolvent pending the attachment No notice was given to the Official Assignee as required by cl (b) of sub r (1) and it was held that the sale was a nullity Since the notice under this rule affords the very foundation of the jurisdiction it follows that where execution is issued without previously issuing a notice required under sub rule (1) and property belonging to the judgment debtor is sold in execution the sale is a nullity whether the property is purchased by the decree holder [O 21 r 72] (*m*) or by a third party (*n*) It makes no difference whether the property sold is movable or immovable (*o*) The Patna High Court has held that where a notice has been issued and the judgment debtor though not served with the notice appears and contests the execution the object of the rule is achieved and the Court has jurisdiction to hold the sale (*p*)

Notice to wrong person as legal representative —The principle laid down in *Raghunath Das's* case applies where no notice is given But what if notice is given and served upon a person who proves not to be the legal representative The leading case upon the subject is *Mallarjun* v *Narhari* (*q*) A decree was passed against a person who afterwards died and in executing the decree against his estate a person was served as his legal representative with notice under this rule The person served objected

(*j*) *G las v Bla a tpo e Zem nda y Co Ld* (19 1) Cal W N 97 64 I C 476 (1) A C 409

(*k*) (1893) 0 Cal 3 0 [no notice to le al r presentative]

(*l*) (1914) 41 I A 251 4 C 1 7 4 I C 304 *Shy m Mandal* v *S t ath* (1917) 44 Cal 9 4 38 I C 403 *I m I ink r* v *Shu l am* (1918) 7 Cal L J 5 8 46 I C 1 *Kant Bh n* v *e d a Nath* (19) 3 Cal L J 9 1 64 I C (1) A C 4 6 *I yg pal* v *I m ch r* (19 4) 47 M d 8 80 I C 9 ( ) A M 431 [F B] dissenting from the vi ws expressed in *Lish wa athan* v *Nor as dr am* (19) 45 M d 8 70 I C 61 ( ) A M 93 a d *Do aswami* v *C t mba m* (19 4) 47 Ma 1 63 75 I C 46 (4) A M 130 *Ch da Pra ad* v *Musst J m a* (19 9) 49 All 830 10 I C 39 (8) A A 74 *Mon math* v *M st J kmi* (19 8) 55 Cal 90 10 I C 65 ( ) A C 60 *I mda* v *Fannamal* (19 9) 7 Rang 110 117 I C 4 (9) A R 161

(*m*) *I am sun Dassee* v *Doo ga Dass* (1881) 6 C l 103 [no notice to l gal representati e] *C uda* v *Bho ca p e Z m dary Co Ld* (19 1) Cal W N 9 64 I C 4 6 (1) A C 609

(*n*) *I m nissa* v *L ak t H sa n* (1881) 3 All 4 4 [no notice to legal represe ta ti e] *Gopal Ch der* v *(am i Dasi* (1893) 0 Cal 370 [no notic to l g l repre s ntative] *Sahdeo* v *Gh m* (1894) 1 Cal 19 *I a ashr m* v *I alm ku d* (1908) 3 Bom 57 [decree more than a ye r old and no noti e to judgment debtor]

(*o*) *S hdeo* v *Gh nram* (1894) 1 Cal 19 [where th property sol l w s an l plant]

(*p*) *F khrul* v *I* (19) 7 Pat 117 I C 648 (9) A I 9

(*q*) (1901) 5 Bom 337 7 I A 216 m app from *Erara* v *S dramappa* (1 9) 21 Bom 4 4

22 that he was not the legal representative of the deceased The executing Court decided and as it turned out subsequently decided erroneously that he was to be treated as such representative [see s 47] After that the execution proceedings went on with the result that certain property belonging to the deceased judgment debtor was sold and purchased by a third party The question arose whether the sale was void as made without jurisdiction or whether it was merely voidable Their Lordships of the Privy Council held that *a notice having been served in fact though upon a wrong person, the Court had jurisdiction to sell the property* and the sale was not void Their Lordships further held that the omission to give notice to the right person constituted a serious irregularity and that the sale was therefore voidable that is to say it was valid until it was set aside under O 21 r 90 or by independent suit brought within a year as provided by art 12 cl (a) of the Limitation Act Their Lordships said He (the person served) contended that he was not the right person but the Court having received his protest decided that he was the right person and so proceeded with the execution *In doing so the Court was exercising its jurisdiction It made a sad mistake it is true but a Court has jurisdiction to decide wrong as well as right* (r) But if the decree holder knows who the legal representative of the deceased judgment debtor is and deliberately serves the notice upon a wrong person as his legal representative and there is no adjudication by the executing Court as to who the legal representative is the sale has been held to be absolutely void (s)

More than one year after the date of the decree—The term decree in sub r (1) cl (a) means the decree capable of execution Thus where an appeal is preferred from a decree and the appeal is dismissed for default under O 41 r 11 the decree of the lower Court is the decree capable of execution and the period of one year is to be calculated from the date of that decree (t) See notes to s 36 What decree may be executed Even where the decretal amount is made payable by instalment the period of one year must be calculated from the date of the decree and not from the date of default (u)

More than one notice—In one case the High Court of Patna held that once the original decree has been put into execution after notice as provided by this rule no fresh notice need be served for every subsequent application for execution made more than one year from the date of the last order for execution (v) but this case was overruled by a Special Bench of the same High Court where it was held that the rule applies to every application for execution and not merely to the first application and that in every case where an application for execution is made more than a year after the last order made against the judgment debtor in any previous application a fresh notice must be served (w)

The High Court of Madras has held that where property is attached on an application for execution no notice need be given to the judgment debtor of the *application for sale* though the latter application is made more than a year after the previous *application for execution* (x)

Irregular service of notice—Irregularity in the service of notice as distinguished from non service is a material irregularity within the meaning of O 21 r 90 (y)

(r) *Ib* p 347 See also *Ilia ajnal* v *Daim* (190) 32 Cal 96 pp 314 315 3 I A 3

(s) *Shankar* v *Dattatray* (19 1) 45 Bom 1186 63 I C 248 (1) A B 395 [suit by auction purchaser for possession—Shah J held that the sale was void—Macleod C J held that the sale was voidable but that the purchaser was not entitled to possession]

(t) *Shyam Mandal* v *Satinath* (1917) 44 Cal 9 4 38 I C 493

(u) *Kora Lal* v *Punjab National Bank* (19 3) 5 Lah L J 5 I C 816 ( ) A L 395

(v) *Mahadeo* v *Dhobi* (19 3) Pat 915 71 I C 833 (3) A P 243

(w) *Aditya Pras* v *Ram Narayan* (19 6) 5 Pat 1 87 I C 531 ( ) A P 474

(x) *Subramanya* v *Gopal Krishnamma* (19 0) 43 Mad 57 53 I C 57

(y) *Das* v *Mi* (19 1) 6 Pat L J 319 61 I C 8 (1) A P 145

Death of judgment debtor pending execution by transferee Court—See O 2 notes to s 50

Court executing the decree —It may either be the Court which passed the decree or the Court to which the decree is sent for execution

Sub rule (2) —This sub rule is new It enables the Court to issue execution without issuing a notice as provided by sub rule (1) in cases where the issue of a notice may involve an unreasonable delay or defeat the ends of justice Where the Court dispenses with notice under sub rule (1) it should record its reasons (z) In a recent Madras case it was said that the omission to record the reasons is a mere irregularity (a)

Limitation to set aside sale for want of notice—An application to set aside a sale which is *void e g* for want of notice under this rule is governed by art 181 and not art 166 of Sch I of the Limitation Act (b)

Appeal—An application to set aside a sale held without notice as required by sub r (1) falls within s 47 and hence a second appeal lies (c)

Decree against two or more persons jointly—Art 182 of the Limitation Act 1908 applies to decrees of Courts oth r than Chartered High Courts Under Explanat on 1 to that article when a decree has been passed jointly against more person than one an application for execution of the decree if made against any one or more of them shall take effect against them all Therefore an order of revivor of a joint decree made under this rule against one or more of the judgment debtors will operate against the other judgment debtors though no notice has been given to them No such Explanation is appended to art 183 which applies to decrees of Chartered High Courts Therefore if a joint decree is passed by a Chartered High Court an order of revivor of such decree made against one of several judgment debtors does not operate against other judgment debtors to whom no notice is given under this rule (d)

Notice under this rule and limitation —One of the starting points for limitation under art 18- of the Limitation Act 1908 for the execution of decrees of Courts other than Charter d High Courts is the date of i sue of notice under this rule The High Court of Calcutta has held that the date of issue of notice means the date when the notice is *actually issued* and not the date when the Court *passes the order* for i suing the notice (e) On the other hand the High Courts of Bombay and Allahabad have held that the date of issue of notice means the date when the Court passes the order for i suing the notice and not the date on which the notice is actually issued (f) According to the High Court of Bombay if no notice has been issued a mere order for i suing a notice will not give a fresh starting point for limitation (g) It is not however neces ary that the notice shoul l have been actually served (h)

Art 183 *of the Limitation Act* which applies *to decrees of Chartered High Courts* provides *inter alia* that a decree of such Court can be enforced within twelve years from its date unless the decree has been *revive l* The High Court of Calcutta has held that an *order for execution* operates as a revivor within the meaning of this article (i) but mere *issue an l service of a notice* under this rule does not (j)

(z) *Ma m tha Nath* v *La hm* (19-8) 5 Cal 96 105 I C 6 (9) A C 60
(a) *Tal gop l* v *l a n n j chari r* (19 4) 47 M d -88 91 80 I C 9 (24) A M 431
(b) (19 1) 47 M l 288 80 I C 9 (1) A M 431 [1 B] supra *Sesh giri* v *Sri iasa* (19 0) 43 Mad 313 56 I C 60 *I m k nk r* v *(h i) am* (1918) 7 Cal L J -8 46 I C 1
(c) (19 4) 4 Mad 88 -90 91 80 I C 9 (4) A M 431 *s p a*
(d) *Kri hnai ah* v *(jend a* (1917) 40 M d 21 40 I C 608
( ) *Kada estur* v *Moh m Chand a* (190) 6 C W N 6 6
(f) *Gom d* v *Dada* (1904) -8 Bom 416 *Jumai* v *Abd l* (1908) 30 All 536
(g) *H m* v *l am ba* (1899) 3 B m 3 Note the w ds l as been issued in a t 1 of the Limitati n Act
(h) *Damod* v *N aji* (1903) 27 Bom 6
(i) *Suja* v *M ol r Das* (189) 24 Cal -4
(j) *Mononur D s* v *F u k Ch nd* (19) 9 9 *Chutterput* v *S l* (191 4 -6 -6 *Im lya* v *Lo* C I L J 159 8 I C 61 (

23 [S 249] (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed

Procedure after issue of notice

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit

24 [Ss 250 251] (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree

Process for execution

(2) Every such process shall bear date, the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed

(3) In every such process a day shall be specified on or before which it shall be executed

Unless it sees cause to the contrary—See notes to O 21 r 37 under the head Whether an executing Court has discretion to refuse or suspend attachment of judgment debtor s property

Delegation of authority to execute—The officer to whom a warrant is delivered for execution under this rule may deliver it to his subordinate for execution It is not necessary that the proper officer should himself execute all warrants sent to him (*k*) But a warrant addressed to the *peon* of a Court cannot be executed by a *Naib* (*l*)

Arrest without warrant—Where an officer of the Court arrests a judgment debtor without having the warrant in his possession at the time of arrest the arrest is illegal (*m*)

Shall be sealed—The provisions of this rule being mandatory the omission of the Court s seal on the warrant renders the attachment illegal (*n*)

Specification of day on or before which warrant should be executed—The warrant should specify the date on or before which it is to be executed Resistance to the execution of a warrant which does not specify such date is not illegal (*o*) Moreover a warrant cannot be executed after the expiration of the date specified in the warrant

(*k*) *Abdul Karim* v *Bullee* (1884) 6 All 38 *Dharam Chand* v *Queen Empress* (189) Cal 596 *Sheo Prog* ... v *Bhoop Narain* (189) Cal 59

(*l*) *M* ... *King Emperor* (1916) 1 Pat L J 5 0 36 I C 8

( ) *Empress* v *Amar Nath* (1883) 5 All 318

( ) *Khadir Bux* v *King Emperor* (1918) 3 Pat L J 636 49 I C 171 ... *Gope* v *King Emperor* (19 6) 5 Pat 216 97 I C 146 (6) A I 3

(*o*) *Mol* ... v *King Emperor* (1916) 1 Pat L J 530 36 I C 8 1

for its execution (p) If the warrant is extended the date to which it is exten
be specified on the warrant If this is not done the warrant is not a good war
resistance to its execution after the date originally specified in it does not amo
offence under s. 186 of the Indian Penal Code (q)

Endorsement on process

25 [S 343] (1) The officer entrusted with the
cution of the process shall endorse t
the day on and the manner in w
was executed and if the latest day specified in the
for the return thereof has been exceeded the reason
delay, or, if it was not executed the reason why it w
executed, and shall return the process with such endor
to the Court

(2) Where the endorsement is to the effect th
officer is unable to execute the process the Court shall e
him touching his alleged inability and may if it thin
summon and examine witnesses as to such inability, an
record the result

Stay of execution

When Court may stay execution

26 [Ss 239 240] (1) The Court to which a dec
been sent for execution shall upo
cient cause being shown stay the
tion of such decree for a reasonable
to enable the judgment debtor to apply to the Court by
the decree was passed or to any Court having appellate
diction in respect of the decree or the execution thereof
order to stay execution or for any other order relating
decree or execution which might have been made by such
of first instance or appellate Court if execution had been
thereby or if application for execution had been made t

(2) Where the property or person of the judgment
has been seized under an execution the Court which issu
execution may order the restitution of such property
discharge of such person pending the result of the appli

Power to require security from or impose conditions upon judgment debtor

(3) Before making an order to stay execution or f
restitution of property or the disch
the judgment debtor the Court m
quire such security from or impose
conditions upon the judgment debtor as it thinks fit

Stay of execution —See notes under the same head to s. 4

Alterations in the rule—The words "or for the recovery of a wife" which occurred in the corresponding sec 259 of the Code of 1882 after the words "share in a specific movable" have been omitted for there can be no decree under the law for the recovery of a wife as a wife cannot be treated as a chattel to be delivered over to the husband Where any third person prevents the wife from returning to her husband the latter may obtain an injunction against him which may be enforced in case of disobedience either by the imprisonment of the defendant or by the attachment of his property or by both under r 32

Decree for specific movable property—Where a decree directs recovery of specific movable property and for payment of the price thereof if the property be not delivered the decree holder is not entitled to execute the money part of the decree before applying for delivery of the property (a) As to the cases in which a decree may be passed for the delivery of specific movable property see Specific Relief Act I of 1877 s 11

Rule when not applicable—It has been held by the High Court of Calcutta that this rule does not apply where the property sought to be attached is not in the possession of the judgment debtor (b)

Decree for specific performance for restitution of conjugal right or for an injunction

32 [S 260 R S C, O 42, r 30] (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced *in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction* (c) by his detention in the civil prison, or by the attachment of his property or by both

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention

(3) Where any attachment under sub rule (1) or sub rule (2) has remained in force for one year if the judgment debtor has not obeyed the decree and the decree holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree holder such compensation as he thinks fit, and shall pay the balance (if any) to the judgment debtor on his application

(a) *Bal ak da v B ng l N gpur Ra l aj Co Ltd* (1928) 5 Cal 6 103 I C 740 (27) A C 6

(b) *P l l v Chu d D l* (1896) 1 C W N 0

(c) The italicized words were added by Act 9 of 1923

(4) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of the one year from the date of the attachment no application to have the property sold has been made, or if made has been refused, the attachment shall cease

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder or some other person appointed by the Court at the cost of the judgment debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree

Illustration

A a person of little substance erects a building which renders uninhabitable a family mansion belonging to B A in spite of his detention in prison and the attachment of his property declines to obey a decree obtained against him by B and directing him to remove the building The Court is of opinion that no sum realizable by the sale of A s property would adequately compensate B for the depreciation in the value of his mansion B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceeding

Alterations in the rule—Sub rules (2) and (5) are new See notes below under the head Sub rule (5)

The words or for an order requiring the performance of or abstention from any other particular act which occurred in s 260 of the Code of 1882 have been omitted and in lieu thereof the words or for an injunction have been substituted See notes below under the head Sub rule (1) decree for injunction

Specific performance—As to specific performance of contract see Specific Relief Act I of 1877 ss 12 30

Injunction—As to perpetual injunctions see Specific Relief Act I of 1877 ss 54 57

Restitution of conjugal rights—The words italicized in sub rule (1) were added by Act 29 of 1923 Having regard to those words a decree for restitution of conjugal rights can no longer be enforced by detention in the civil prison whether it be against a husband or a wife As to decree against a husband see also r 33 below

Sub rule (1) decree for injunction—Sub rule (1) applies to both prohibitory and mandatory injunctions (d) Where an injunction has been granted on each successive breach of it the decree may be enforced under this rule by an application made within three years of such breach under art 181 of the Limitation Act (e) A separate suit to enforce the injunction is barred by the provisions of s 47 (f) If the decree is enforced by the imprisonment of the defendant the period of imprisonment should not at any one time exceed six months see s 58

(d) S h P d v A r th (1919) 46 Cal 103 10 45 I C 864

(e) Ve k t h Ham v Ve ppa (1906) 9 Mad 311 S ch I a I v Am rnath (1919) 46 Cal 103 45 I C 864 B t s Pam Sa Ch t S gh (1901) 3 All 465 R w D v Ihd (1906) 28 All 300

(f) S h I d v Am r th (1919) 46 Cal 4 I C 864

Where a woman who had been directed by a decree to refrain from preventing her daughter returning to her husband, *permitted* the daughter who was of age to reside in her house it was held that such conduct did not constitute a breach of the direction under the decree so as to render it punishable under this rule (*g*)

It was held under the old section that an order directing a defendant to render accounts within a specified time was an order requiring the performance of a particular act within the meaning of that section and that disobedience to the order was punishable under that section (*h*) The words performance of or abstention from any other particular act which occurred in the old section were held to have a very wide general meaning and they have been omitted from this rule and for it the word injunction has been substituted. Hence disobedience to an order directing a party to render accounts can no longer be punished under this rule as such an order cannot be said to be an injunction within the meaning of this rule (*i*)

Opportunity of obeying the decree—All that the Court has to see before directing execution to issue under this rule is whether the party bound by the decree has had an *opportunity* of obeying the decree or injunction and has wilfully failed to obey it If the party has had the opportunity and has *wilfully* failed to obey the decree the Court may order execution to issue under this rule without giving him any further opportunity and it is not obligatory upon the Court in such a case to serve a notice upon the party calling upon him to obey the decree or injunction (*j*)

Where an application is made under this rule but the party bound by the decree has had no opportunity of obeying the decree the application will be dismissed But the dismissal of the application is no bar to another application made after an opportunity has been afforded to the party of obeying the decree Thus if a decree is made directing the defendant to deliver certain articles necessary for the performance of the duties of priest in a temple to the plaintiff the plaintiff is not entitled to execute the decree under this rule unless it is proved that he went to the temple after notice to the defendant to receive the articles from him (and thereby afforded an opportunity to the defendant to comply with the decree) and that the defendant failed to deliver the articles If such an opportunity has not been afforded the plaintiff s application will be dismissed but its dismissal will be no bar to a subsequent application after such opportunity has been afforded (*k*)

Party against whom a decree for injunction has been passed — See notes to s 50 Decree for injunction.

Sub rule (5)—This sub rule is new It corresponds to O 42 r 30 of the English Rules In the absence of any provision in the old section similar to the one contained in this sub rule it was held that where a decree directed the defendant to remove an obstruction such as pulling down a wall or opening a path way and the defendant failed to obey the decree it was not competent to the Court to depute any of its officers to remove the obstruction as that was not one of the modes of execution sanctioned under that section (*l*) Under the present rule the Court may direct the act to be done so far as practicable by the decree holder or some other person appointed by the Court (*m*) But the Court has no power under this rule to order the police to see that its decree is carried out Thus where a d cree is passed declaring the plaintiff s right to perform certain ceremonies in a temple and restraining the defendant from obstructing

(*g*) *Aj asi Kuar* v *Suraj Prasad* (18) 1 All 501

(*h*) *Degamb r* v *Kally Nath* (1881) 7 Cal. 654 *Raghunath* v *Ga patı* (190) 27 All 3 4

(*i*) *Arj n* v *K ng Emperor* (1918) 3 Pat L J 106 44 I C 37

(*j*) *D rga Das* v *Dewraj* (1906) 33 Cal 306

(*k*) *K sho e Bun* v *Dwarka ath* (1894) 1 Cal 84 1 I A 89

(*l*) *Bhoob n M hun* v *Nobin Chunder* (18) 18 W R 28 *Protab Chunder* v *I e ry* (188) 8 Cal 174 *Sakarl l* v *Bai Parvat* (190) 26 Bom 83 86 87 *D rga Das* v *D wraj* (1906) 33 Cal 306 309 311

(*m*) *Sach Pr s d* v *Amarnath* (1919) 46 Cal. 103 10 45 I C 864

the plaintiffs from performing the ceremonies the Court has no power under this rule to order the police to see that the plaintiffs performed the ceremonies without interference on the part of the defendants (n)

The expression "the act required to be done" means what has to be done to enforce the injunction (o) Hence if a defendant is directed by a decree to demolish *a certain wall and the wall is demolished he cannot in execution proceedings be directed* to remove a new wall built after the date of the decree in a different place The plaintiff's remedy in respect of the new wall is to file a fresh suit against the defendant (p) In a recent Calcutta case (q) Richardson J expressed the opinion that sub r (5) applied to prohibitory as well as mandatory injunctions

Discretion of Court in executing decrees for restitution of conjugal rights

33 [*New*] (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree *against a husband* for the restitution of conjugal rights or at any time afterwards, may order that the decree *shall be executed in the manner provided in this rule*

(2) Where the Court has made an order under sub-rule (1), it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment debtor shall make to the decree holder such periodical payments as may be just, and, if it thinks fit, require that the judgment debtor shall, to its satisfaction, secure to the decree holder such periodical payments

(3) The Court may from time to time vary or modify any order made under sub rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money

Compare the Matrimonial Causes Act 1884 (47 and 48 Vict c 68)

Amendment of the rule—The italicized words in sub rule (1) were added by Act 29 of 1923 The words "and the decree holder is the wife" which occurred in sub rule (2) after the words "under sub rule (1)" were omitted by the same Act. The effect of this omission is that the present rule applies to a decree for restitution of conjugal rights passed against a *husband* The words "shall be executed in the manner provided in this rule" in sub r (1) have been substituted for the words "shall not be executed by

(n) *Goswami Gordhan Lalji v Goswami Makhand* (1918) 40 All 648, 48 I C 6

(o) *Sachi Prasad v Amarnath* (1919) 46 Cal 103 108 45 I C 864

(p) *Malka v Sundar Singh* (1925) 7 Lah L J 0, 88 I C 583 (1925) A L 333

(q) *Sachi Prasad v Amarnath* (1919) 46 Cal 103 108 45 I C 864

detention in prison See as to the latter words the undermentioned case (r) See r 32 above and note the alterations mad in that rule by the same Act

Decree for execution of document or endorsement of negotiable instrument

34 [Ss 261, 262] (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment debtor neglects or refuses to obey the decree, the decree holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf

(3) Where the judgment debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit

(4) The decree holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp paper if a stamp is required by the law for the time being in force, and the Judge or such officer as may be appointed in this behalf shall execute the documents so delivered

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely —

C D Judge of the Court of
(or as the case may be), for A B, in a suit by E F against A B"

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration

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(r) Bai I rvati v Ghan h (19 0) 44 Bom 97 59 I C 361

Sub rule (1) decree for execution of a document—Where the document to be executed relates to some property the property must be the subject matter of the suit If it is not a regular suit must be brought to enforce execution of the document ( )

Sub rule (6) registration—This sub rule is new It gives effect to a decision of the Allahabad High Court that if a document requires registration it must be registered though executed by the Court (t) At the same time provision is made for the registration of documents though their registration is optional if the decree holder desires to have them registered

Appeal—An appeal lies from an order under this rule on an objection to the draft of a document or of an endorsement [O 43 r 1 cl (i)]

35 [S 263] (1) Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and if necessary, by removing any person bound by the decree who refuses to vacate the property

Decree for immoveable property

(2) Where a decree is for the joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree

(3) Where possession of any building or enclosure is to be delivered and the person in possession being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree holder in possession

Alterations in the rule—Sub rules (2) and (3) are new See notes below

Sub rule (2)—A plaintiff who is entitled to possession jointly with other persons may be granted a decree for joint possession whether the plaintiff was originally in possession and was subsequently dispossessed (u) or whether he had never been in possession (v) But the Court has a discretion in the matter (w) and joint possession was refused where the defendant had been 24 years in separate possession with the acquiescence of the plaintiff (x) Sub rule (2) which is new has been inserted to remove the difficulty experienced in executing decrees obtained for joint possession of immoveable property as against co sharers and persons holding under them

(s) Sa d m v Ieh y I I (19 0) C W N 68 611 L 3
(t) K k i Lal v K I Dh (18 0) All 3)
( ) Ih iro I i v I (1904) 6 All 5 8
(v) J j th I m I h I (1911) 31 All 1 0 131 (9 B k k H m (19) 41 All 1 631 (b ( ) A A 314
1 S h I I j K m (19) 41 All 5 631 (81 ( ) A A 16
(w) B at d Co I m k nd D n (1 90) 15 C I 10 1 I A 110
( ) Ha m I al M th ra I rasad (19 8) 26 All L J 9 11 I (143 ( ) A A 4 F I

detention in prison See as to the latter words the undermentioned case (r) See r 32 above and note the alterations made in that rule by the same Act

Decree for execution of document or endorsement of negotiable instrument

34 [Ss 261, 262] (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment debtor neglects or refuses to obey the decree, the decree holder may prepare a *draft of the document or endorsement in accordance* with the terms of the decree and deliver the same to the Court

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf

(3) Where the judgment debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft as it thinks fit

(4) The decree holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp paper if a stamp is required by the law for the time being in force, and the Judge or such officer as may be appointed in this behalf shall execute the documents so delivered

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form namely —

'C D Judge of the Court of
(or as the case may be), for A B, in a suit by E F against A B'

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same

(6) The Court, or such officer, as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration

(r) *B I Jarvat v Ghan hi* (19 0) 44 Bom 07? 9 I C 361

Sub rule (1) decree for execution of a document—Where the document to be executed relates to some property the property must be the subject matter of the suit If it is not a regular suit must be brought to enforce execution of the document (s)

Sub rule (6) registration—This sub rule is new It gives effect to a decision of the Allahabad High Court that if a document requires registration it must be registered though executed by the Court (t) At the same time provision is made for the registration of documents though their registration is optional if the decree holder desires to have them registered

Appeal—An appeal lies from an order under this rule on an objection to the draft of a document or of an endorsement [O 43 r 1 cl (i)]

35 [S 263] (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property

Decree for immovable property

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree does not afford free access the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in pubic according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree holder in possession

Alterations in the rule—Sub rules (2) and (3) are new See notes below

Sub rule (2)—A plaintiff who is entitled to possession jointly with other persons may be granted a decree for joint possession whether the plaintiff was originally in possession and was subsequently dispossessed (u) or whether he had never been in possession (v) But the Court has a discretion in the matter (w) and joint possession was refused where the defendant had been 24 years in separate possession with the acquiescence of the plaintiff (x) Sub rule (2) which is new has been inserted to remove the difficulty experienced in executing decrees obtained for joint possession of immovable property as against co sharers and persons holding under them

(s) [illegible] (19 0) 5 C W N 68 [illegible]
(t) [illegible] Lal v [illegible] (18 0) All 39
(u) [illegible] (1904) 6 All 588
(v) [illegible] (1911) 34 All 1 0 [illegible] (19) 44 All 1 [illegible] 80 [illegible] 314 [illegible] 5 631 [illegible] A 16
(w) [illegible] (1 30) 18 [illegible] 10 17 [illegible] A 110
(x) [illegible] (19 8) [illegible]

5 **Resistance to delivery of possession to decree holder**—Where the holder of a decree for the possession of immovable property is *resisted or obstructed* by any person in obtaining possession of the property the procedure to be followed is that prescribed by rr 97 103 of this order

Actual and formal possession—The possession referred to in sub rules (1) and (3) is *khas* or *actual* possession while that referred to in sub r (2) and r 36 below is *formal* or *symbolical* possession. *Formal* or *symbolical possession* is delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode at some convenient place the substance of the decree.

Rules 35 and 36 refer to cases where a suit is brought for possession of immovable property and a decree is passed in the suit for the delivery of the property to the decree holder Rules 95 and 96 refer to cases where immovable property belonging to a judgment debtor is sold in execution of a decree passed against him and possession of the property is sought by the auction purchaser In both cases the possession may be either actual or symbolical. If the immovable property of which possession is directed by the decree to be delivered to the decree holder is in the possession of the judgment debtor *actual possession* must be delivered to the decree holder under r 35 (1) Where it is in the possession of a tenant or other person entitled to occupy the same only *symbolical possession* can be delivered, and that is to be done under r 36 Likewise where immovable property is sold in execution of a decree and possession is sought by the auction purchaser *actual possession* must be delivered to him under r 95 if the property is in the possession of the judgment debtor But if the property is in the possession of a tenant or other person entitled to occupy the same only *symbolical possession* can be delivered and that is to be done under r 96

There are thus three cases in which the law allows symbolical possession to be given namely the cases contemplated by sub rule (2) of the present rule by r 36 and by r 96 of this Order *Symbolical* possession given in such cases operates as *actual* possession against the judgment debtor but not against third persons who were not parties to the decree (y) In other words *symbolical* possession is no possession at all as against third parties. This distinction is of great importance in the law of limitation. The rule to be deduced from the cases on the subject is that where in execution of a decree *symbolical* possession is delivered of immovable property to the person entitled to possession thereof and such person subsequently institutes a suit for *actual* possession, the symbolical possession is to be treated as actual possession where the suit is *against the judgment-debtor or his representatives* and the period of 12 years allowed for such a suit is to be calculated not from the date of sale but from the date of the subsequent dispossession [ill (2)] But where a suit for actual possession is instituted *against a third party claiming to be in possession of the property adversely to the judgment-debtor* no account is taken of the symbolical possession of the plaintiff in determining the period of limitation and the period of 12 years is to be calculated, not from the date on which symbolical possession was delivered to the plaintiff but from the date on which the possession of such third party became adverse as against the judgment-debtor [ill. (1)].

Illustrations

(1) *P* obtains a decree against *D* In execution of the decree certain property alleged to belong to *D* is sold, and is purchased by *A* *A* applies for possession, and is placed in *symbolical* possession of the property *C* has been in possession of the

(y) *Runjit Singh v Banwari Lal* (1884) 10 Cal. 993 *Juggobundhu v Ram Chunder* (1880) 5 Cal 584 *Juggobundhu v Purna a d* (18[illegible]) 16 Cal 530 *Radha Krishna v I m B had* (191[illegible]) 20 Bom L. R. [illegible] 43 I C 268 [P C] *Mahaderappa v Bhima* (1922) 46 Bom 10 66 I C [illegible] (22) A B [illegible] *Jagannatha v Srinivasa* (192[illegible]) 49 Mad L. J 656 660-661 90 I C 103 [illegible] A M [illegible]

operty adversely to *D* for 10 years prior to the date on which *A* is placed in *symbolical* possession *C* continues to be in possession of the property as before After three years sues *C* for possession The defence is that *C* has been in adverse possession for more than twelve years and the suit is therefore barred under art 144 of the Limitation Act contends that his symbolical possession operated to break the continuity of the adverse possession of *C* and that the period of twelve years allowed by art 144 for a suit for possession should be calculated from the date on which symbolical possession was delivered to him The suit is barred for *A* s possession being merely symbolical did not operate at all as possession as against *C* who was not a party to the suit and it could not therefore break the continuity of *C* s possession (*z*) In other words delivery of symbolical possession to *A* did *not* amount to a *dispossession* of *C*

(2) *A* obtains a decree against *B* for possession of certain immovable property the property *being in the occupancy of B s tenants symbolical* possession is delivered to under r 36 Subsequently *B* dispossesses *A* by receiving the rents and profits *A* thereupon sues *B* for actual possession The period of limitation for such a suit is twelve years from the date of dispossession (*a*) The same principles apply where a person is placed in *symbolical* possession under sub rule (2) of this rule in cases where the decree is one for *joint* possession and also where he is placed in *symbolical* possession under r 96 of this Order (*b*)

Note—It will be observed that in ill (2) the suit is against the judgment debtor and in ill (1) it is against a third person who was not a party to the suit *Symbolical* possession operates as actual possession against the *judgment debtor* that being the only means by which *as between the parties* the order of the Court can be effectively carried out But it does not operate as actual possession against third persons who were not parties to the suit and the reason for this is very plain. A suit might be brought and a decree obtained by a person who has neither title nor possession against another person who has neither title nor possession and if the delivery of symbolical possession in such a suit were to constitute actual possession as against the true owner who had been in actual possession for many years and who was no party to the suit it would operate most unjustly (*c*)

It has already been stated that where a judgment debtor himself is in possession *actual* possession must be delivered to the person entitled to possession under sub r (1) of this rule or under r 95 as the case may be If *symbolical* possession is delivered in a case where actual possession ought to have been delivered the question arises whether it will operate as actual possession against the judgment debtor? It has been held by the High Court of Calcutta that it does The delivery of symbolical possession *even erroneously* is not a nullity and it operates *as actual possession* against the judgment-debtor and his representatives for it is said that after all it is possession obtained *through an officer of the Court and by process of law* and the judgment debtor must be taken to be a party to the proceeding relating to the taking of possession. From this point of view a suit for *actual* possession may be brought at any time within 12 years from *the date on which symbolical possession is given* (*d*) On the other hand a Full Bench of the Bombay High Court has held that symbolical possession given in circumstances in which actual possession ought to have been given is a *nullity* and the period of limitation for a suit for actual possession is 12 years from *the date of sale* The reason given by the High

(*z*) *Ha j ra v Sh r m* (189) 19 Bom. 6 0 *Ru jit S ngh v Bu wari Lal* (1884) 10 Cal 9 J3

(*a*) *Juggobundhu v R m Chu d r* (1880) 5 Cal 584 [F B] *Ali Hus in v Mohammad* (1 8) 3 Luck 130 10 I C 81 (8) A O 8 *Ja g Bahadur v Hanwant* (19 1) 43 All 5 0 63 I C 1 (21) A A 9 *Ali Husain v Af al Husain* (19 8) 3 Luck. 130 10 I C 781 (28) A O 8

(*b*) *Joygobu dhu v Pu m and* (188) 16 Cal 530 [F B]

(*c*) *R jit S gh v B nwa i Lal* (1884) 10 Cal. 993 99

(*d*) *Lokessur v P gun* (1881) Cal 418 *II M h v Bib ral* (18) 4 (L 1 *Bh lu Beg v J t d a Nath* (19) C W N 4 I C 1035 (3) A C 1 8

Court of Bombay is that symbolical possession is not actual possession nor is it equivalent to actual possession except where the Code expressly or by implication provides that it shall have that effect and there is no section of the Code which provides that where symbolical possession is given in a case in which actual possession ought to have been given such possession should be treated as equivalent to actual possession (e) The High Court of Allahabad has taken the same view as the Bombay High Court (f) In an earlier case (g) the Madras High Court took the same view as the High Court of Calcutta but in later ca s it has followed the Bombay ruling (h)

Illustrations

In execution of a decree obtained by A against B certain property belonging to B is sold and it is purchased by C in the year 1895 *B is in possession* of the property at the date of sale C applies for possession but instead of actual possession being delivered to him under r 95 symbolical po session is given to him in the year 1901 C subsequently sues B for actual possession in the year 1908 that is more than 12 years after the date of sale but within 12 years from the date of delivery of symbolical possession According to the Bombay and Allahabad High Courts the suit is barred by limitation according to the Calcutta High Court it is not

It has been held by a Full Bench of the Oudh Court that where a sale is of an undivided share in a property delivery of posse sion by means of beat of drum is a valid and effective delivery of posses ion within O 21 r 95 and that it is sufficient to give to the auction purcha er a fre h start for limitation Stuart C J observed that the distinction between actual and symbolical po ses ion had little to do in such case and that the real question was whether the delivery was effective in the circumstance of each particular case *Gulab Khan* v *Ataullah* (1928) 3 Luck 506 110 I C 70 (28) A O 91 In the Full Bench Bombay case referred to above the sale was al o of an undivided share but the question whether that circumstance made any difference was not before the Court All that the Bombay case decided was that when in a case where actual po ession ought to have been delivered mere symbolical po se sion is delivered the delivery of symbolical pos e ion does not give to the purchaser a fresh start for limitation

Sub rule (2) affixing copy of warrant—Where in a case falling within sub r (2) of the present rule or rule 36 below or r 96 below no copy of the warrant is affixed but the substance of the decree is proclaimed by beat of drum *in the presence of the judgment debtor* the possession so delivered is good symbolical possession and carried with it all the incidents of such possession as against the judgment debtor if he *had notice* of the proceedings (i) but not if he had no such notice (j)

D ne f r d ll f I n ll property wh i In c c p in y I f n t

36 [S 264] Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the

(e) *Mah l r* v *J* ((191) 36 B 3 3 14 I C 44 (F B) [*d* *U d i* *Mahadevapi* v *I* *d* (19) 46 Bom 10 1 66 I C 3 0 ( ) A B 9] *Lakal* v *Mor* (189) 16 I m *Shritha* v *I* *pil* (1919) 43 Bom 9 I I C *Iaji* *th* *K* *Ib* (19) 4 B I R 4 69 I C 91 ( ) A B *

(f) *J* *j B k l* v *H* *t* (19 1) 43 All 1 63 I C 21 (1) A A 9

(g) (*I* v *k k I* (190) 1 M I L J 94

(h) *Co* *I* *wa* *Ieth pe* *n I* (191) 41 I C 833 *K* *yy* v *Bh* *n* *elt* (19) 49 M I L J 303 86 I C 439 ( ) A M 1140

(i) *Ja hri L l* *I e n* (19 0) 2 Lah L J (r 53 I C 19 *H nam S gh* v *Milkh I m* (19 9) 11 Lah I J 146 118 I C 391 ( ) A L 545

(j) *Kh l l* v *I* (191) P j R no 0 I 74 39 I C 7 3 *Harnam Singh* v *Milkh Ram* (19) 11 Lah I J 146 118 I C 391 (9) A L 45 See also *Ram h ndv* *Ja* (19) 3 Lah I J 138 5 I C (1) A L 36 [no symbolical possession obtained at all under decree for joint possession—no suit for possession not maintainable]

decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property

Symbolical possession—See notes to r 35 above

Other person entitled to occupy the same—A person disturbing the possession of another without any right legitimately derived from any competent person to do so is not a person entitled to occupy the property within the meaning of this rule (1) He is no more than a trespasser

Arrest and detention in the civil prison

37 [S 245 B] (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment debtor who is liable to be arrested in pursuance of the application, the Court may instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison

Discretionary power to permit judgment debtor to show cause against detention in prison

(2) Where appearance is not made in obedience to the notice, the Court shall if the decree holder so requires, issue a warrant for the arrest of the judgment debtor

Discretionary power to issue notice under this rule—When a decree is for the *payment of money* and execution is applied for against the *person* of the judgment debtor the Court *may* issue a notice to the judgment debtor calling upon him to show cause why he should not be committed to the civil prison in execution of the decree As to the procedure to be followed when the judgment debtor appears in pursuance of the notice see r 40 below

Whether an executing Court has discretion to refuse or suspend attachment of judgment debtor s property—A Court executing a decree may in its discretion under r 40 below disallow an application for the arrest or imprisonment of a judgment debtor But there is no rule which empowers the Court in express terms where an application is made for attachment of the judgment debtor s property to give time to the judgment debtor to pay the judgment debt and for that purpose to stay execution O 21 r 24 (1) provides that when the preliminary measures required by the foregoing rules have been taken the Court shall *unless it sees cause to the contrary* issue its process for the execution of the decree In a Calcutta case under s 250 of the Code of 1882 it was held that when an application is made for *attachment of the property* of a judgment debtor the Court has no power to refuse or stay execution except in the cases

(1) [illegible] 1(19) 43 Mad L J 1 9 0 1 C (3) A M [illegible]

expressly provided for by the Code (*l*) As to the words unless it sees cause to the contrary it was held that they referred only to the express provisions contained in the Code itself such as s 246 (now r 18 above) s 243 (now r 29 above) etc but that they did not give any discretion to the Court to refuse or stay execution In a later case under the present Code it was held that the Court has inherent power under s 1ól to defer the issue or operation of its own process and that it may in a proper case grant time to the judgment debtor In that case the Subordinate Judge gave five days time to the judgment debtor and it was held by Mukerjee J that the time was rightly granted in the circumstances of the case Graham J did not express any definite opinion as to the validity of the order but said that there might be circumstances in which the Court would have discretion to grant reasonable time *e g* in the case of illness of the judgment debtor (*m*) Assuming that the Court has an inherent power to allow time to a judgment debtor it should not it is submitted be exercised in a case where the judgment debtor is unable to pay the judgment debt immediately and says that he would be able to do so if time was allowed to him

Privilege from arrest —See s 135 sub section (2)

Warrant for arrest to direct judgment-debtor to be brought up

38 [S 337] Every warrant for the arrest of a judgment debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay together with the interest thereon and the costs (if any) to which he is liable, be sooner paid

Subsistence allowance

39 [Ss 339 340] (1) No judgment debtor shall be arrested in execution of a decree, unless and until the decree holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment debtor from the time of his arrest until he can be brought before the Court

(2) Where a judgment debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment debtor has been arrested by monthly payments in advance before the first day of each month

(4) The first payments shall be made to the proper officer of the Court for such portion of the current month as remains

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(*l*) I han Ch der v ... oll k (1884) 10 Cal 61

(*m*) ... (19) 31 C W N 63 660-661 665-661, 665 102 I C 513 (27) A ... 581

unexpired before the judgment debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison

(5) Sums disbursed by the decree-holder for the subsistence of the judgment debtor in the civil prison shall be deemed to be costs in the suit

Provided that the judgment debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed

40 [S 37A] (1) Where a judgment debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit make an order disallowing the application for his arrest and detention, or directing his release, as the case may be

Proceedings on appearance of judgment debtor in obedience to notice or after arrest

(2) Before making an order under sub rule (1), the Court may take into consideration any allegation of the decree holder touching any of the following matters, namely —

(a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account

(b) the transfer, concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree holder in the execution of the decree ,

(c) any undue preference given by the judgment debtor to any of his other creditors ,

(d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it,

(e) the likelihood of the judgment debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree holder in the execution of the decree

(3) While any of the matters mentioned in sub rule (2) are being considered, the Court may, in its discretion, order the judgment debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court

(4) A judgment debtor released under this rule may be re arrested

(5) Where the Court does not make an order under sub rule (1), it shall cause the judgment debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison

Sub rule (1) Unable to pay—Where a decree is passed against *A* *B* and *C* and the Court is satisfied that *A* is unable to pay and that *B* and *C* each possess property which may be realized by the decree holder in execution of the decree the Court may reject an application made by the decree holder for the arrest of *A* *(n)*

Sub rule (3)—The security should not be personal security *(o)*

Appeal—An order rejecting an application for the arrest of a judgment debtor falls within s 47 and is appealable as a decree *(p)*

Attachment of Property

Examination of judgment debtor as to his property

41 [*Cf* s 267] Where a decree is for the payment of money the decree holder may apply to the Court for an order that—

(a) the judgment debtor, or

(b) in the case of a corporation, any officer thereof or

(c) any other person

be orally examined as to whether any or what debts are owing to the judgment debtor and whether the judgment debtor has any and what other property or means of satisfying the

(n) *Lala D*[illegible] v *M*[illegible] *M I* (19[illegible]) 4 Lah [illegible] J [illegible] 9 I [illegible]

(o) *Dhar*[illegible] v *K*[illegible] *pati* ([illegible]) 4 Cal [illegible]

(p) (19[illegible]) 4 Lah [illegible] [illegible]

decree and the Court may make an order for the attendance and examination of such judgment debtor, or officer or other person and for the production of any books or documents

Object of the rule—The object of this rule is to obtain discovery for purposes of execution to avoid unnecessary trouble in obtaining satisfaction of money decrees It is a useful rule but orders for discovery may operate harshly against the party directed to give discovery and must not be lightly made (q)

Any and what other property—This refers to property which is liable to attachment and sale under the decree against the judgment debtor Property of a judgment debtor which he has mortgaged is *prima facie* liable to be seized in execution of a decree against him and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage debt (see s 73) If the mortgagee claims that he is *in possession* as mortgagee he may be *examined* under this rule (r) See note to r 62 below

What property may not be attached—See s 60

42 [S 2ɔɔ] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money

Attachment in case of decree for rent or mesne profits or other matter amount of which to be subsequently determined

Attachment under a preliminary decree—In a suit by *A* against *B* for the recovery of possession of immovable property and for mesne profits a preliminary decree is passed against *B* for the delivery of the property to *A* and an inquiry is directed as to the mesne profits due by *B* to *A* *B* delivers possession of the property to *A* Subsequently while the inquiry as to mesne profits is still pending *A* applies for attachment of certain property belonging to *B* The attachment may be allowed under this rule (s) See O 20 r 12

43 [S 269] Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment debtor the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof

Attachment of movable property other than agricultural produce in possession of judgment debtor

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once

(q) Nat [illegible] Bank of India Ltd v [illegible] (1916) 43 Cal [illegible] 34 I C [illegible]
(r) [illegible] (1893) 1 Bom 14 [illegible] dh [illegible] Mol n v G kul Das (1860) 10 M I A 63 5 1 [illegible] to attachment of property in possession [illegible]
(s) [illegible] Sharoda Moy v [illegible] Moye (186[illegible]) 8 W R 9

Movable property in possession of judgment debtor—This rule provides for attachment of movable property in the possession of the judgment debtor. As to movable property not in possession of the judgment debtor see r 46 below.

Attachment by actual seizure—Where a warrant of attachment is executed by affixing it to the outer door of the warehouse in which goods belonging to the judgment debtor are stored, it amounts to actual seizure within the meaning of the present rule (t).

Security bond to produce attached property—Goods attached under this rule by an Amin are made over by him to a third person for safe custody on his passing a bond undertaking to produce them in Court. The surety fails to produce the goods when required by the Court. Is the decree holder entitled to proceed against the surety under s 145 (c)? No according to the Madras High Court there being no order of the Court as contemplated by cl (c) of s 145 (u). Yes according to the Allahabad High Court (v).

Rateable distribution—See notes to s 73 Assets held by a Court Case H.

44 [*New*] Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

Attachment of agricultural produce

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing floor or place for treading out grain or the like or fodder stack on or in which it is deposited,

and another copy on the outer door or some other conspicuous part of the house in which the judgment debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain, and the produce shall thereupon be deemed to have passed into the possession of the Court.

Attachment of agricultural produce—This and the following rule provide for the attachment of agricultural produce. Both these rules are new. Growing crops are under this Code included in the category of movable property [see s 2 cl (13)]. But the procedure relating to the *actual seizure* of movables cannot be applied in its entirety to growing crops for considerable injury would result to both parties if such crops were allowed *to be removed* on attachment like other movable property. With a view to prevent such injury and to secure to both parties the fullest value from the property attached, it is enacted by the next following rule that where agricultural produce is attached the Court should make such arrangements for the custody thereof as it may deem sufficient and subject to such conditions as may be imposed by the Court the

(t) *M ll n Ch d v Ba k of Madras* (1904) Mad 316

(u) *Rajah ... v ... S ra* (1910) 33 Mad L J 4 ... 6 I C 134

(v) *Madho Prasad v Pearey Lal* (1911) 19 All L J 4 ... 6 I C ... 19 ... 1) A A ... 0

judgment debtor should be allowed to continue to perform all acts of husbandry and if he endeavours to defeat the attachment by neglecting the crop the decree holder should be allowed to intervene and protect his interests O 21

45 [New] (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient, and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered

Provisions as to agricultural produce under attachment

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it, and if the judgment debtor fails to do all or any of such acts the decree holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree holder shall be recoverable from the judgment debtor as if they were included in, or formed part of, the decree

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re attachment merely because it has been severed from the soil

(4) Where an order for the attachment of a growing crops has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court nay suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered

Time at which the crop is likely to be cut or gathered—The decree holder should specify in the application for attachment the time at which the crop is likely to be cut or gathered. The object is to enable the Court to make necessary arrange-

ments for the custody of the crop [sub r (1)] If the application is presented within twenty days before the maturity of a crop not lending itself to storage it should be refused [sub r (5)] See notes to r 44 above

Attachment of debt share and other property not in possession of judgment debtor

46 [S 268] (1) In the case of—

(a) a debt not secured by a negotiable instrument,

(b) a share in the capital of a corporation,

(c) other movable property not in the possession of the judgment debtor, except property deposited in or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court,

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon,

(iii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment debtor

(2) A copy of such order shall be fixed on some conspicuous part of the Court house, and another copy shall be sent in the case of the debt to the debtor in the case of the share to the proper officer of the corporation, and, in the case of the other movable property (except as aforesaid), to the person in possession of the same

(3) A debtor prohibited under clause (i) of sub rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same

Attachment of debt.—A debt cannot be attached unless it is *actually due* from the garnishee (judgment debtor's debtor) to the judgment debtor It may be either presently payable or payable in the future by reason of a *present obligation* (w) As stated by their Lordships of the Privy Council in the undermentioned case (x) an *existing* debt though payable at a future day may be attached But only such debts can be attached as the judgment debtor could deal with properly and without violation of the rights of third persons (y) For instances of attachable debt see notes to s 60 Debts

(w) *Tapp v. Jones* (18[illegible]) L R 10 Q B 591 592; *Webb v. Stenton* (1883) 11 Q B D 518; *Chatterton v. [illegible]* (1881) 1[illegible] C D 3[illegible] 383; *Lachman v. J[illegible]* (19[illegible]) 50 All. [illegible] 10 [illegible] 103

(x) *Syud Tuffuzzool v. Rughoonath* (18[illegible]1) 14 M I A 40 50

(y) *B[illegible] v. Consolidated B[illegible]* (1888) 38 C D 238; *D[illegible] v. [illegible]* (1890) 4 Q B D 519; *Compo[illegible] v. [illegible]* [illegible] L R 435

The following are some of the more important rules relating to the attachment of debts —

1 It is not necessary for the purpose of attaching a debt that the exact amount of the debt should be stated, provided there is a debt *actually due* at the time of attachment B delivers certain goods to his agent C for sale The goods are sold by C and the sale proceeds are received by him In execution of a decree obtained by A against B A may attach the sale proceeds in the hands of C though the exact amount due to B may not then have been ascertained ( )

2 The attachment of a debt does not prevent the judgment debtor from suing his debtor or from taking any other step necessary for the recovery thereof but he is not entitled to *receive payment* thereof from his debtor unless the claim in respect of which the debt is attached is first satisfied C owes a debt to B The debt is attached in execution of a decree obtained by A against B This does not preclude B from *suing* C to recover the debt or from *prosecuting the suit* if a suit has already been instituted but he cannot receive *payment* of the debt from C unless he first satisfies A s decree (a) See sub rule (1) cl (i)

Attachment of mortgage debt — A executes a mortgage of immovable property to B to secure payment of Rs 5 000 lent to him by B It is provided by the mortgage bond that if A fails to pay the mortgage debt on the due date B should have the right to sue A personally for the debt and also to realise the debt by the sale of the mortgaged property In such a case B s interest in the mortgage bond comprises (1) the right to sue A *personally* for the mortgage debt and (2) the right to realise the debt by *sale of the mortgaged property* If C obtains a decree against B for Rs 000 and seeks in execution of the decree to attach the mortgage debt due to B how is the attachment effected? Is the mortgage debt a debt not secured by a negotiable instrument within the meaning of this rule and attachable in the mode prescribed by this rule or being secured by a mortgage of *immovable* property is it immovable property within the meaning of r 54 and attachable in the mode prescribed by that rule? The answer afforded by the decisions on the subject eliminating what are merely *obiter dicta* (b) is that a mortgage debt is a debt within the meaning of this rule and it is therefore to be attached in the manner prescribed by this rule Again if the mortgage debt due to B is attached under this rule in execution of C s decree and sold in execution and purchased by P what are the rights of P? The answer is that they are the same as those of B the mortgagee P may sue A for a *personal* decree against him He may also sue him for a decree for the *sale* of the mortgaged property (c) It does not make any difference that the mortgage bond gives a right to the mortgagee to enter into possession and that he is in possession at the date of the attachment (d) The cases referred to above were all cases either of a simple mortgage or of a hypothecation bond As regards usufructuary mortgage it was held by the High Court of Bombay in a case where the bond provided that the mortgagee was to enjoy the profits in lieu of interest for ten years and that the mortgage was to be redeemed on the expiration of the term by payment of the mortgage debt that there was no *debt* which the mortgagee was entitled to recover at the date of the attachment and that the interest of the mortgagee could only be attached in the mode

(z) *M H D* v *I* (1894) 16 All 286
( ) *Sh b S gh* v *S I* (1891) 13 All 6; *B* v *Collector of M* (189) 17 All 198 1 A 31
(b) *tppa* v *S* (1886) 9 Mad ; *S* v *I h* (188) 10 Mad 169
(c) *I m* v *I h I C* (1893) 15 All 134; *D be dra K mar* v *Rup L I* (1885) 1 Cal 46; *K* *th D* v *S* (1893) 20 Cal 80; *B* v *P* (189) 19 Bom 1; *T* *B* (190) 6 Bom 30; *M* *ppa* v *S* (189) 18 Mad 437; *N* v *Th* *So th I a Ba* (1914) 3 Mad 51 13 I C 91; *Lal* v *L I S gh* (19 4) All L J 840 843 80 I C 830 (4) A A 96
(d) *Ch* v *Oth m* (1914) Mad L J 39 6 I C 508

prescribed by r 54 for attachment of immovable property (e) This case was distinguished in a Madras case where the period having already expired the amount of the loan had become payable which it was said could only be attached as a debt (f)

Attachment of debt after delivery of cheque—A gave a cheque to B for work done Before the cheque was presented by B for payment X who had obtained a decree against B attached in A's hands the amount due by him to B *Held* that A having handed over the cheque to B the payment was complete and that there was no debt due by A to B which could be attached (g)

Procedure where garnishee denies debt—Where the garnishee denies the debt it is not the business of the Court to inquire if the debt is really due (h) and the decree holder may have it sold, or he may have a receiver appointed under s 51 with power to him to sue the garnishee to recover the debt from him (i) As to release of debt from attachment see notes to O 21 r 58 Rules 58 to 63 apply to debts also A decree holder is not entitled to recover from the garnishee more than what the judgment debtor himself could recover from the garnishee (j)

Procedure when garnishee admits debt—If the garnishee admits the debt the Court may order payment of the debt or so much of it as is admitted to be due into Court (k) But the Court cannot make an order on the garnishee before the debt has become payable (l) If a cross debt is due to the garnishee from the judgment debtor at the date of the attachment the garnishee is entitled to set it off against the amount due by him (l)

In a case where the debt was fraudulently sold at an undervalue with the connivance of the judgment debtor although the garnishee was willing to pay the amount into Court it was held that the remedy of the decree holders claiming rateable distribution was a suit for compensation (m)

Procedure where garnishee resides outside jurisdiction and debt also is payable outside jurisdiction—It is not competent to a Court under this rule to issue a prohibitory order upon a person resident outside the limits of its jurisdiction in respect of property which also is beyond such limits Thus where A obtains a decree in the Court of Bardwan against B residing in Bardwan and there is a debt due to B from C who resides in Calcutta the debt being also payable in Calcutta the proper course for A to adopt if he seeks to attach the debt is to apply to the Bardwan Court to issue a prohibitory order upon B prohibiting him from recovering the debt and also to apply to that Court to transfer the decree for execution to the Calcutta Court and, after the decree is so transferred to apply to the Calcutta Court to issue a prohibitory order upon C prohibiting C from paying the debt to B (n)

Claims over which Courts in British India have no jurisdiction e g a debt due to the judgment debtor from a non resident foreigner in respect of which no suit could be brought by the judgment debtor in a British Indian Court are not debts liable to be attached under this rule (o) But where a judgment is recovered in the High Court of Bombay against a foreign corporation which submitted to jurisdiction and a bank in Bombay owes the Corporation a debt payable in Bombay the High Court of Bombay has jurisdiction to attach the debt and direct the bank to pay the amount of the debt into Court (p)

(e) *Ma l l v Motibhai* (1911) 35 Bom 399 10 I C 819
(f) *Ramsami v Srinivasa* (1916) 39 Mad 389 8 I C 94
(g) *Bhayeandas v Abdul Husen* (18 9) 3 Bom 4?
(h) *Ma S w l n v Hoe To* (19 6) 4 Rang 100 9 I C 24 (?6) A R 1 5
(i) *Toolsa v Anto* (18) 11 Bom 448
(j) *Amarendra v S Ba rjee & Co* (19 1) 40 Cal L J ? 84 I C 10? ( ) A C 1038
(k) *Jeth v D g d ll* (19) ?9 Bom L R 416 10? I C 418 ( ) A B 365
(l) *Tyaball v Atma am* (1914) 38 Bom 631 ?5 I C 3 5
(m) *Na k Ch d v Chheda Lal* (19?7) 9 I C 46 ( ) A.A 41
(n) *Begg Dunlop & Co v Jaga nath* (191) 39 Cal 104 11 I C 417 *Bank of Bengal v Sarat* (1919) 4 Pat L J 141 49 I C 943
(o) *Cha shamlal v Bhansali* (1881) 5 Bom 49
(p) *Swiss Bank Corporation v Boehmische Industrial Ba k* (19 3) 1 K B 673

Shares—A deed of transfer of shares in a company which does not comply with the formalities prescribed by the Indian Companies Act and the Articles of Association of the Company is invalid as against a subsequent purchaser of the shares in execution of a decree against the shareholder (q) See rr 79 and 80 below

Life policy—Where a life policy is payable on proof to the satisfaction of the directors of the death of the assured the policy amount cannot be said to be a debt due by the company before such proof is given (r)

Sub rule (3) payment into Court—*A* obtains a decree against *B* In execution of the decree *A* attaches a debt due ostensibly from *C* to *D* but alleged by *A* to be in reality due from *C* to *B* In such a case if the Court orders the amount of the debt to be paid into Court it is incumbent upon the Court to provide by its order that the money when deposited should not be paid to the decree holder [*A*] until adjudication of the question as to who is entitled to the money *B* or *D* (s)

Garnishee order—Company in liquidation—Where a judgment is recovered against a company which is in voluntary liquidation the invariable practice of the Courts *is to stay execution of the judgment unless there are very exceptional reasons for exercising its discretion otherwise* Thus if *A* obtains a decree against a limited company and the company thereafter goes into liquidation and a debt is due by *D* to the company the debt forms part of the general assets of the Company and is divisible among the creditors *pari passu* and for this reason *A* is not entitled to a garnishee order against *D* (t)

47 [*New*] Where the property to be attached consists of the share or interest of the judgment debtor in movable property belonging to him and another as co owners, the attachment shall be made by a notice to the judgment debtor prohibiting him from transferring the share or interest or charging it in any way

Attachment of share in movables

Attachment of share in movables—This rule is new It provides for the attachment of a share or interest in *movable property* belonging to the judgment debtor and others in co ownership Such a share or interest is obviously incapable of actual seizure and provision has therefore been made for the issue to the judgment debtor of a notice prohibiting him from transferring his share or interest in any way

48 [*New*] (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or

Attachment of salary or allowances of public officer or servant of railway company or local authority

(q) Nagabhushanam v Ramachandra (19) 45 Mad 53 O I C 659 (3) A M 41

(r) John v Sambamurty (19 9) 56 Mad L J 99 (9) A M 317

(s) Harinath v Haradas (1916) 43 Cal 69 9 I C 580

(t) Anglo-Baltic and Mediterranean Bank v Baltic ... Co [19 4] 2 K B 410

allowances either in one payment or by monthly instalments as the Court may direct, and, upon notice of the order to such officer as the Government may, by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub rule (2), shall, without further notice or other process, bind the Government or the Railway Company or local authority as the case may be, while the judgment debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India, and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule

Attachment of salary of public officer etc—This rule is new It provides a special procedure for the attachment of the salary of public officer railway servants and servants of local authorities The rule follows upon the lines of section 151 sub section (3) of the Army Act (44 and 45 Vict c 58) which it may be observed applied only to officers of the army Under the Code of 1882 the salary of a public officer or railway servant could not be attached unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree (u) This led to considerable inconvenience in the execution of decrees and put the decree holder in many cases to an enormous expense The present rule substitutes a less expensive and at the same time more effective machinery for the execution of decrees against this class of judgment debtors Under it the salary of a public officer or a railway servant of a local authority may be attached *whether the judgment-debtor or the disbursing officer is or is not within the local limits of the jurisdiction of the Court executing the decree* A Court to which a decree is transferred for execution has the same power (v) As to how much of the salary of such persons may be attached see s 60 cl (h) and (i)

(u) [illegible] (188[illegible]) 1[illegible] Bom 44 [illegible] (1901) [illegible] Bom 198 [illegible] (1903) 30 Cal 13

(v) K[illegible] Lal v Lala B[illegible] (19[illegible]6) 1 Luck 46 91 I C 1043 ([illegible]) A O 11

Sub rule (3) Liability of Government —Sub r (3) provides that if an attachment order is not returned in accordance with the provisions of sub r (2) the Government shall be liable for such sum as should have been stopped out of the judgment debtor pay But no order can be made against the Government unless the Government is on the record (u)

49 [*New* *53 & 54 Vict, c 39 s 23 R S C, O 46, rr 1A and 1B*] (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such

Attachment of partnership property

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other order as might have been directed or made if a charge had been made in favour of the decree holder by such partner, or as the circumstances of the case may require

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same

(4) Every application for an order under sub rule (2) shall be served on the judgment debtor and on his partners or such of them as are within British India

(5) Every application made by any partner of the judgment debtor under sub rule (3) shall be served on the decree holder and on the judgment debtor, and on such of the other partners as do not join in the application and as are within British India

(6) Service under sub rule (4) or sub rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served

Attachment of partnership property —*This rule is new The first three sub* rules are a reproduction of the English Partnership Act 1890 [53 and 54 Vict 9]

(u) *Nandar Mal v Bd? lph* (191) Punj Rec no 93 p 3? 14 I C 3

s 23 The last three rules corre pond to O 46 rr 1A and 1B of the English Ru es
0 As to suits by and against firms ee O 30 below

This rule provides that no execution can issue against any *partnership property* except on a decree passed *against the firm or against the partners in the firm as such* (x) but a judgment-creditor of a partner in a firm may apply for an order charging *that partner s interest* and for a receiver The share of a partner in a partnership business is liable to attachment under s 60 (y) See notes to r 50 under the head Where decree has been pas ed against a firm

Against the partners in the firm as such —The e words in sub r (1) do not occur in s 23 of the Engli h Partnership Act They have been added to show that the operation of this rule is not ousted by the mere circumstance that the decree is passed not against the firm but against the partners constituting it where tho e partners have been sued as such

Direct accounts —It has been held in England under the Partnership Act s 23 sub s of which sub r (2) is a reproduction that the discretion given to *direct accounts* should only be exerci ed under special circumstances as fo in tance with a view to a di olution The deci ion is based upon the words if a *charg* had been made in favour of the decree holder by such partner These word it has been said should be read with s 31 sub s 1 of the Engli h Partnership Act which provides that an assignment by a partner of his hare in the partnership either absolute *or by way of charge* does not as against the other partners entitle the assignee during the continuance of the partnership to require *any accounts* of the partn rship transaction but entitle the assignee only to receive the share of the profits of the assigning partner and the as ignee must accept the account of profits agreed to by the partners Relying upon these provi sions Rigby L J said I think it plain that the intention of the legislature was that *under ordinary circumstances* in dealing with a case under sub 2 of s 23 [sub r (2) of this rule] the analogy of an assignm nt by a partner of his share should be adhered to ( )

Charging order and insolvency —A charging order under this rule upon a judgment debtor s interest in a partnership being a proceeding in invitum is not a tran action protected by s 5? of the Presidency towns Insolvency Act (a)

Execution of decree against firm

50 [*New* R S C O 43A r 8] (1) Where a decree has been passed against a firm execution may be granted—

(a) against any property of the partnership,

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner,

(c) against any person who has been individually served as a partner with a summons and has failed to appear

(x) The same was the law before the present Code came into force *Karimbha* v *Co ervator of Forest* (18 9) 4 Bom ??
(y) *Jagat Chunder* v *Isw Chunder* (1893) 0 Cal 693

(z) *Brown J nson & Co* v *Hutch nso & Co* [1899] 1 Q B 1 6
(a) *Wild* v *Southwood* [189] 1 Q B 31 Provincial Insolvency Act 19 0 s 55

Provided that nothing in this sub rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872 O 2

(2) Where the decree holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub rule (1), clauses (b) and (c) as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined

(3) Where the liability of any person has been tried and determined under sub rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer

Scope of the rule—This rule is new It is a reproduction of O 48A r 8 of the English Rules Execution under this rule can only be granted where a decree has been passed against a *firm* A decree passed against a *firm* must perforce be *in the firm's name* Under this rule execution may be granted *against the partnership property* It may also be *granted against the partners* in which case the decree holder may proceed against the separate property of the partners It must not be supposed however that where a decree has been passed against a firm execution will be granted *as a matter of course* against all the partners in certain cases *special leave* is necessary to issue execution against a partner It is only when execution is applied for against a person referred to in sub r (1) cls (b) and (c) that it will be granted as of course But where execution is sought against any other person alleged to be a partner the decree holder must apply to the Court which passed the decree *for leave* to execute the decree against him Thus if in a suit against a firm a person has been individually served as a partner with the writ of summons but fails to appear at the hearing and a decree is passed against the firm the decree holder is entitled to execution against him as a matter of course see cl (c) of sub r (1) But a decree holder is not entitled to execution as of course against a person who is sought to be made liable as a partner but who was not served with the summons and who did not appear at the hearing In such a case the decree holder must apply for leave to execute the decree against such person If such person admits the liability the Court may grant leave without further inquiry (*b*) But if he disputes the liability the Court may direct an issue to determine whether he was a partner or held himself out to be a partner in the defendant firm (*c*) These rules follow from the peculiar nature of a suit against a *firm* and from the special rules as to service of summons in such a suit To understand the present rule it is necessary to peruse rules 3 6 and 7 of Order 30 The

(b) *J g l Cha dra v G ny* (19 5) 3 Cal 14 19 0 91 I C 8 4 (6) A C 1 | (c) *Dav Hyman & Co* [1903] 1 K B 8 4

important point to note is that where persons are sued as partners *in the name of their firm* it is not necessary that the summons should be served upon each one of them or indeed upon any one of them it may be served upon any one or more of the partners or at the principal place of the firm s business *upon any person having the control or management of the business though he may not be a partner*

Where a decree has been passed against a firm —Execution under this rule can only be granted where a decree has been passed against a firm in the firm s name A decree cannot be passed against a firm unless the suit is against partners in the name of their firm And conversely where a suit is against partners in the name of their firm the decree must be against the firm in the firm s name See O 30 r 6 and notes

Against any property of the partnership — Property belonging to a partner hip shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such See r 49 (1) above

Against any person who has appeared —See O 30 rr 3 5 6 and 7 and notes

Against any person who has been individually served —See O 30 r 5 and notes

Sub rule (2) Leave to issue execution —Order 30 deals with suits by or against firms Rule 1 provides that two or more persons being liable as co partners may be sued in the firm s name It does not matter that the firm is dissolved at the date of the suit so long as the claim in respect of which the suit is brought arose during the continuance of the partnership (*d*) But where a firm is dissolved *to the knowledge of the plaintiff* before the institution of the suit the plaintiff is bound to serve the summons upon every per on within Briti h India whom it is sought to make liable as provided by O 30 r 3 No order can be made under sub rule (2) against a former partner who has to the knowledge of the plaintiff left the firm before the institution of the suit The rea on is that O 30 r 3 override sub r (2) of the pr ent rule Sub r ( ) applies only where there has been no di solution or none to the knowledge of the plaintiff Where there has been a di olution to the knowledge of the plaintiff an outgoing partner cannot be made liable unle s he has been served with the summons in accordance with the provi o to rule 3 of Order 30 (*e*)

O 21 r 50 is not controlled by O 30 r 2 (3) A suit is brought by a firm against *A* On *A* s application the names of the partners of the firm ar disclosed by the attorneys for the firm under O 30 r 2 A then files a counter claim against the firm The firm s suit is di missed and a decree is passed against the firm on the counter claim *A* takes out execution against *X* whose name was given by the firm s attorneys as one of the partners of the firm X denies that he was a partner and says that he did not instruct the firm s attorneys to give his name as a partner There is nothing in the provisions of O 30 r 2 (3) to preclude X from raising this contention and the question whether he is a partner or not should be decided in the manner provided by O 21 r 50 (2) (*f*)

Execution against legal representatives —If a partner has died the suit against firm cannot include the legal representatives of the deceased partner though they may be added as defendants and served with summons under O 30 r 3 if it is sought to make the eparate estate of the deceased partner liable Sub rule (2) which is subject to O 30 r 3 does not empower the Court to give leave to execute the decree against the legal representatives (*g*) If a decree against a firm makes a partner personally liable under

(*d*) *Ell s* v *Wade on* [1899] 1 Q B 14 16
(*e*) *Wig am* v *Cox Sons Buckley & Co* [1894] 1 Q B 9
(*f*) *Naturlal* v *Sa soon* & *C* (19 7) 51 Bom 94 103 I C 6 (2-7) A B 417
(*g*) *M thu ud s* v *Ebrah m* (19) 51 Bom 986 10 I C 8 1 ( ) A B 581

sub rule (1) (a) or (1) (b) it may be executed against his legal representatives after notice under r 22 (h)

Issue to determine liability —See notes above Scope of the rule

Court which passed the decree —See notes below Award

Where decree transferred for execution —An ex parte order under sub rule (2) granting leave to execute the decree and transferring the decree for execution to another Court does not preclude the transferee Court from determining the question whether the decree transferred was a nullity (i)

Sub rule (3) —An ex parte order made under sub rule (2) above is not within sub rule (3) Sub rule contemplates an order where the liability has been tried and determined (j)

Sub rule (4) —This sub rule relates to persons other than those referred to in sub r (1) cls (b) and (c) The summons to appear and answer in sub r (4) does not mean the writ of summons It means a summons or a notice to appear and answer the *application specified in sub r (2)* The object of sub r (4) is to give an opportunity to a person against whom the decree holder seeks to execute the decree other than such a person as is referred to in sub r (1) cls (b) and (c) of disputing his liability as a partner if he desires to do so (k)

Minor partner —The proviso to sub r (1) declares that nothing in that sub rule should be deemed to limit or otherwise affect the provisions of section 247 of the Contract Act The combined effect of that section and the present rule is that where a decree has been passed against a firm containing a minor who is admitted to the benefits of a partnership execution may be granted against the property of the firm including the share of such minor in the property of the firm but it cannot be granted against the separate property of the minor Having regard to the definition of a firm in s 239 of the Contract Act and to a minor s inability to contract the share of such minor in the property of the firm mentioned in s 247 is merely his right to participate in the property of the firm after its obligations have been discharged (l)

Award —It has been held by the High Courts of Calcutta (m) and Allahabad (n) that an award against a firm filed under s 11 of the Indian Arbitration Act 1899 stands on the same footing as a decree and that the provisions of this rule apply to such an award In the case of an award the Court which passed the decree referred to in sub r (2) is the Court in which the award is filed (o) The High Court of Allahabad has held relying on s 42 of the Code that where an award is sent for execution by one Court to another the latter Court has the power to try the issue as to partnership under sub r (2) (p)

Insolvency of firm —Where a decree has been passed against a firm execution may be taken out against any partner who was served with the summons The insolvency of the firm is no bar to execution against individual partners (q)

(h) J g t Ch dra v C (19 6) 3 Cal 14 91 I C 8 4 (6) A C 1

( ) All rt d Co H b b (19 9) All I J 553 115 I C 86 (9) A A 390

(j) (19 9) 7 All I J 5 3 11 I C 86 (9) A A 390 s pra

(k) Jag t Ch d a v C n (19 6) 53 C l 14 0 4 91 I C 8 4 (6) A C 71 Jiraj v Bl gra t (19) 4 Bom I R 1037 68 I C 6 7 (3) A B 66 M th d v Ebr h n (19 7) 51 Bom 9 6 10 I C 8 1 ( ) A B 81

(l) Sanj (l M t I K st alh I a r) (19) 49 I A 108 49 Cal 560 6 I C I 4 ( ) A I C 3

( ) Lo is Dr if d Co I n oll n (19 0) 4 C l 9 6 I C 3 C I d to e B ll d C lo b (19 3) C W N 666 I C 868 (4) A C 11

(n) S t l M rs Cl m nt I oh on d C (19 1) 43 All 394 61 I C 401 (1) A A 199

( ) (19 3) C W N 666 668 I C 868 (4) A C 117 s

(p) (19 1) 43 All 394 61 I C 401 (1) A A 199 supr

(q) I h D s T ath D s (19) I h I J 16 89 I C 138 ( ) A L 3 9

53 **53** [S 273] (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

Attachment of decrees

(a) if the decrees were passed by the same Court, then by order of such Court and,

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree

(2) Where a Court makes an order under clause (a) of sub-rule (1) or receives an application under sub-head (ii) of clause (b) of the said sub-rule it shall on the application of the creditor who has attached the decree of his judgment-debtor proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1) the attachment shall be made by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached prohibiting him from transferring or charging the same in any way and, where such decree has been passed by any other Court also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent

sub rule (1) (a) or (1) (b) it may be executed against his legal representatives after notice under r 22 (h)

Issue to determine liability —See notes above Scope of the rule

Court which passed the decree —See notes below Award

Where decree transferred for execution —An ex parte order under sub rule (2) granting leave to execute the decree and transferring the decree for execution to another Court does not preclude the transferee Court from determining the question whether the decree transferred was a nullity (i)

Sub rule (3) —An ex parte order made under sub rule (2) above is not within sub-rule (3) Sub rule contemplates an order where the liability has been tried and determined (j)

Sub rule (4) —This sub rule relates to persons other than those referred to in sub r (1) cls (b) and (c) The summons to appear and answer in sub r (4) does not mean the writ of summons It means a summons or a notice to appear and answer the *application specified in sub r (2)* The object of sub r (4) is to give an opportunity to a person against whom the decree holder seeks to execute the decree other than such a person as is referred to in sub r (1) cls (b) and (c) of disputing his liability a a partner if he desires to do so (k)

Minor partner —The provi o to sub r (1) declares that nothing in that sub rule should be deemed to limit or otherwise affect the provisions of section 247 of the Contract Act The combined effect of that section and the present rule is that where a decree has been passed against a firm containing a minor who is admitted to the benefits of a partnership execution may be granted against the property of the firm including the share of such minor in the property of the firm but it cannot be granted against the separate property of the minor Having regard to the definition of a firm in s 239 of the Contract Act and to a minor's inability to contract the share of such minor in the property of the firm mentioned in s 247 is merely his right to participate in the property of the firm after its obligations have been discharged (l)

Award —It has been held by the High Courts of Calcutta (m) and Allahabad (n) that an award against a firm filed under s 11 of the Indian Arbitration Act 1899 stands on the same footing as a decree and that the provisions of this rule apply to such an award In the case of an award the Court which passed the decree referred to in sub r (2) is the Court in which the award is filed (o) The High Court of Allahabad has held relying on s 4? of the Code that where an award is sent for execution by one Court to another the latter Court has the power to try the issue as to partnership under sub r (2) (p)

Insolvency of firm —Where a decree has been passed against a firm execution may be taken out against any partner who was served with the summons The insolvency of the firm is no bar to execution against individual partners (q)

(h) J g t (l I a x C t r (19 6) 53 Cal 14 91 I C 8 4 (6) A C 1

( ) Ul rt (Co H bil (19 9) All I J 333 11 I C 86 (9) A A 390

(j) (19 9) All I J 5 3 11 I C 86 (9) A A 390 s j r

(k) J r t Ch 7 (r (19 6) 53 C l 14 70 4 91 I C 8 4 (6) A C 71 J raj Bhai d (19) 4 I m I R 1037 68 I C 6 7 (3) A B 66 M tl i d Fbr h (19 7) 1 Bom 986 10 I C 8 1 ( ) A B 581

(l) Sa yam (l a a M i l K I all I erj (19) 49 I A 108 49 Cal 560 67 I C 1 4 ( ) A PC 3

(m) Tor Drejf d Co I c s tlu (19 0) 4 Cal 56 I C 3 5 Cl d ton Will & Co Ioo b (19 3) C W N 666 I C 868 (4) A C 11

( ) S t l M s Cl ent Robson & Co (19 1) 43 All 394 61 I C 401 (1) A A 199

( ) (19 3) C W N 666 668 I C 868 (4) A C 117 s pra

(p) (19 1) 43 All 394 61 I C 401 (1) A A 199 supra

(q) I h o D T th Das (19 5) Lah I J 16 89 I C 138 ( ) A L 3 9

51 [S 270] Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court

Attachment of negotiable instruments

The proper method of attaching a promissory note in the hands of an individual is by its actual seizure and not by the issue of a prohibitory order for if it is not seized the promisee may negotiate it and mere notice will not avail against a holder in due course (r) But notice of the order of attachment to the debtor or promisor is sufficient protection against his paying the amount due to the promisee or anyone else (s)

52 [S 272] Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or Officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued

Attachment of property in custody of Court or public officer

Provided that where such property is in the custody of a Court, any question of title or priority arising between the decree holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment attachment or otherwise, shall be determined by such Court

Attachment of dividends in the hands of Official Assignee—The Official Assignee is a public officer within the meaning of this rule and moneys in his hands payable by way of dividend to a creditor of an insolvent may be attached in execution of a decree against the creditor in the manner provided by this rule (t)

Attachment of property in the hands of a receiver—A receiver is an officer of the Court. No attachment therefore of money in the hands of a receiver can be made *without leave of the Court* (u)

It was held by the High Court of Bombay in some of the earlier cases that in the case of a decree against a firm the assets of which are in the hands of a receiver appointed in a previous partnership suit the proper course for the decree holder to follow is to ask the Court for a charging order undertaking by the order to deal with the charge according to the order of the Court (v) On the other hand it has been held in a recent case that the proper course is to issue a notice to the receiver under this rule and not a charging order (w)

Anticipatory attachment—This rule does not permit an anticipatory attachment of money *expected to reach* the hands of a public officer but applies only to money

(r) *S brama a v Chokkal ga* (19 3) 46 Mad 415 ° I C 189 (" 3) A M 31
(s) *Ramaq rs v Muthu V lappa* (19?9) 56 Mad L J 0 111 I C 887 ( ) A M 940
(t) *Hurdayal v Haj Adam* (19?5) 49 Bom 638 8 I C 1011 (5) A B 344
(u) *Mahommed v Mahomm d* (1894) 1 Cal 85 *Kahn v Ali Mahom d* (189) 16 Bom 5
(v) *A H j Isma l & Co v P biaba* (1910) 34 Bom 491 4 I C 135 *Shidl ngappa v Shankarappa* (1904) 28 Bom 1 6 1 9 *Kakuba v Hargowan* (Bom H Ct—Suit no 19 4 of 1919 (Pratt J) unreported)
(w) *Ven ukhgaori v Pajaballi* (19) 9 Bom L. R. 689 106 I C 184 (7) A B 405

actually in his hands An attachment made before the money has reached the hands **O 21,** of the officer is invalid (*x*)

Priority —There is a conflict of decisions as to whether if a fund in Court is attached by several decree holders they are entitled to hare rateably or whether they are to be paid in the order of their attachments As to partnership a sets in the hands of a receiver the High Court of Bombay held in one case that no one judgment creditor of the firm is entitled to priority over others by attaching the partner hip asset and that they should be di tributed pro rata among all the judgment creditors (*y*) On the other hand it was hel l in a recent case that the judgment creditor who first tool out execution again t the as ets was entitled to have his decree satisfied to the full in priority over other non attaching creditors ( ) It is submitted with great respect that the latter decision is incorrect Where a receiver is appointed in an administration suit and a creditor of the deceased obtains a decree against the legal representative of the deceased after such appointment he is not entitled to execute the decree again t the estate of the deceased (*a*)

The following propo itions have been laid down by a Full Bench of the Madras High Court in *Visvanadhan* v *Arunachelam* (*b*) overruling *Katum* v *Haji Mahomed* (*c*) an earlier decision of the same High Court

(1) Where the property attached is in the custody of a Court it is the duty of such Court to hold it at the di po al of the attaching Court and it is the duty of the attaching Court if the property attached is money to call upon the custody Court to pay it into the attaching Court and in other cases to provide for the realisation of the property and to divide the money or proceeds rateably between the attaching decree holder and the o her decree holders who are entitled to distribution under s 73 of the Code of Civil Procedure i.e. those who have applied to it for execution before the receipt of such as ets

(2) Where the property in the custody Court is the subject of several attachments in execution of several decrees the custody Court must award priority to the first in point of time If the other decree holders want to share in the rateable di tribution they must apply in time to the first attaching Court The power conferred on the cu tody Court by the proviso to O 21 r 52 to determine claims to priority etc does not entitle the custody Court itself to distribute the assets rateably among the attaching decree holders

(3) When the attaching Court and the custody Court are the same there is a receipt of a ets within the meaning of s 73 of the Code of Civil Procedure only when so much of the money standing to the credit of the judgment debtor as is neces ary to sati fy the decree holders who have applied to it for execution is ordered to be trans f rred to the credit of th first attaching creditor s suit

The Calcutta High Court (*d*) has followed *Katum* v *Haji Mahomed* but this was before the Full Bench case

Form —See Sch I App I No 7

(*x*) *Tul j I l H* (1898) B m 39 c m n t d upo i *l m b* *4 n t* (191) 33 B m 80 t p 8 I C 18 *T g l l v H g l ah* (1914) 6 M I L J 364 4 I C 61 *Th k r l Jo ph* (1917) 44 C l 10 41 I C 516

(*y*) *Kh v All M h med* (189) 16 Bom 5

(*z*) *Ke ba v I ak i* (19) 9 Bom L R 66 106 I C 113 (7) A I 391 V n *sikla r l jiballj* (19 7)) Bom I I 6 3 106 I C 184 (9) A B 40

( ) *Dura l ll* v *Bhol n* (19) 9 P m L R 409 10 I C 413 (7) A R 6 7 *Bh ji 4d t t Gen l* (1893) 3 Bom 4 8 [estat in I n l of Administrator G n r l]

(*b*) (19 1) 44 Mad 100 60 I C 30 (21) A M 18 *V hwaj j a* v *S bb er* (19 3) 46 Mad 506 513 7 I C 890 (3) A M 50

( ) *Kat m* v *Haj Mahomed* (1915) 38 Mad 1 29 I C 39

(*d*) *Th k d s* v *Joseph* (191) 44 Cal 1072 41 I C 516

53 **53** [S 273] (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

Attachment of decrees

(a) if the decrees were passed by the same Court, then by order of such Court, and,

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment debtor applies to the Court receiving such notice to execute its own decree

(2) Where a Court makes an order under clause (a) of sub rule (1), or receives an application under sub head (ii) of clause (b) of the said sub rule, it shall, on the application of the creditor who has attached the decree of his judgment debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub rule (1), the attachment shall be made by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way, and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required O 21,

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment debtor bound by the decree attached, and no payment or adjustment of the attached decree made by the judgment debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force

Alterations in the rule—This rule corresponds with s 273 of the Code of 1882 except in the following particulars —

1 The words or for sale in enforcement of a mortgage or charge in sub r (1) are new See notes below Attachment and realization of decrees

2 The words or his judgment debtor in sub r (1) cl (b) sub head (ii) are new These words give effect to the opinion expressed by Maclean C J in the undermentioned case (e)

3 Sub rules (3) and (6) are also new See notes below under the e sub rules

Attachment and realization of decrees—For the purpose of this rule decrees have been divided into two classes namely —

(1) decrees for the payment of money or for sale in enforcement of a mortgage or charge and

(2) other decrees

First as to attachment of decrees—Decrees of the first class are attached in the manner prescribed by sub r (1) Decrees of the second class are attached in the manner prescribed by sub r (4)

Next as to realization of attached decrees—Decrees of the first class are realized in the manner prescribed by sub r (2) There is no provision in this rule for the realization of decree of the 2nd class e g a decree for partition (f) or for foreclosure of a mortgage (g) These decrees are realized by a sale of the decree itself But decrees of the first class that is money decrees (h) and mortgage decrees are not realized by sale (i) They can only be realized in the manner prescribed by sub r (2) The reason of this distinction is as follows —

Decrees are not expressly mentioned in s 60 as property liable to attachment and sale Hence they are attachable and saleable as comprised in the expression all other saleable property which occurs in that section Being liable to attachment as *saleable* property they can be *sold* in execution of another decree But money decree and mortgage decrees *must not be sold* because the present rule prescribes *special procedure* for the realization of such decrees [sub r (2)] But for this provision money

(e) 4 ll (1 Ira v I l Mol n (189) 24 Cal 7 8 0 Tl o de i ion in Un I ja v Ur n i (191) 3 M I C 9 I C 86 would have been different if the case was governed by the present Code

(f) Gopal v Jol imal (189) 16 Bom 5

(g) Bath a Di v B j Lal (1901) 6 All 91

(h) S ltan Kuar v C l ori L l (18 0) All 90 I ruv g da v I yd l g (1893) 6 Mad 418 Jott Iro v t v Dir Ia v th (1893) 0 Cal 111

(i) Vith ldas v S braya (19 1) 45 Bom 343 59 I C 541 (1) A B 1 Ma g Lun Bye Ma ng I o Nyu (1923) 1 Lang 360 6 I C 6 9 (4) A L 1

decrees and mortgage decrees would have to be realized by *sale* like other decrees The special procedure prescribed by sub r (2) is an exception to the general rule that property when attached can only be realized by sale

Under the old section decrees were divided into two classes namely —

(1) decrees for the payment of money and

(2) other decrees

There was no specific provision for decrees for sale in enforcement of a mortgage Hence the question arose whether such decrees belonged to the first class or the second class The decisions on the subject were conflicting (j) To remove this doubt the words or for sale in enforcement of a mortgage or charge have been inserted in sub r (1) These words made it clear that mortgage decrees should be attached and realized in the same manner as money decrees [see sub rules (1) and (2)]

Decree for dissolution of partnership —A decree for the dissolution of a firm and for the taking of accounts where a receiver has been appointed by the decree for the sale of the assets of the firm and for the payment of the partnership debts is a decree for the payment of money within the meaning of this rule though part of the partnership assets consists of immovable properties (k)

Decrees other than money decrees and mortgage decrees —*D1* holds a decree against *J* for *partition* of certain property passed in Court *Y* *D2* obtains a decree against *D1* for Rs 6 000 in Court *X* If *D1* fails to satisfy the decree obtained against him by *D2* *D2* may apply to Court *Y* to execute his decree *by attachment and sale* of the decree held by *D1* against *J* The decree held by *D1* being neither a money decree nor a mortgage decree the only mode of realizing it in execution of *D2* s decree is by attachment *and sale*

Money decrees and mortgage decrees —Where the decree attached is a money decree or a mortgage decree it can only be realized by execution it *cannot be sold* in execution For this purpose two applications must be made one for attachment of the decree and the other for its execution The application for attachment must be made by the holder of the decree sought to be executed to the Court which passed it. But the application for execution of the attached decree must be made to the Court which passed the decree attached and it may be made either by the holder of the decree sought to be executed or by the holder of the decree attached as in the following illustrations

(a) *Where the decree sought to be executed and the decree sought to be attached are passed by the same Court* —*D1* holds a decree against *J* for Rs 5 000 passed by Court *Y* This is a *money decree* *D2* obtains a decree against *D1* also in Court *X* for Rs 6 000 If *D2* seeks to attach *D1* s decree in execution of his decree he should apply to Court *Y* for attachment and either he or *D1* may then apply to that Court for execution of the decree held by *D1* against *J* *D2* can apply for execution for he is deemed to be the *representative* of *D1* [see sub r (3)]

(b) *Where the decree sought to be executed and the decree sought to be attached are passed by different Courts* —*D1* sues *J* on a mortgage and obtains a decree for sale of the mortgaged property under O 34 r 5 in Court *Y* This is a *mortgage decree* *D2* obtains a decree against *D1* for Rs 6 000 in Court *X* and in execution of his decree applies to Court *X* for attachment of the mortgage decree held by *D1* against *J* The attachment

(j) See *Delhi and London Bank Ltd* v *Partab Singh* (1906) 8 All 71 (mortgage decree held not to be a money-decree) *Vaidhinadasamy* v *Somasundaram* (1905) 8 Mad 4 3 (mortgage decree held to be a money decree)

(k) *Sidlingappa* v *Shankarappa* (1903) 7 Bom 5 6

is to be made by the issue to Court X of a notice by Court Y requesting Court X to **O 21**
stay execution of *D1* s decree against *J* unless and until—

(i) the notice is cancelled by Court Y or

(ii) an application is made to Court *X* by *D2* or *D1* to execute the decree held by *D1* against *J*

If an application is made by *D2* or *D1* to Court X to execute the decree held by *D1 against J Court X will proceed to execute the decree and the nett proceeds* that may be realized in execution will be applied in satisfaction of *D2* s decree

If in the case put above Court X does not stay execution of *D1* s decree on receiving the notice from Court *Y* and proceeds with the execution in spite of the notice the proceedings will be deemed to be *ultra vires* and a sale held in execution of that decree will be set aside as void (*l*)

Sub rule (1) Stay —The stay under sub r (1) (b) is only a limited stay and does not prevent either the holder of the decree sought to be executed or his judgment debtor from seeking to execute the original decree (*m*)

Sub rule (3) Representative —This sub rule is new It gives effect to the undermentioned decisions (*n*) under the Code of 1882 It declares in effect that one who attaches a decree is a *representative* of the decree holder within the meaning of s 47 Thus in the cases put above *D2* is the representative of *D1*

A holds a money de ree against *B* *B* holds a decree for sale in enforcement of a mortgage against *C* *A* attaches in execution of his own decree the decree held by *B* against *C* *C* brings into Court from time to time sums of money for satisfaction of the decree held against him by *B* Since *A* is the representative of *B* the payments made by *C* become forthwith available to *A* and operate from their respective dates as partial sati faction also of the decree held by *A* again t *B* Hence interest on the decree held by *A* runs only up to the dates of the deposit and not up to the date when *A* with draws the moneys from Court (*o*)

Sub rule (6) Adjustment of attached decree —This sub rule is new The latter part of the rule gives effect to a Bombay decision that where a decree is attached no adjustment of the decree subsequent to the attachment can be recognized by the Court (*p*) See O 2 r 2 A Full Bench of the Madras High Court has held that though the attachment is effected by notice to the Court under sub rule (1) yet a payment or adjustment made by the judgment debtor in ignorance of the attachment and before he has received notice of the order of attachment under sub rule (6) is valid This sub rule merely provides in cases of bona fide transactions by judgment debtors an exception to the general rule laid down in s 64 above (*q*)

Decree —A decree whereby *B* was compelled to deliver up po se sion of certain lands to *C* is rever ed in appeal and *B* is declared to be entitled to recover back po se sion from *C* with me ne profits *A* obtains a decree again t *B* and applie in execution of hi decree to attach *B* s right to recover mesne profits from *C* The right i not attachable for it is not a *decree* The language [of this rule] seem to apply only to cases where the right attached is a right expressly *settled by* the decree and not a right *arising from* the decree by way of restitution (*r*)

(*l*) *B hm Di Bajh L l* (1904) 6 All 91 *Ma th I lv B a al* (190) 3 Cal 1104
(*m*) *Chanda ppa v H ll s pp* (19 4) 48 Bom 48 491 80 I C 33 (4) A B 383
(*n*) *Sah M M ll v Kanag bap thi* (1893) 16 Mad 0 *Krishnan v le lat pathi* (1906) 3 Mad 318
(*o*) *Madan M han v Bishnupada* (19) 35 C L J 109 64 I C 80 (1) A C 560
(*p*) *Gop l v Joha m l* (189) 16 Bom 5 *Jatt v B shan* (19 9) 10 Lah 143 110 I C 41 (8) A L 834
(*q*) *L k h h m L kshm arasimh m* (19) 50 Mad 6 103 I C 0 ( ) A M 3 F B
(*r*) *Vasudeva v Naraja a* (1901) 4 Mad 341

Attachment of immovable property

54 [S 274] (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed on a conspicuous part of the property and then upon a conspicuous part of the Court house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate

Immovable property—The equity of redemption of a mortgagor is immovable property within the meaning of this rule (s) The life interest taken by a Parsi widow under her husband's will in the income of his immovable property is not movable but immovable property and is attachable under this rule (t)

Proof of service of prohibitory order—Where it is found as a fact that a prohibitory order was duly served on all the judgment debtors the destruction of part of the record which afforded proof of the service of notice does not render the execution sale invalid (u)

Mortgage debt—The sale of a mortgage debt in execution of a decree carries with it the security and an attachment of the property under this rule is not necessary see notes to r 46 Attachment of mortgage debt

Omission to beat drum—Such an omission is a material irregularity within the meaning of r 90 of this Order (v)

Land paying revenue to Government—Shrotriyam villages in the Madras Presidency are land paying revenue to Government within the meaning of this rule (w)

Proclamation of sale—See r 64 below and note thereto See also notes to s 64 Where an attachment has been made

Removal of attachment after satisfaction of decree

55 [S 275] Where—

(a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(c) the decree is set aside or reversed,

(s) *Pa ash am v Cori d* (189) 21 Bom ° 6 *Ba e dra Nath v Mart n & Co* (19 1) 3 Cal L J 13 6 I C 16 (1) A C 801
(t) *Natha v Dhunbaiji* (1899) 23 Bom 1
(u) *Mohammad Abdul v Akram* (19 4) All L J 03 83 I C 8 3 (4) A A 4
(v) *T al Na a* (1 6) 10 Bom 504
(w) *Ga n ma v Ket edd* (19 3) 46 Mad 6 I C 369 (4) A M 1 ceal o *Ah d F v Joe* (19) Lah L J 501 504 58 I C 3 1 ( ) A L 533

the attachment shall be deemed to be withdrawn, and, in the case of immovable property, the withdrawal shall, if the judgment debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

O rr 5

Alterations in the rule —

1 The words or certified to the Court in cl (b) are new The effect of these words is to place satisfaction certified under r 2 of this Order on the same footing as satisfaction made through the Court

2 The latter part of the rule commencing with the words the attachment shall be deemed to be withdrawn etc is new Under the old section *an express order* was necessary for the withdrawal of the attachment No such order is necessary under the present rule The attachment is *to be deemed to be withdrawn* on the happening of any of the events specified in cls (a) (b) and (c)

Relation of this rule to s 73 —See notes to s 73 Assets not available for rateable distribution

The attachment shall be deemed to be withdrawn —*A*s property is attached in execution of a decree obtained against him by *B* *C* another judgment creditor of *A* applies for execution of his decree but no attachment is issued upon his application On the date fixed for the sale *A* pays into Court the amount payable under *B*s decree The next day *C* applies for sale of the property *C* is not entitled to have the property sold because the effect of the payment into Court was the withdrawal of the attachment under this rule and there being no attachment under *C*s decree no sale can be ordered in execution of his decree (*x*)

56 [S 27] Where the property attached is current coin or currency notes, the Court may at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same

Order for payment of coin or currency notes to party entitled under decree

57 [*New*] Where any property has been attached in execution of a decree, but by reason of the decree holder's default the Court is unable to proceed further with the application for execution it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date Upon the dismissal of such application the attachment shall cease

Determination of attachment

Object of the rule —The object of the rule is to put a stop to the practice of making orders striking off proceedings or removing proceedings from the file

(*x*) So bji K I (1916) 36 I m I I C 911 I ... *f* ... *b* (1 0) 8 Mal 3 0 ... c c ll ... el in the notes to s 3 under the head Assets held by a Court

57 a form of order for which there was no justification under any of the earlier Codes (y) and which made it doubtful whether the effect of the order was whether the attachment ceased or whether it still continued This subject has already been di cus ed in the notes to s 64 under the head Effect of striking off execution proceedings or of removing them from the file

By reason of the decree holder s default—The provisions of this rule that the attachment should cease upon the dismis al of the application for execution do not apply unless the dismis al was on the ground of default on the part of the decree holder (z) The word default is not confined to default in appearance or in payment of process fees or in production of documents but includes failure to do what a decree holder is bound to do that is to proceed with his application for execution Failure therefore to give notice to the judgment debtor prior to the drawing up of the proclamation as required by r 66 of this Order is default within the meaning of this rule (a) Where a sale in execution of a decree is set aside for any reason other than this default on the part of the decree holder the antecedent attachment is revived so as to support a second application for execution of the decree by sale of the same property and no fresh attachment is necessary (b)

Upon the dismissal of such application the attachment shall cease—These words are imperative A Court therefore has no power while dismissing an application for default on the part of the decree holder to direct by its order that the attachment shall continue Thus where an executing Court made an order that the execution case is accordingly dismissed the properties will *remain under attachment* it was held that the order being one dismissing the application for execution the attachment ceased by virtue of the provisions of this rule notwithstanding the direction that the attachment should continue (c) In an Allahabad cas the order ran in these terms The execut on case should *for th time being* be dismis ed but the attachment shall remain in force The Court held that it was in effect an order *adjourning* the proceedings and was therefore valid (d) In a later Allahabad ca e the executing Court struck off the file an application of its own motion and without any default on the part of the decree holder It was held that there was no dismissal of the application within the meaning of thi rule and that the attachment had not ceased (e) These questions derive importance from the fact that an alienation of property after the attachment has ceased is not within the prohibition contained in s 64

Attachment before judgment—A Full Bench of the High Court of Madras has held that the words property attached *in execution of a decree* apply to property attached before judgment So when an execution applicat on for the sale of property attached before judgment was dismissed for default the attachment though it was made before judgment ceases (f) *A* sues *B* and obtains an order for attachment before judgment *A* then obtains a decree in the suit against *B* Thereafter *A* applies for execution of the decree but the application is dismissed for default of prosecution The dismissal of the application puts an end to the attachment before judgment This is

(y) *D wan Cla d* v *B dha* (1919) Punj Rec no 154 pp 410 413 5 I C 294

( ) *Aziz B kh h* v *Kani* (191) 34 All 490 15 I C 49

(a) *Ramu a B b* v *Ro ha M ah* (1911) 39 Cal 48 9 I C 558 *Dildar Hus in* v *Sheo Na n* (1919) 41 All 15 49 I C 113 *F teh D n* v *Q tab Din* (19) 3 Lah 7 67 I C 543 ( ) A L 108

(b) *Mahabharat* v *S rja Kanta* (1918) 3 Pat L J 310 45 I C 589 *V nkatesw rayyan* v *Asw tha* (19 3) 45 Mad L J 415 (1 I C 493) A M 03 But see *G p l bhatta* v *D vappa* (19) 46 Bom 94 6 I C 895 (3) A B 30

(c) *Ran a B bi* v *Rosha Miah* (1911) 38 Cal 48 9 I C 5 8 *Dildar Hu a* v *Sheo Na a n* (1919) 41 All 15 49 I C 113

(d) *Muhammad Mubar k* v *Sahu* (19) 44 All 2 4 65 I C 91 ( ) A A 6

(e) *B j* v *Raghun th* (19 6) 48 All 698 97 I C 10 (6) A A 734

(f) *Me y app* v *Ch dambaram* (19 4) 47 M d 483 83 I C 91 (4) A M 490 ov rruli g *Ve k t subiah* v *V lat Sesh ya* (1919) 4 Mad 1 48 I C 3

directly oppo ed to the deci ions of the High Courts of Allahabad (*g*) and Calcutta (*h*) where it was held that the words attached in execution of a decree do not include an attachment before judgment The High Court of Bombay has followed the Madras deci ion It is submitted that the view taken by the High Courts of Calcutta and Allahabad is the correct one (*i*)

Investigation of Claims and Objections

58 [S 278] (1) Where any claim is preferred to, or any objection is made to, the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit

Investigation of claims to and objections to attachment of attached property

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection

Postponement of sale

Rules 58 to 63—These rules deal with investigation of claims preferred to property attached in execution of a decree and of objections to the attachment of such property

Scope of the rule—Objections to attachment raised by a *party* to the suit in which the decree under execution was passed or his *representative* fall within the scope of s 47 Objections to attachment raised by a *third party* come under the present rule This distinction is important in two ways —

1 Where an objection to attachment is made by a *party* to the suit or hi *representative* the objector should proceed by an *application under* s 47 *a separate suit for the purpose is barred* But where an objection to attachment is made by a *third party* the objector may *either* proceed by an *application* under this rule *or* he may bring a regular *suit* to establish his objection failure to proceed by an application under this rule is no bar to a separate *suit* The object of this rule is to give a claimant a speedy and summary remedy but the rule does not deprive him of his remedy by *suit* The summary remedy given by this rule is alternative to the remedy by way of suit (*j*) See notes to 47 Objections to attachment or sale by third parties and notes to r 63 below Payment by claimant under protest

(*g*) *Bolra Akher Pa v Bas t Lal* (19 4) 46 All 894 80 I C 106 (4) A A 860

(*h*) *G e h v L ra Lal* (191) 16 Cal L J 86 14 I C 345 *Shid ath S ngh v Sha kh Saber dd* (19) 56 Cal 416 (9) A C 48

(*i*) *Sh rt v Ha* 19 9 53 Bom 543 (9) A B 3 1

(*j*) *Ka h L l v Natio l Ba k f Ind a* (1913) 40 Cal 598 40 I A 56 18 I C 949 *Sundar S gh v Ghasi* (1896) 18 All 410 *Krishn bhupati v Vikrama* (1895) 18 Mad 13 1 *Raghunath v S osh kama* (1899) 3 Bom 66

58 2 An order made under s 47 allowing or disallowing an objection to attachment is a decree (s 2) and is therefore *appealable* But orders under rr 60 61 or 62 made upon an application under this rule are *not appealable* under the Code (*k*) and the remedy of the party against whom the order is made is by a regular *suit* to establish the right which he claims to the property in dispute (r 63) Such suit must be brought within one year from the date of the order [Limitation Act art 11] (*l*) but subject to such suit the order is conclusive (*m*) see r 63

The following illustration shows the operation of rr 58 62 In execution of a decree obtained by *A* against *B* certain property alleged to belong to *B* is attached If the property attached is claimed by *C* *C* may bring a regular suit for a declaration that the property attached belongs to him and for removal of the attachment *Or* if he desires to avail himself of the speedy remedy provided by this rule he may present an *application* to the Court executing the decree claiming that the property belongs to him and praying for the removal of the attachment If *C*s claim is allowed (r 60) *A* may bring a suit under r 63 for a declaration that the property belongs to *B* and is therefore liable to attachment And if *C*s claim is disallowed (r 61) he may bring a suit for a declaration that the property attached belongs to him and is therefore not liable to attachment If no such suit is brought within one year from the date of the order under r 60 or 61 the order will be conclusive

Objections to attachment though made by a *party* to a suit or his *representative* come within the scope of this rule if property attached is held by the objector *on behalf of a third party* as a trustee guardian or in any other *fiduciary* capacity See notes to s 47 under the heads Parties to the suit p 154 above and Objection by party or his representative that property attached is not liable to attachment

On the ground that such property is not liable to attachment —The Allahabad High Court has held that these words refer to the case only of an objection made to attachment and not to the case of a claim preferred to the property attached Therefore any claim such as that of a mortgagee which would be inconsistent with the continuance of an unqualified attachment is liable to adjudication by the Court (*n*)

Where objection to attachment is raised after sale —The application for removal of attachment under this rule should be made before the property attached has been sold The executing Court has no power to entertain such an application after sale (*o*)

Mortgage decree – This rule does not apply where the property in dispute is directed to be *sold under a mortgage decree* The reason is that the property directed to be *sold* under a mortgage decree does not require to be *attached* by way of execution (*p*) and the benefit of the summary procedure afforded by the present rule is limited to claims and objections arising in respect of an *attachment* *A* obtains a decree against *B* for sale of certain property mortgaged to him and applied in execution for the sale thereof If the property is claimed by *C* he must proceed by a *suit* for a declaration that the property belongs to him and not by an application under this rule (*q*)

(*k*) *Abdul* v *Muhammad* (188) 4 All 190 *Daya* ... *m* v *Govardhandas* (1904) 8 Bom 4 3

(*l*) *Harsha* ... v *Nar* ... (1894) 18 Bom 60

(*m*) *R h m Bux* v *Abdul Ider* (190) 3? Cal 53 *P* ... *m* ... *R gh ban ma* (1897) 4 C l o 3 *S al* ... *L l* v *Ambika Persh d* (1898) 15 Cal 5 1 5 6 15 I A 1 3

(*n*) *Debi Das* v *Mol* ... *P p* ... *d* (19) 49 All 903 10 I C 9_ (_) A A 593

(*o*) *Maung Io Pe* v *Mau g Kua* (19 7) 5 Rang 7 1 107 I C 161 (8) A R 80

(*p*) *Day cl* ... *l* v *Her h* ... *d* (1880) 4 Bom 515 5 0 ... *nkat* ... *ra* ... *mah* v *Ram a* (18 9) Mad 108 11 ... *tan Lal* v *Bala Parsh d* (1918) Punj Rec no 58 p 19 44 I C 986

(*q*) *Humatr m* v *Kl sl al* (1894) 18 Bom 98 *De filolts* v *Pet s* (188) 14 Cal 631 ... *w l Da* v *B smill h* (189) 19 All 480 481 48 *M h bir Pr sad* v *Joge d a Nath* (19 1) 26 C W N 50 68 I C 71 (1) A C 4 9

O. [illegible] rr 5[illegible]

Whether rules 58 to 63 apply if the property attached is a debt—A obtains a decree against *B* for Rs 5 000 and attaches in execution of the decree a debt alleged to be due by *C* to *B*. Can *C* apply under this rule to have the attachment removed? Yes and if the attachment is not removed he may institute a suit for a declaration that no debt is due from him to *B* within a year from the date of the order against him. If no such suit is filed the order will be conclusive against him (r). In an earlier Bombay Case the opinion was expressed that the procedure laid down in the sections of the Code of 1882 corresponding to rr 58 to 63 did not apply to a debt attached in execution of a decree the reason given being that a *debt* was not property capable of *possession* within the meaning of rr 60 and 61 and that if *C* alleged that no debt was due the proper course was for the Court to satisfy itself as to its existence (r 66) and if it was satisfied that no debt existed it should abstain from proceeding to sell the debt (s). But this view has since been dissented from and it has been held that the words possessed of in rr 60 and 61 are not restricted to object capable of *physical* possession but apply also to object capable of *constructive* possession such as a debt. Moreover the word property in the present rule is wide enough to include a debt. As to a garnishee s right to set off see notes to r 46 above.

Appeal—No appeal lie under the Code from an order made in a claim case [see notes to s 47 Objections to attachment or sale by parties or their representatives and Objections to attachment by third parties. But it has been held by the High Court of Madras that an appeal lies from such an order under cl 15 of the Letters Patent and that where such an appeal is preferred the period of limitation for the suit contemplated by r 63 below is to be calculated from the date of the order made on appeal (t). The High Court of Rangoon has held that there is no appeal from an order under this rule under the Letters Patent (u).

59 [S 279] The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of the property attached.

Evidence to be adduced by claimant

Some interest—These words mean such an interest as would entitle the possession of the judgment debtor possession not on his own account but on a [illegible] or in trust for the claimant (v).

Or was possessed of—These words mean was possessed of for [illegible] and not as trustee for the judgment debtor. See the next rule and the notes the[illegible].

Limits of inquiry under rules 59 to 61—In *Sardhari Lal v Ambika Prasad* (w) their Lordships of the Privy Council said the Code does not prescribe the extent to which the investigation should go and though in some cases it [illegible] be very proper that there should be as full an investigation as if a suit were [illegible] the very purpose of trying the question in other cases it may also be the [illegible] and proper course to deliver an opinion on such facts as are before the [illegible] time leaving the aggrieved party to bring the suit which the law allows [illegible]. Rules 59 to 62 provide for a summary investigation into *possession* as distinguished from a thorough trial of *ultimate right*. It is impossible to separate altogether [illegible] possession and of title. Thus if the judgment debtor was in possession [illegible] been in possession as agent or trustee for another [rr 60 61] and the [illegible]

(r) [illegible] (1904) [illegible] M [illegible] 8 [illegible] (1914) 38 Bom 631 [illegible]
(s) [illegible] (1[illegible]0) 4 Bom [illegible]
(t) [illegible] (1916) [illegible] 33 Mad 1190 [illegible] 30
(u) [illegible] (19[illegible]7) [illegible] A R
(v) [illegible] v [illegible] 61 [illegible] M d 5 [illegible]
(w) (1[illegible]8) 15 I A 1[illegible]

into To that extent the title may be part of the inquiry in a claim case but no ultimate questions of trust are intended to be thrashed out (x) In execution of a decree obtained by A against B three pieces of Government securities are attached The securities stand in the name of C C applies for removal of the attachment under r 58 alleging that the securities belong to him and they are held by him on his own account A alleges that the securities are held by C *benami* for B It is not open to the Court under these circumstances to inquire whether C in whose name the securities stand is merely a *benamidar* for B The property must therefore be released from attachment (y) and the question whether C is merely a *benamidar* is a question of *title* which should be the subject of a suit under r 63 Similarly if the property attached is claimed by a person as a Mutawali under a deed of wakf and it is proved that he has been in possession as Mutawali for upwards of 20 years the property must be released from attachment The Court has no power under these rules to decide whether the deed of wakf is valid (z) The words possession of the judgment debtor or of some person in trust for him in rr 60 and 61 refer to cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the judgment debtor and not to cases in which very intricate questions of law may arise as to whether or not valid trusts may result in particular instances (a) If instead of determining the question of possession the Court determines the question of title and disposes of the application on the question of title the order is open to revision under s 115 of the Code (b) Similarly where a Court ought to inquire into the question whether the possession of the judgment debtor was on his own account or on account of some other person but it refuses to do so the order is open to revision The word conclusive in r 63 means non appealable it does not mean not capable of revision (c)

60 [S 280] Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that being in the possession of the judgment debtor at such time it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit from attachment

Release of property from attachment

Limits of inquiry under rules 59 61—See notes to r 59 above under the same head

Property in possession of some person not in trust for judgment debtor—*A* obtained a decree against *B* as the heir and legal representative of his

(x) *Najmu e s v Nacharaddin* (19 4) 51 Cal 548 83 I C 733 (4) A C 44 *Moh t Bhagw I hetter Mon* (1896) 1 C I W N 617 *Mo mohin j v Radha K i to* (190) 9 Cal 543 *Hamid v Bukter* (188) 14 C L 61 *Sleoraj v Gop l* (1891) 18 Cal 90

(y) (190) 9 Cal 543 *s pra*

(z) (1887) 14 C I 617 *s pra* *Pa gan mal v Serug n* (1915) 8 Mad L J 3 7 9 I C 8

(a) (1887) 14 Cal 61 6 0 *sup a*

(b) *Appa wam v Balakrishn* (19) 48 Mad L J 603 87 I C 189 (2) A M 588 (191) 3 Mad L J 3 7 J I C 8 *upra* (188) 14 Cal 61 *supra* (1891) 18 Cal) *upr*

(c) *Phomon S ngh A J Wells* (1923) 1 Rang 76 6 I C 67 (23) A R 195

deceased father and in execution of the decree attached certain money in the hands of *C* due to the estate of the deceased Prior to the date of the decree an order had been made by the High Court under ss 17 and 18 of the Administrator General s Act 2 of 1874 [now Act 3 of 1913 ss 10 and 11] authorising the Administrator General *to collect the assets of the deceased* It was held on the application of the Administrator General that the attachment should be removed As the order under the Administrator General s Act authorised the Administrator General to realise the debt from *C* as part of the assets of the deceased the amount in the hands of *C* could not be said to be property in the possession of a third person in trust for the *judgment debtor* (*B*) (*d*) See notes to r 62 below

Property in possession of a judgment debtor not on his own account but on account of or in trust for some other persons—Such property if attached should be released from attachment under this rule *A* consigned goods by railway to *B* and *B* had made specific advances against them and the goods on arrival at the railway station were attached in execution of a decree against *A* it was held that the goods though in the hands of the Railway Company were in the possession of *A* but on account of or in trust for *B* and should therefore be released from attachment on *B* s application (*e*)

Effect of order of release—An order made under this rule releasing the property attached from attchment is only provisional and liable to be set aside by a regular suit (r 63) It is not conclusive a suit may be brought to claim the property notwithstanding the order (*f*) It has not the effect therefore of putting an end to an attachment duly made so as to leave the claimant free to deal with the property as he likes If a suit is brought by the decree holder to establish his right to attach the property and the decree is in his favour it has the effect of setting asid *the order of release* and of maintaining the attachment originally made The result is that any private transfer of the property by the claimant though made *after* an order under this rule releasing the property from attachment will be void under s 64 if the right to attach is subsequently established by suit under r 63 (*g*) In execution of a decree obtained by *A* against *B* certain property standing in the name of *C* (*B* s son) is attached *C* objects to the attachment and the property is released from attachment under this rule *C* afterwards mortgages the property to *M* *A* then sues *B* and *C* for a declaration that *B* and not *C* is the real owner of the property and a decree is passed in his favour The property is then re attached and sold in execution of *A* s decree and purchased by *P* The mortgage to *M* is a transfer contrary to the attachment within the meaning of s 64 and *P* takes the property free from the mortgage The second attachment in such a case relates back to the date of the first attachment Similarly any payment made by a debtor to his creditor though after the attachment on the debt has been raised cannot prevail over the attaching decree holder who eventually succeeds in a suit brought by him under this rule (*h*) In the case however of an attachment before judgment it is obligatory upon the Court to withdraw such attachment upon the dismissal of the suit [O 38 r 9] and the reversal of the judgment of dismissal in appeal does not operate to revive the attachment which has been withdrawn (*i*)

Appeal—See notes to r 58 above Appeal

Revision—See notes to r 59 above Limit of inquiry under rules 58 to 61

(*d*) *Bhaj v Administrator General of Bombay* (1833) 3 Bom 4 8

(*e*) [illegible] (189) 1 Bom 8

(*f*) *Sadi Lal v [illegible] had* (1888) 15 Cal 5 1 15 I A 1 3

(*g*) *Bo o [illegible]* (1806) 3 C 1 8 3 *J Chandra v Mahesh* (1906) 33 Cal 1158 *I ol j Chand a v [illegible]* (1910) C W N 544 6 I C 348 *Ali d Khan v Lansh* (1909) 31 All 36 1 I C 9 1 *Lalu [illegible]* (1 6) 10 Bom 400 40 *[illegible] v M [illegible]* (19) 45 M 1 84 69 I C 64 ( ) A M 1 6 *[illegible] the matter f* (19) 7 1 01 118 I C 61 (29) A R

(*h*) (19) 4 Mad 84 63 I C 64 (—) A M 1 6 p

(*i*) *S [illegible] Meheba* (1911) 13 C L J 43 1 C 918 *Gopal Chandra v [illegible] Chandra* (1910) C W N 544 6 I C 348

61 [S 281] Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim

Disallowance of claim to property attached

Limits of inquiry under rr 59 to 61—See notes to r 59 above under the same head

Effect of order under this rule—An order in favour of a decree holder made under this rule does not enure for the benefit of other decree holders who are not parties to the proceedings (j)

Disallowance of claim—An order disallowing a claim under this rule is not a nullity and cannot be said to have been made without jurisdiction merely because the Court erroneously omits to decide the question of *possession* but disallows the claim on *some other ground* Such an order therefore is conclusive unless a suit is filed by the claimant as provided by r 63 of this Order (k)

Appeal—See notes to r 58 above Appeal

Revision—See notes to r 59 above Limits of inquiry under rules 59 to 61

62 [S 282] Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge

Continuance of attachment subject to claim of encumbrancer

Scope of the rule—This rule is an enabling rule empowering the Court to make an order continuing the attachment subject to a mortgage if the Court is satisfied that the property attached is subject to a mortgage in favour of some person *not in possession* The decisions are conflicting as to whether an order which refuses to recognize a mortgage or a charge and directs the continuance of an attachment *free* from such mortgage or charge is to be referred to rule 66 or to this rule The Bombay High Court and an old Allahabad case refer it to rule 66 (l) But the Madras High Court and a recent Allahabad case decide that rule 58 applies (m) The latt r view cuts down the mortgagee s time for suing to one year see s 63

Subject to a mortgage—The Code clearly makes a distinction between the case in which property is expressly sold subject to a mortgage and the case in which notice of an alleg d mortgage is given in the proclamation of sale The former is provided for by the present ru e and the latter by r 66 below In the former case the Court *after being satisfied of the existence of the mortgage* sells only the judgment debtor s equity of redemption that is to say the purchaser buys the property *subject to the mortgage* In the latter case he buys the property with *notice* of the mortgage *and subject to such risk as the notice might involve* the executing Court *does not decide whether the mortgage subsists or not* Such being the case if there is in reality a subsisting mortgage then

(j) *Jagan Nath* v *Ganesh* (1896) 18 All 413
(k) *Bhagwan D* v *Raj Nath* (191) 34 All 36 14 I C 90
(l) *Ga e h* v *Damoo* (191) 41 Bom 64 30 I C 913 *Durga P asad* v *M sa P m* (1904) 1 All L J 531
(m) *F lu* v *A mug m* (19 0) 38 Mad L J 397 56 I C 481 *L k h ma an* v *Pa sivam* (1919) 37 Mad L J 159 5 I C 0 *D b J* v *M h raj P p ha I* (19) 49 All 903 10 I C 9 ( ) A A 593

purchaser has to redeem it If on the other hand the mortgage specified in the proclamation of sale turns out invalid the purchaser acquires the property free from liability for the mortgage The point to be noted is that mere notice of an alleged mortgage in the proclamation of sale does not preclude the purchaser from questioning the validity of the mortgage (n) And it is also to be noted that if the mortgage specified in the proclamation proves to be invalid the judgment debtor is not entitled to claim from the purchaser the amount alleged to have been due on the mortgage (o)

Mortgage in favour of some person not in possession —It has been held by the High Court of Bombay that where a mortgagee is in possession of the mortgaged property at the time of attachment he can claim to have the attachment removed under r 60 the reason given being that a mortgagee cannot be said to be in possession as a trustee for the judgment debtor (p) The High Court of Patna has taken the contrary view (q) See notes to r 41 above See also s 73 (1)

Attachment of property agreed to be sold —An agreement for a sale of immovable property does not create any interest in or charge on the property even if earnest money has been paid The property may therefore be attached after the agreement and a sale thereof in execution will pass a good title to the auction purchaser (r) But it is otherwise where the purchase money has been paid and possession delivered for the purchaser is in that case entitled to a charge on the property (s)

Saving of suits to establish right to attached property

63 [S 283] Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive

Alteration in the rule —S 283 of the Code of 1882 ran as follows The party against whom an order under sections 280 281 or 282 [now rr 60 61 or 62] is passed may institute a suit to establish the right which he claims etc The present rule on the other hand says that where a claim or an objection is preferred the party against whom an order is made may institute a suit to establish the right which he claim etc The specific reference to the previous sections or rules has been omitted A corresponding change has also been made in the Limitation Act 1908 Sch I art II See notes below Ord r against party to a claim or objection

Parties to suits under this rule —This rule provides that unless the party against whom an order is made institutes a suit to establish the right which he claims to the property in dispute [within the period of a year from the date of the order as provided by art 11 of the Limitation Act 1908] the order made against him shall be conclusive Now the party against whom an order may be made may be the decree

(n) Sh b F n tr v Sheo Pra l (1906) 8 All 418 (s) I sl ott (1903) 33 Bom 311 1 I C 106 N r a N L (1911) 3 Bom 10 I C 913 J M I I ll K han (1913) 3 All 0 I C 1 I l lt I ra a na I (19 0) 4 C 1 446 I C 189 Agla S lt Mohalb t I ha (19 1) 43 All 4 9 63 I C 33 (1) A A 9 I sl L l Lall (13) 44 All 14 63 I C 90 ( ) A A 443 h l l J I a n (19 8) 30 I n L I 1136 (8) A B 444

(o) I z t u N m B g F t b S gh (1909) 31 All 583 36 I A 03 3 I C 93

(p) I r r t ll (18 3) 10 B H C 100 [C I C 1 3 s 46]

(q) B sw th I g (19) 1 Pat 1 9 0 I C 306 ( ) A I 408

(r) H ej I e l e (1894) 18 Bom 13 1 o Tr n f r of Prop rty Act 18 s 54

(s) Lall h I Choloo m (1900) 4 Bom 403 al o Transf r of Ir perty Act, 1 s (6) (b)

53 holder (r 60) or the claimant including an incumbrancer (r 61) or even the judgment debtor The result therefore is as follows —

1 The *decree holder* against whom an order is made under r 60 may sue the successful claimant for a declaration of his right to attach and sell the property released from attachment (*t*) To such a suit the judgment debtor is not a necessary party (*v*)

2 The *claimant* whose claim has been disallowed under r 61 may sue the decree holder to establish his right to the property attached (*t*) To such a suit the judgment debtor is a necessary party (*w*) And since the right conferred by this rule is not a personal one confined to the original claimant a *purchaser* of the interest of the original claimant can also bring a declaratory suit under this rule (*x*)

3 *A* attaches a house in execution of a decree against *B* The property is claimed by *C* The Court allows *C* s claim and the property is released from attachment This is an order against *A* the decree holder (r 60) Does it also amount to an order against the *judgment debtor*? In other words can it be said by reason of the fact that *C* s claim to the property is allowed that the order operates also against *B* the judgment debtor? Assuming that the order does operate against *B* it can only do so if *B* is deemed to be a party against whom an order is made within the meaning of this rule If so *B must bring a declaratory suit against C within a year from the date of the order* otherwise the order against him would be conclusive But it has been held that a judgment debtor who is not *in fact* a party to the claim proceedings does not in the eye of the law become such by reason solely of his being the judgment debtor Unless therefore he is a party *in fact* the order is not binding upon him and he may institute a suit even *after* the lapse of one year from the date of the order provided he does so within the ordinary period of limitation applicable to the suit to establish his title to and recover possession of the property from the claimant [C] (*y*) But if he was a party in fact the order would be binding on him unless he brought the suit within the period of one year

Alienation by claimant after order in his favour—A purchaser of property from a claimant after an order has been passed in the claimant s favour removing the attachment on the property but before the institution of a suit by the decree holder against the claimant under this rule is an alienee pendente lite and is not therefore a necessary party to the suit The alienee however takes the property subject to the provisions of s 52 of the Transfer of Property Act (*z*) In execution of a decree obtained by *A* against *B* certain property alleged to belong to *B* is attached *C* claims the property *C* s claim is allowed and the attachment is removed *C* then sells the property to *D* *A* then sues *B* and *C* for a declaration that at the date of attachment the property belonged to *B* and that he was entitled to attach it *D* is not a necessary party to the suit But the alienation by *C* to *D* will be affected by the doctrine of lis pendens as laid down in s 52 of the Transfer of Property Act 1882

Period of limitation for suit under this rule—The period of limitation for a suit under this rule is one year from the date of the order [Limitation Act 1908 Sch I art 11] In *Sardhari Lal* v *Ambika Pershad* (*a*) the Judicial Committee said It [that is the order] is not conclusive a suit may be brought to claim the property notwithstanding the order but then the law of limitation says that the plaintiff

(*t*) *Mitchell* v *Mathura Dass* (1885) 1 I A 150
( ) *Ghasi Ram* v *Mangal Chand* (1906) 8 All 41
(*v*) *Narayanrao* v *Balkrishna* (1880) 4 Bom 529
(*w*) *Ghasi Ram* v *Mangal Chand* (1906) 8 All 41 43
(*x*) *Ganesh* v *Kashi Nath* (1904) 26 All 89
(*y*) *Krishnasami* v *Somasundaram* (1907) 30 Mad 335 *Vadpalli* v *Dronamraju* (1908) 31 Mad 163 *Shivapa* v *Dod* (1887) 11 Bom 114 *Kedar Nath* v *Rakhal Das* (1888) 15 Cal 674 *Anant Ram* v *Damodar Das* (1914) Punj Rec no 84 p 96 I C 97
(*z*) *Krishnappa* v *Abdul Khader* (1915) 38 Mad 535 I C 11 *Srinivas* v *Shiddika* (1925) 27 Bom L R 931 89 I C 90 (1925) A B 413
(*a*) (1888) 15 I A 123 15 Cal 5 1

must be prompt in bringing his suit The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales and for that reason a year is fixed as the time within which the suit must be brought Where an appeal is preferred from the order the period of one year is to be calculated from the date of the appellate order (b) But although the period of limitation runs from the date of the order Article 11 of the Limitation Act does not apply unless the attachment has actually been effected in pursuance of the order (c)

Suit not necessary if the property is released from attachment within the period of limitation—Where after an order disallowing a claimant s claim and directing the attachment to continue the attachment ceases within the period of one year from the date of the order e g by reason of the dismissal of the application for execution under r 57 above for default of prosecution (d) or by reason of the withdrawal of attachment on payment by the judgment debtor to be decree holder of the amount of the decree (e) it is not incumbent upon the claimant to institute a suit under this rule or to prosecute the suit if he has already brought one and he will not be affected by any of the consequences which result from a failure to institute a suit under this rule In execution of a decree obtained by A against B certain property alleged to belong to B is attached C claims the property as his own but the claim is disallowed Within one year from the date of the order A s application for execution is dismissed under r 7 above C is not bound to bring a suit under this rule

Scope of suit under this rule Consequential relief—This rule provides that a party against whom the order referred to in this rule is made may institute a suit to e tablish his right to the property in dispute The words to e tablish his right to the property are it has been held wide enough to cover a suit not only for a decla ration but a suit for a declaration and consequential relief (f) Thus a plaintiff may under this rule sue to e tablish his right to the goods attached and for damage in re pect of the wrongful attachment Where the goods have already been sold he may sue for the value of the goods (g) He may also claim the full value of the good where the goods have depreciated owing to a fall in the market between the date of attachment and the date of sale (h) But he is not bound to claim any consequential relief (i) If he sues for a declaration of his title and obtains a decree he is entitled to bring a suit for po se sion against the auction purcha er Such a suit i not barred by the provi ions of O - r - above (j)

A suit under this rule is not limited by any special standard of evidence or of law The *claimant* may if nece sary thrash out his title in the fullest and most ultimate sense But if the title which he claims is not the ultimate full title to the property then of course he must be content to assert whatever the title claimed may be So too the *decree holder* may make out his debtor s title exactly as if it were a suit for po ession by the debtor (k)

Subject to the result of such suit the order shall be conclusive — This means that unless the suit is brought as provided by this rule the party against

(b) *Venugop l v Venkatasubbiah* (1915) 39 Mad 1196 8 I C 367

(c) *M th a Chetti v P lin appa* (19 8) 5 I A 56 109 I C 6 6 (8) A I C 139

(d) *V j u ne s Na h add* (19 4) 51 Cal 548 83 I C 33 (4) A C 44 *K imara v Th rar ja* (19 5) 48 Mal I J 616 8 I C 635 (5) A M 1113 *Fateh D n v Q tib Di* (19) 3 Lah 6 I C 543 ( ) A L 108

(e) *M l l v Nath l l* (19 1) 45 Bom 561 59 I C 4 (1) A B 3 *Lm st Chunder v Iaj B ll bh* (18) 8 Cal 9

(f) *S l v Iam B n C n d* (19) 16 Bom 608 *Pi r Iedl v I iajya* (1917) 40 Mad 733 36 I C 445

(g) (1917) 40 Mad 733 36 I C 44 *s p*

(h) *Ki s m h n v H sukh Da* (1890) 17 Cal 436 17 I A 1

(i) *C P The v O A O K P M F rm* (19 7) 5 Rang 69 106 I C 368 (8) A R 31

(j) *Ambu v K ll lamma* (1891) 14 M 1 3 *K stnam Pa h a Bee* (1906) 9 M 1 151 *Ve k tasubba v V g eswa adu* (19 9) 56 M d L J 5 110 I C 54 (8) A M 840

(k) *Naj m ess v Na l adl n* (19 1) 7 Cal 548 (4) A C 44 83 I C 33 *Vasu l e v Eknath* (1910) 35 Bom 9 t9 8 I C 639

whom the order is made cannot assert either as plaintiff or as defendant in any other suit or as a party to any other proceeding the right denied to him by the order (l) A obtains a decree against B and in execution of the decree attaches certain property alleged to belong to B C claims that he is in possession of the property under a sale from B of a date prior to the attachment and applies that the property be released from attachment The executing Court finds that C was in possession at the date of the attachment but that the sale to him was fictitious and disallows C s claim No suit is brought by C within the period of a year to establish his right to the property The property is then sold in execution and purchased by P P then sues C for possession C is precluded in this suit from again asserting his right as purchaser from B No suit having been brought by him within the period of limitation the order disallowing his claim became *conclusive against him under this rule* Similarly if *A in execution of* a decree against B attaches a debt alleged to be due by C to B and C objects to the attachment on the ground that no such debt is due and C s objection is over ruled but C brings no suit under this rule he will be precluded in a suit against him by the execution *purchaser* of the debt from contending that no debt was due by him to B (m) The result would be the same even if C had brought a suit against A and B to establish his right to the debt and the suit was dismissed The result of failure to file the suit as also of the dismissal of the suit if one is filed is that the order becomes conclusive not only as regards the parties to the order or the suit but also as regards the auction purchaser In either case C cannot assert his claim in a substantive suit against the auction purchaser nor can he set it up by way of defence to a suit against him by the auction purchaser (n)

The order is conclusive as against the party against whom it is made — A obtains a decree against B and attaches B s property in execution of his decree C claiming to be a mortgagee of the property puts in a claim under r 58 A contends that the mortgage is not valid but his contention is disallowed No suit is instituted by A as required by the present rule and the order becomes conclusive against him The property is then sold subject to C s mortgage and it is purchased by A Subsequently C sues A (purchaser) and B (mortgagor) to recover the mortgage debt by sale of the mortgaged property B not being a party to the claim proceeding may contend in C s suit that the mortgage is not valid but A cannot for the order became conclusive against him The fact that B the judgment debtor can impeach the validity of the mortgage and that the property purchased by A is the property which belonged to B does not entitle A to be placed in B s position so as to give him the same right to attack the mortgage as B has (o) See notes above Parties to suits under this rule para 3

Property in respect of which order is conclusive — An order in a claim case is conclusive only as regards the particular property in dispute (p)

Order against party to a claim or objection —

1 An order made on an application which does not come within the scope of r 58 is not an order to which the present rule applies (q)

2 *Order dismissing a claim for default* — Section 283 of the Code of 1882 ran as follows The party against whom an order under sections 280 281 or 282 is passed

(l) [illegible] v [illegible] (188) 10 Bom 35 *Ba lur* v *Lak hn a* (18) 4 Mad 30 *[illegible] ma giuda* v *Pa e l* (1898) Bom 640 [illegible] v *Ash to h* (1900) Cal 14 *Kojy a* v *Doory* (1906) 9 M d 5

(n) *S bb* v *Mo l e* (19 3) 44 Mad L J 88 I C 5 8 (3) A M 56

( ) *St g h* v *Cl bl* (19 1) 44 Mad 68 60 I C 0 (1) A M 10

(o) *P mu A* v *I al pp* (191) 3 Mad 35 8 I C 11

(p) *A h a B b* v *Awaljal E b* (191) 44 Cal 698 37 I C 88

(q) *B lakri hn* v *P ngan* (19) 4 Mad 0 69 I C 3 6 ( ) A M 183 [att hm nt b for i ency] *B th* v *Li g r* (19) 1 Lat 159 0 I C 306 ( ) A P 408 [u ufructuary mortg ge]

may institute a suit etc It was accordingly held in some cases that the order referred to in s 283 must be one made *after investigation* of the claim *as contemplated by sections* 280 281 *and* 282 and that an order dismissing a claim *for default and without investigation* did not come under that section Accordingly it was held that an order dismissing a claim for default did not become conclusive against the party against whom it was made so as to preclude him from instituting a suit more than one year after the date of the order provided the suit was within the ordinary period of limitation (r) The language of the present rule is more comprehensive than the language of s 283 This rule make no reference to the previous rules namely rules 60 61 and 62 and a corresponding change has also been made in art 11 of the Limitation Act The result is that the rule applies to every order made *against* a party to a claim preferred or an objection made under r 58 even if the order was made for *default and without investigation* (s) But this does not take away the right of the party to apply to have the order of dismissal for default set aside (t)

3 *Order refusing to investigate a claim on the ground of delay* —Where a claim or objection is preferred under r 58 and the Court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed the order is one made against the claimant or objector within the meaning of this rule (u)

4 An order on a claim petition stating that as the petition was filed late the claim will be notified to the bidders is in effect an order rejecting the claim Such an order is one made against the claimant within the meaning of this rule (v) But an order in these terms namely Sale stopped the claim cannot be investigated by this Court petition dismissed has been held not to be an order against the claimant (w) Similarly where a mortgagee applied that the sale proceeds should be kept in Court to satisfy his mortgage but the application was dismissed on the ground that the sale had already taken place and the Court had no jurisdiction to hear the application it was held that there was no order against the mortgagee (x) Where A preferred a claim to the property attached on the ground that he was entitled to a share in the property and the Court made an order in these terms namely Whatever right the judgment debtor has will pass by the sale the claim does not require any further investigation the claim put forward will be noted in the sale proclamation it was held that it was not an order against the claimant (y)

5 If in point of fact there has been no attachment art 11 of the Limitation Act cannot apply for unless there has been an attachment there can be no order made on an objection lodged to it nor can any claim be made to the property so attached and without such an order there can be no terminus a quo for the running of limitation and with this limitation itself is non existent So when a mortgagee preferred a claim in the belief that there was an attachment over the property mortgaged and it is subsequently proved that the order of attachment had never been carried out the Privy

(r) S r l [illegible] l a [illegible] (190) 31 M 1 5 S [illegible] [illegible] 7 [illegible] Iro d (190) 11 C W N 48

(s) [illegible] F [illegible] D (1918) 4 [illegible] 85 44 I C 6 [illegible] (19 1) 6 C W N 1 6 64 I C 13 [illegible] 160 [illegible] (1916) P [illegible] 66 p 01 3 I C 3 1 [illegible] (19) 41 M [illegible] 9 5 97 [illegible] 48 I C [illegible] (1919) 41 All 6 3 50 I C 48 [illegible] (19) 49 All 103 10 I C [illegible] (2) A A 593 [illegible] (1918) 40 All 3 44 I C [illegible] [illegible] 1 I ang 4 I 6 I C 811 (4) A I 4

(t) P [illegible] a (19 4) 4 M d 6 1 9 I C 818 (4) A M I

(u) [illegible] (1918) 41 M [illegible] 48 I C [illegible] (19 3) 45 All 438 4 I C 10 4 (3) A A 43 [illegible] (19 4) 4 M d 160 I C 64 (4) A M 111 [illegible] (19) 48 M L J 616 61 619 8 I C 83 ( ) A M 1113

(v) [illegible] (1918) 41 M d [illegible] 4 I C [illegible]

(w) [illegible] (19 1) 41 Mad L J 19 [illegible] I C 431 (1) A M 4 8

(x) [illegible] (19) 43 M L J 46 [illegible] I C 648 (3) A M 8

(y) [illegible] 41 (19 3) 44 M d L J 141 I C 8 (3) A M 9

3 Council held that the order passed rejecting the claim was a nullity and art 11 did not apply to the mortgagee s subsequent suit on his mortgage (z)

6 See also notes to r 62 above Scope of the rule

7 There is a material difference between an order which falls under this rule and an order which fall under r 66 below In the one case if the party affected does not sue within 12 months to set it aside it becomes conclusive In the other ca e it ha no such effect (a)

8 No suit can lie under this rule unless there has been an order either allowing or disallowing an objection to attachment A person is not entitled to object to an attachment and then to withdraw the attachment and bring a suit under this rule (b)

Orders in proceedings for attachment before judgment—Rules 58 to 63 apply to claims preferred to property attached before judgment (c) But a Provincial Court of Small Causes has no power to attach immovable property before judgment and an order made by such a Court adjudicating a claim to property so attached is *ultra vires* (d) See notes to s 7 on p 21 above

Suit for refund of purchase money—This rule applies to a suit to establish the plaintiff s right to the *property in dispute* It does not apply to a case where a plaintiff whose claim to the property is disallowed under r 61 sues the judgment debtor for a refund of the money paid by him for the purchase of the property *A* sells certain property to *B* *C* obtains a decree against *A* and attaches the property in execut on. *B* claims the property as purchaser but his claim is disallowed. *B* sues *A* for a refund of the purchase money more than a year after the date of the order but within the ordinary period of limitation The suit is not barred by limitation The reason is that r 63 does not apply to such a suit (e)

Revival of attachment on the suit being decreed—See notes to r 60 above Effect of order of release

Payment by claimant under protest—If the claimant fails and the attachment i not removed he is not compelled to bring a suit under this rule for a declaration of his title to the property he may prevent the sale of the property by paying the decretal amount to the decree holder and then sue for it as money paid under compulsion of law i e under pres ure of execution proceeding (f) Further the claimant is not bound to take proceedings at all under the Code to set aside the attachment He may pay the amount of the decree under protest and then sue as stated above (g) See notes to r 64 below

Jurisdiction—In a suit for a declaration that property is not liable to attachment and sale in executi n of a decree where the value of the property is in exce s of the amount claimed in execution of the decree the value of the suit for purposes of jurisdiction is not the value of the property but the decretal amount (h) But where the plaintiff seeks not only for a declaration that the property is not attachable but

(z) *Muth ah Chett v Pala ppa* (19 8) 5 I A 6 109 I C 6 6 (8) A I C 139 r ersin *Muthiah Ch tt v Pal ppa* (19 1) 4 Mad 90 0 I C 43 ( ) A M 44

( ) *Ch n lal v Pira Miyaj* (19 7) 9 Bom L R 8 101 I C 33 (7) A B 4

(b) *Mull P j v P lla* (19 6) 7 Lah 35 93 I C 997 (6) A L 348

(c) *Pras da N yudu v B ayy* (1918) 41 Mad 849 47 I C 1000 [F B] *P jkishore v Bhabatosh* (19 9) 49 Cal. L. J 51

(d) *Sadek Al v Sa at Al* (19 3) 3 C W N 16 80 I C 300 (4) A C 193

(e) *F ti Iam v Barhmaj t* (19 4) 46 All 4 7 I C 8 (4) A A 30

(f) *D lich d v Ramkishen* (1881) 7 Cal 649 8 I A 93 *Jugi o v Rajah S gh* (1888) 15 Cal 6 6 See al o *J stalinna v Secretar of Stat* (1890) 14 Bom 99

(g) *K nhay Lal v Nat o al Bank of Ind* (1913) 40 Cal. 598 40 I A 56 18 I C 949 See also *Mahad o v Drigbija* (19 1) 43 All 2 60 I C 881 (1) A A 81 [debt attached admitted to be due]

(h) *Khet v M mtaz Begam* (1916) 38 All 31 I C 8 9 *A a d K wa v Ram N ra j a Das* (1918) 40 All 505 45 I C 494 See al o *Ph l K mar v Gha sh m Misra* (1908) 35 Cal 0 35 I A

for a declaration of his title to the property as against the decree holder and the judgment debtor the value of the suit for purposes of jurisdiction is the value of the property (i)

Burden of proof—The burden of proof in a suit under this rule lies on the plaintiff as in other cases and not on the defendant (j)

Effect of attachment on adverse possession—The High Court of Madras has held that attachment of property in execution of a decree does not arrest the running of time in favour of a party holding the property adversely to the judgment debtor (k) *A* obtains a decree against *B* In June 1921 *A* attaches certain property alleged to belong to *B* *C* objects to the attachment and the attachment is raised in April 1922 In January 1923 *A* sues *C* under this rule for a declaration that the property belongs to *B* and that he is entitled to attach it *C* contends that he has been in possession of the property adversely to *C* for upwards of 12 years and that *A* s suit is barred by limitation *At the date of the attachment* *C* s possession was for 11 years only and *at the date of the suit* it was for upwards of 12 years According to the Madras High Court the period of *C* s possession is to be counted up to the date of the suit and *A* s suit is therefore barred the reason given being that attachment could not prevent the running of time in favour of *C* On the other hand according to the Bombay High Court the period of *C* s possession must be counted only up to the date of attachment and hence *A* s suit is not barred the reason given being that the real question in such a case was whether the judgment debtor [*B*] had a subsisting right to the property *at the date of attachment* (l) According to the Calcutta High Court also the material date is the date of attachment (m)

Fraudulent transfer by judgment debtor—Where a claim is made to the property attached by one claiming to be a transferee from the judgment debtor and the claim is disallowed and the claimant subsequently institutes a suit under this rule to establish his title to the property it is open to the attaching creditor to plead in defence that the transfer was in fraud of the general body of creditors (n) In execution of a decree obtained by *A* against *B* *B*'s property is attached *C* claims the property as having been purchased by him from *B* before *A* obtained the decree against *B* but the claim is disallowed *C* then sues *A* and *B* under this rule to establish his right to the property *A* is entitled to plead in defence that the transfer by *B* to *C* was made with intent to defraud *B*'s creditors If the claim is allowed and a suit is brought by the attaching creditor under this rule he is entitled to sue on his own behalf He is not bound to sue on behalf of himself and all other creditors of the judgment debtor (o) Thus if in the case put above *C* s claim is allowed and the attachment is raised it is competent to *A* the attaching creditor to sue *B* and *C* under this rule to establish his right to attach the property and he may prove in such suit that the transfer by *B* to *C* was fraudulent *A* is not bound to bring a representative suit on behalf of all the creditors of *B*

Damages for wrongful attachment—Where goods attached as belonging to the judgment debtor are claimed by a third party and his claim is disallowed he may sue under this rule not only for a declaration of his title to the goods but also for the value

(i) *S* *t* *Pegi* v *M her Ch* ... (191) P nj Rec n 8 p 93 18 I C 8 0

(j) *Sa nh J* v *Bl* (1908) 30 All 3 1 *I r ila* *Ie k y n* (19 4) 4 M ... J 14 9 I C 8.. (4) A M 0 ... *B* ... *K* ... *n* (19 1) 3 Lah L J 198 6 I C 876 (1) A I 0 ... *M* *F r* *Ma* ... *B* *I y n* (19 7) 5 Rang 8 10 I C 88 (7) A I C 37 [I C]

(k) *Set* ... (1901) 11 M d L J 344 *R* ... *pa* *tta* ... (19 5) 49 Mad L J 6 6 90 I C 103 (6) A M 4

(l) *Yand o* v *Ek* ... *ath* (1911) 35 Bom 9 8 90 ... 8 I C 633

(m) ... *ne* ... *addi* (19 4) 1 C 1 54 83 I C 33 (4) A C 44

(n) *Rama a* ... *M ll ppa* (19 0) 43 Mad 60 59 I C 94 ... *b ma* ... *M tt* ... (1918) 41 M d 61 43 I C 6 1 [F B] *Abd l K d* ... *M a* (191) 15 Cal L J 643 14 I C 15 *Bhi* ... *Laxm* (19..) ... B ... L R 743 5 I C 430

(o) *Polke* v *K* ... *h m d* (1919) 4 Mad 143 51 I C 14 ... (19 8) 5 Ran 5 8 ... I C ... ( ) A P I

of the goods as where they have depreciated owing to a fall in the market between the date of attachment and the date of sale He is not bound to allege and prove that the decree holder resisted his application for the removal of attachment maliciously and without probable cause (p)

Insolvency of judgment debtor —Leave of the Insolvency Court under sec 28 (?) of the Provincial Insolvency Act 1920 is not necessary for the commencement of a suit by the attaching creditor under this rule for a declaration that the property belonged to the judgment debtor at the date of the attachment (q)

Costs —The costs incurred in the summary proceeding under rule 58 may be dealt with in the suit filed under this rule (r)

Court fee —The Court fee payable upon the plaint in a suit by a person whose claim to property attached in execution has been dismissed is Rs 10 under the Court Fees Act Sch II art 17 whether the claim is dismissed for default or after investigation (s)

Revision —See notes to r 59 above Limits of inquiry under rules 59 to 61

Sale generally

64 [S 284] Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same

Power to order property attached to be sold and proceeds to be paid to person entitled

Sale of goods not belonging to judgment debtor —*A* obtains a decree against *B* In execution of the decree *A* points out to the sheriff s agent goods belonging to *C* as the property of *B* *C*'s goods are thereupon attached by the sheriff s agent and sold in execution *C* is entitled to claim from *A* the market value of his goods as on the date of attachment The sheriff is not liable in such a case (t)

65 [S 286] Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed

Sales by whom conducted and how made

Save as otherwise prescribed —See r 76 below The Bombay High Court has held that the Court may for good reasons direct that the bidders at an auction sale shall be restricted to a particular class of persons (u)

Acceptance of bid —There is nothing in the Code to require a bid to be accepted by a Judge before a contract of sale can be held to be complete The officer conducting the sale is the person to declare the highest bidder to be the purchaser (v) It would

(p) *Ki orim h n v H lh D s* (1890) 17 C I 436 17 I A 17
(q) *S l m j m v ha mham* (19 9) 6 Mad L J 489
( ) *E F M Firm v Maung Po Ky ne* (19 8) 6 Rang 408 11 I C 85 (28) A R 48
(s) *Ph l K mari v Gha hyam M sr* (1908) 35 C l [P C] *Satyendra N th v Sl ra* (1921) 6 C W N 1 6 1 8 64 I C 713 ( ) A C 166
(t) *K ss ri ohun v Harsukh Das* (1890) 17 Cal 436 17 I A 17 *G ma v Gokaldas* (18 9) 3 Bom 4 See also *Dorab Ally v Abd l Azee* (1881) 5 I A 116
( ) *D gamb r v Hari* (19 7) 9 Bom L R 10 100 I C 1008 (7) A B 143
(v) *M j Ohn T n v P R M I S R M Ch tty Firm* (19 9) 7 Rang 4 5 (9) A R 311

seem that in Patna Court sales are conducted by the Nazir but the bid is to be accepted by the Munsif Until such acceptance there is no contract of sale (*w*)

66 [S 287] (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court

Proclamation of sales by public auction

(2) Such proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(a) the property to be sold,

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government,

(c) any incumbrance to which the property is liable,

(d) the amount for the recovery of which the sale is ordered,

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification the matters required by sub rule (2) to be specified in the proclamation

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto

Alterations in the rule —

1 The provision in sub r (2) for notice to be given to the decree holder and the judgment debtor is new

2 Sub r (3) is also new

(*w*) *Ja bahad* v *Mat Adla* (1 3) P t 514

; **Incumbrances to which the property is liable**—Where a decree holder who held a simple money decree stated in his application [sub r (3)] that the property to be old was subject to a mortgage in his favour but no mention was made of the mort gage in the proclamation the omission not being due to any fraud on his part it was held that he was not estopped from enforcing his mortgage against the auction purchaser (*x*) But he would be so estopped if he omitted to mention his mortgage in the application (*y*) See notes to r 62 of this order

Value of the property—Clau e (e) of the rule provide that the proclamation shall specify as fairly and accurately as possible every other thing which the Court con iders material for a purchaser to know in order to *judge of the nature and value* of the property There can hardly be any doubt that the value of the property to be put up for ale is a material fact within the meaning of cl (e) As said by the Judicial Com mittee in *Saadatmund Mohan* v *Phul Kuar* ( ) Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be consi dered as one of the e things which the Court considers material for a purchaser to know and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated as fairly and accurately as possible If any enquiry into the value of the property is nece sary the Court should hold an enquiry (*a*) If the value is understated in the proclamation and the understatement is such as is calculated to mislead bidders and to prevent them from offering adequate price and the sale results in a price altogether inadequate the sale must be set aside on the ground of material irregularity in publishing or conducting the sale within the mean ing of r 90 below (*b*) In a Calcutta case it was said that the Court was not bound to investigate the value of the property (*c*) but these remarks were *obiter dicta* (*d*) and it was held in a later case that the Court is bound under this clause to inve tigate the value and insert it in the sale proclamation (*e*) In view of the decision of the Judicial Com mittee in the ca e cited above there is no doubt that the value of the property should be stated as fairly and accurately as pos ible in the sale proclamation. The Court may in an exceptional case state in the proclamation the values stated both by the decree holder and the judgment debtor instead of attempting itself to value the property (*f*) The Madras High Court has held that the Court is under no obligation to fix in the proclamation of sale its own valuation of the property to be sold (*g*)

Specifying property to be sold.—See notes to r 90 below Material irregu larity in publishing or conducting sale no 1A

Specifying revenue—See notes to r 90 below Material irregularity in publish ing or conducting sale nos 1A and 2

Specifying incumbrances.—See notes to r 90 below Material irregularity in publishing or conducting sale no 1A

Proclamation of sale to be settled by Court—The power to ettle the pro clamation of sale cannot be delegated to a commissioner The proclamation must be settled by the Court (*h*) If it is settled by a commissioner the sale would be invalid.

(*x*) *Pam Sarup* v *Bharat S gh* (1921) 43 All. 703 64 I C 63 ('21) A A. 113

( ) *Kalidas* v *Prasa a Kumar* (19 0) 47 Cal 446 455 4 6 5 I C 189

( ) (1898) 20 All. 41 418 25 I A 146 *Munsh I gh ath* v *Ha-anlal* (191) P t. L J 130 3 I C 8 *Ia Beni Pras d* v *Edal S ngh* (1919) 4 Pat L. J 3 49 I C 195

( ) *S end a Moh n* v *Hurruk Chand* (1908) 1 C W N 54

(*b*) *Sand ma d* v *Phul Kuar* (1898) 0 All. 41 25 I A 146 *Sivasami* v *Rat sami* (1900) 23 Mad 563 See also *Dha uk dhari Si gh* v *Mahabir Pershad Si gh* (190) 31 I A 164

( ) *Kashi* v *Jamuna* (1904) 31 Cal 92

(*d*) *Sa e dra* v *Hurruk Cha d* (1908) 1 Cal W N 54

( ) *La hm n* v *Ga ga* (191) 15 Cal. W N 13 6 I C 150

(*f*) *Bejoy S gh* v *A hutosh* (1923) 8 C W N 55 83 I C 430 ('24) A C 589

(*g*) *Thiruvengadaswami* v *Govindaswam* (1928) 51 Mad 655 109 I C 698 ('28) A M 503

(*h*) *S bramania* v *A h ta* (19 6) 49 M d 333 91 I C 8 ('26) A M 55

Duty of Court in respect of Court Sales—In a case in which the terms of the proclamation were not clearly explained by the officer of the Court conducting the sale to a bidder who asked for an explanation and who was thus misled into buying property which was subject to mortgages amounting to more than its value the Judicial Committee in setting aside the sale observed In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers It would be disastrous it would be absolutely shocking if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this (i)

Non compliance with provisions of this rule—See notes to r 90 below Material irregularity in publishing or conducting sale nos 1A and 2

Where judgment debtor lies by see notes to r 90 below Waiver and estoppel

Appeal—An order under this rule not being included in the list of appealable orders given in O 43 is not appealable as an order The question then arises whether an order under this rule is an order in execution proceedings within the meaning of s 47 Now an order in execution proceedings may be a final order that is it may conclusively determine the rights of parties or it may be interlocutory In the former case the order operates as a decree and is appealable as such [s 2 (2)] but not in the latter case [see notes to s 47 Interlocutory orders in execution proceedings] The question therefore in each case is whether a particular order made under this rule *conclusively* determines the rights of the parties or not

A Full Bench of the High Court of Madras in *Sivagami* v *Subrahmania* (j) which was a case under the corresponding section 287 of the Code of 1882 held that no proceeding of a Court under that section in relation to the proclamation of sale is an order within s 244 (now s 47) so as to be appealable as a decree In the course of the Order of Reference the learned Judges said We are disposed to think that the preliminary objection is well founded and that under section 287 Civil Procedure Code the proceedings are in themselves administrative and not judicial but that if and when a sale does take place if ever and it has to be judicially confirmed objection may be taken to the confirmation of the sale on any of the grounds mentioned in section 311 Civil Procedure Code [now O 21 r 90] some of which may relate to the contents of the proclamation This view receives strong corroboration from the provision enacted by section 288 Civil Procedure Code that no Judge or other public officer shall be answerable for any error misstatement or omission in any proclamation under section 287 Civil Procedure Code unless the same has been committed or made dishonestly a provision which in view of Act XVIII of 1850 would have been quite superfluous if proceedings under section 287 Civil Procedure Code were judicial and not administrative In delivering their opinion the Full Bench said We concur in the reasons given in the Order of Reference and we may add that the view that the proceedings in themselves under section 287 are of an administrative and not of a judicial character is further supported by the fact that special provision is made in section 287 [now O 21 r 66 (4)] to summon witnesses and make enquiry into the matters referred to in the section a provision which would be superfluous if the proceedings were judicial It has accordingly been held by that Court that an order under this rule determining the value of the property to be sold the place where the sale is to take place the lot in which it is to be sold and the amount for the recovery of which the property is to be sold is not a judicial but an administrative order and that it does not come within s 244 (now s 47) and is not

(i) *K l M a* *H rpe* *k* (1909) 36 Cal 3 3 3 4 36 I A 3 3 1 I C 1
(j) (1904) Mad 59 *Ch damba am* v *The*

r *a* (1923) 46 Mad 6 80 I C 155 (A M 1

6 appealable (*k*) It may here be stated that s 288 of the Code of 1882 has not been reproduced in the present Code In a case under this Code (*l*) the High Court of Madras observed that the Full Bench decision was good law even under the pre ent Code notwith standing the omi sion of s 288 though in another case (*m*) Schwabe C J expre ed a doubt on that point As to a decision as to the order in which the properties are to be put up for sale the Madras High Court has held that such a decision is an order within sec 47 and that it is appealable if it affects the rights of co defendants *inter se* for example in a case of execution of a decree on a mortgage where the interests of the owners of the items of the mortgaged properties will be seriou ly affected by the order in which the properties are sold (*n*) In a recent case the same High Court held that the Court is under no obligation whatever under this rule to fix and state in the proclamation of sale its own valuation of the property to be sold (*o*)

The Bombay High Court follows the Madras Full Bench Case (*p*)

The High Court of Calcutta has held that an order under this rule may be either final or interlocutory If it is final it falls within s 47 and is appealable as a decree but it is not appealable if it is interlocutory It has accordingly been held that an order determining the value of the property to be sold is merely interlocutory and is not appealable (*q*) An order in the following term let sale proclamation be issued in the meantime I shall hear the objection of the judgment debtor is also interlocutory (*r*) But an order adju dicating upon a dispute as to the boundaries of the property sold and determining that certain accreted land should be included in the property to be sold is final and is appeal able as a decree (*s*) It may be observed that it is not safe to follow such decisions under the Code of 1882 as they proceeded on points in which the definition of decree differed from that in the present Code

The High Court of Allahabad has also held that an order under this rule determin ing the value of the property to be sold does not fall within s 47 and is not appealable The reason given is that in such a case the Court judicially decides nothing (*t*)

In two earlier cases the High Court of Patna held that an order under this rule deter ming the value of the property to be sold was merely interlocutory and was not therefore appealable (*u*) In a recent Patna case a Bench of three Judges held that an order of the Court determining any of the particulars to be stated in the sale proclama tion under this rule is not a final order and is not appealable It was accordingly held in that case that an order refusing to notify a lease in the sale proclamation was not final and was not appealable (*v*)

Letters Patent appeal—An order of a single Judge of the High Court sitting on the Original Side refu ing to alter the upset price fixed in a proclamation of sale or to direct the sale of the property in lots or to postpone the date of sale is not a judgment

(*k*) (1904) 27 Mad 2 9 *supra* *Ramanathan* v *Vankata helam* (19 3) 44 Mad L J 599 I C 836 (23) A M 619 (order fixin upset price) *Meenakshisundaram* v *Chokkal nga* (19 9) 56 M d L J 6 4 (9) A M 506

(*l*) *La ka* v *La ki* (19 4) 46 Mad L J 19 78 I C 8 9 (4) A M 5 7 *supra*

(*m*) *Ravemba* v *M hta & So s* (19 4) 46 Mad L J 1 7 I C 901 (4) A M 34

(*n*) *Velat asa* v *The Madura Hindu Labh Nidh Ltd* (19 3) 45 Mad L J 478 *Na as mha Subbaray udu* (19 6) 51 Mad L J 135 *Meenakshisu da am* v *Chokk l nga* (19 9) 56 Mad L J 6 4 (9) A M 506

(*o*) *Th ru enaadam amy* v *Co ndaswamy* (19 1) 51 Mad 6 5 109 I C 698 (8) A M 503

(*p*) *Kri h a ao* v *Krishnarao* (19 8) 5 Bom 444 111 I C 89 (8) A B 245

(*q*) *De kinanda* v *Bansi S ngh* (191) 16 C L W N 1 4 10 I C 371 *Pun h Duar* v *M* (191) 16 Cal W N 9 0 17 I C 88

(*r*) *Jogesh* v *Heme d a* (19) 3 Cal L J 1 0 64 I C 547 (1) A C 6 9

(*s*) *D vand Nath* v *Ra la h Cha I a* (19 4 9 C W N 5 6 80 I C 861 (5) A C 318

(*t*) *Ajudh a Prasad* v *G p Nath* (1917) 39 All 41 39 I C 578 *Muham d Z karia* v *A h i* (19 6) 48 All 60 9 I C 614 (26) A A 63

(*u*) *Deoki d* v *Rajah Dh le hwar Prasad* (191) Pat L J 13 33 I C 818 *Sauren d natl* v *M tu jay* (19 0) 5 Pat L J 0 58 I C 45

(*v*) *Mohu N* v *Thaka* (19) 4 Pat 731 88 I C 33 (5) A P 500

within the meaning of cl 15 of the Letters Patent but merely an interlocutory order and no appeal lies from it under that clause (u)

Death of judgment debtor pending execution —If the judgment debtor has died before issue of notice to him under this rule his legal representatives must be brought on the record If the legal representatives are not brought on the record the sale would be void (x)

Non appearance of legal representative and res judicata —The failure of the legal representative of a deceased judgment debtor to attend pursuant to a notice under sub r (2) [App E form no 28] at the hearing of an application to settle the terms of a sale proclamation does not estop him on the principle of res judicata from contending thereafter that the property attached belongs to him personally and that it does not form part of the estate of the deceased judgment debtor The notice under sub r (2) is merely to settle the terms of the proclamation it is not for determining questions of *title* to the property (y)

Form of proclamation of sale —For form of proclamation of sale see Appendix E form no 29

Form of notice under sub rule (2) —For form of notice under sub r (2) see Appendix E form no 28

67 [S 289] (1) Every proclamation shall be made and published, as nearly as may be in the manner prescribed by rule 54, sub rule (2)

Mode of making proclamation

(2) Where the Court so directs, such proclamation shall also be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot in the opinion of the Court, otherwise be given

Sub rule (1) —If the property to be sold consists of several villages which are all close together it is not necessary to make proclamation in every village (z)

Sub rule (3) property divided into lots for separate sale – This sub rule is new It incorporates the decision in the undermentioned case (a)

Non compliance with the rule —Omission to carry out the provisions of this rule does not render the sale *ipso facto* void But such omission amounts to a material irregularity within the meaning of r 90 below and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (b) See the proviso to r 90 below

Sub r (2) —Note that under this sub rule the Court *may* direct publication of the proclamation it is not incumbent on the Court to do so (c)

(u) Jai ... v Mehta ... So (19 4) 46 M 1 L J 1 7 I C 901 (4) A M 34

(x) Chi ... Prasad v J ... ina (19 7) 49 All 830 10 I C 9 (.8) A A 4

(y) Ch ... bam v Th ... (19 3) 46 Mad 69 9 1 4 I C 155 (4) A M 1 (F B)

(z) Mal ... Bah d v I C L I (19 9) 6 P t 98 10 I C 689 (9) A I 5

(a) P dro v Jaltho (1888) 1 Bom 369

(b) Nan Kumar v Gol m Ch der (1891) 18 Cal 4

(c) Gopi Ch d v Benarsi Das (1919) 1 Lah L J 19

68 [s 290] Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment debtor, take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the Court house of the Judge ordering the sale

Time of sale

Non compliance with the rule—If a sale is held before the expiration of the period prescribed by this rule it is not void but the case is one of material irregularity within the meaning of r 90 and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (*d*)

69 [s 291] (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reason for such adjournment

Adjournment or stoppage of sale

Provided that, where the sale is made in, or within the precincts of, the Court-house, no such adjournment shall be made without the leave of the Court

(2) Where a sale is adjourned under sub rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment debtor consents to waive it

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale

Omission to fix the day of adjourned sale—Where a sale is adjourned but no day is specified to which it is adjourned the sale is void (*e*)

Omission to fix the hour of adjourned sale—Such an omission amounts to a material irregularity within the meaning of r 90 below (*f*)

Omission to issue fresh proclamation—Such an omission amounts to a material irregularity within the meaning of r 90 below (*g*) see notes to r 90 Material irregularity in publishing or conducting sale No 7 But it has been held that the

(*d*) *Ta ad luk* v *Ahm d* (1894) 1 Cal 66 20 I A 1 6 *Kohil* v *Edal Singh* (1904) 31 C 1 395

(*e*) *Motal ar* v *Mohamm d* (19 4) 40 C L L J 311 84 I C 00 (5) A C 01

(*f*) *S rn M j* v *D kl a* (1897) 24 Cal 91 *Mahabir* v *Dha ukdhari* (1904) 31 Cal 815 818 *Bh kh n* v *Surja M n* (1901) 6 C W N 48 *B b Ram* v *Ima dlah* (19 7) 49 All 40 99 I C 9 6 (7) A A 41

(*g*) *B g l Chander* v *R me hu* (1891) 18 Cal 496 *Syed h h f* v *G g B ksh* (19 7) 2 Luck 490 100 I C 787 ('28) A O 93

property may be kept under hammer for several days without an adjournment and if so a fresh proclamation is not necessary (h)

Sale held on a date other than the one to which it is adjourned—Where a sale is adjourned to a certain date but it is held on a different date the case is one of material irregularity in conducting the sale (i)

Sub rule (3) Sale in execution of a mortgage decree—A mortgagor judgment debtor is entitled to stop the sale of the mortgaged property in execution of a mortgage decree by payment of the debt before the sale actually takes place *even after a final decree* for sale has been passed (j)

Rateable distribution—Moneys paid into Court under sub r (3) to stop a sale are assets available for rateable distribution within the meaning of s 73 (k)

Saving of certain sales

70 [*Cf* s 287, last para] Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector

Execution of decree by Collector—See ss 68 to 72 and Sch III below

Defaulting purchaser answerable for loss on re sale

71 [s 293] Any deficiency of price which may happen on a re sale by reason of the purchaser s default, and all expenses attending such re sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be by the officer or other person holding the sale, and shall, at the instance of either the decree holder or the judgment debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money

Application of the rule—This rule extends to all sales whether of movable or of immovable property and also to re sales made under the Code whether made in consequence of default of payment of deposit under r 84 or of purchase money under rr 85 and 86 (l) But the re sale should only cover the property sold at the prior sale and any substantial difference of description at the sale and re sale in any of the matters required by r 66 will deprive the decree holder of the right to recover the deficiency of price under this rule Thus where the defaulting purchaser had been induced to bid for the property as unincumbered by reason of the fact that the incumbrances were not mentioned in the proclamation of sale and the re sale was on a proclamation in which the incumbrances were mentioned it was held that he was not liable for the deficiency on re sale under this rule (m) The same was held where the property was described as that of *A* at the first sale and as that of *B* at the second (n) The case is different however if the property re sold is substantially the same as that put up for sale at the first sale The reasonable construction to place on rule 71 is that the re sale should be within a reason

(h) *M l Har v N r b Sa y l M hamn d* (19) 6 Pat 43 104 I C 1 ( ) A I 31

(i) *Ha sa Ilan v Shib Gopal* (19) 3 Cal L J 140 6 I C 46 (1) A C 597

(j) *B b j v S h* (1904) 31 Cal 863 *Misr I l v M tu Lal* (1906) 9 All 8

(k) *Pur hot lass v S ajbharthi* (18) 6 Bom 588 589 a decision under s 9 of the Code of 1 8

(l) *P dla v Laj a* (18 1) Cal 33 *J l rba v Ha bha* (1881) 5 Bom 5

(m) *E j ath v Moheep* (18 9) 16 Cal 53

(n) *Ga g d v Pa S j* (191 36 Bom 3 9 14 I C 7

able time after the first sale and the property re sold hould be substantially the same and that any difference will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary cour e of things having regard either to the nature of the property or the transaction in re pect thereof having legal force at the date of sale or was brought about by the first purcha er s default (o) The deficiency may be recovered though the certificate referred to in this rule has not been issued (p)

It is to be noted that on the happening of any of the events that render a re ale neces ary the decree holder i *not b und to lave the same property re sol l* He may proceed against any other property of the judgment debtor leaving the latter to his remedy against the defaulting purcha er (q)

Who may apply under this rule —The only person who can apply under this rule i the decree holder who brought the property to sale or the judgment debtor No other person is entitled to apply (r)

By reason of purchaser s default —These word cover a default not only in pay ment of the balance of the price but in making the depo it of 25 per cent as provided by r 84 below (s)

At a Court sale A bid Rs 5 000 *B* bids Rs 6 000 and *C* bids R 7 000 *C* dies before his bid is accepted by the Court Can *B* be said in the circum tances to be the highest bidder ? No *C* s bid was revoked by his death before acceptance by the Court *B* s bid lapsed on the making of the higher bid by *C* and *A* s bid lapsed on the making of the higher bid by *B* The property should therefore be put up afresh for sale (t)

Certificate —The certificate as to the deficiency can be executed as a decree and can therefore also be attached as a decree (u)

Interest on deficiency —A defaulting purchaser i liable for interest on the deficiency from the date on which an order is made against him under this rule and not from the date of sale (v)

Rateable distribution —Where a decree holder who has brought the property to sale applies under this rule and attaches the amount of the deposit lying in Court other decree holders who have applied before the amount was depo ited in Court are entitled to a rateable distribution of uch amount The amount in depo it in Court represents the assets realised by the Court within the meaning of sec 73 above (w)

Where defaulting purchaser merely an agent —The mere fact that the defaulting purchaser acted as the agent of another is no ground for exempting him from liability und r this rule unless he informed the officer conducting the sale that he was merely an agent The fact that the judgment debtor knew that he was merely an agent does not di entitle the judgment debtor to an order under this rule (x)

Appeal —An order under this rule allowing or di allowing an application for the recovery of the loss by a re ale falls within s 47 and is appealable as a d cree (y) See notes to s 102 Execution.

(o) *Ve kata hell i na ya v Na la t* (1916) 41 Mad 4 4 4 43 I C 68 affirm l on appeal to P C sub nomin *Ve lal i if g j v Venk t l ll m* (19) 48 M 1 L J 33 86 I C 3 3 ( ) A PC 61

(p) *Tapesri Lal v Deoki* (189) 19 All –

(q) *Gou Chu de v Chund r Coomar* (188) 8 Cal 291

( ) *S M h t Praj q v P ja J K l ha t* (1926) 49 Mad 5 0 97 I C 86 (6) A M 8

(s) *S ta Ram v Ja k Ram* (19) 44 All 66 1 65 I C 813 ( ) A A 00

t) *Raja of Bobb li v S ya a ayana* (1919) 4 Mad 6 31 I C 805

( ) *Abd l Jabbar v S ta Ra* (1926) 4 All L J 3 9 I C 103 (6) A A 3 9

(v) *P am M h aju* (19 4) 46 Mad I J 134 8 I C 96 (4) A M 4 6

(w) (19 3) 49 M l 570 97 I C 96 (6) A M 8

(x) (19 4) 46 M d L J 134 8 I C 906 (4 A M 4 6 *p a*

(y) *A B l l e l tach l* (189) 18 Mad 4 J *K l K l re v G i I roo l* (19 8) Cal 93 *R m D al v P i Das* (18 6) 1 All 181 *S ta R m v Ja ki l am* (19) 44 All 266 65 I C 813 ( ) A A 00 o erruling *Deok v Tape r* (189) 14 All 201 See al o *Cangad t v L i S aj* (191) 36 Bom 3 9 14 I C

72 [S 294] (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court bid for or purchase the property O 21

Decree holder not to bid for or buy property without permission

(2) Where a decree holder purchases with such permission, the purchase money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly

Where decree holder purchase amount of decree may be taken as payment

(3) Where a decree holder purchases, by himself or through another person, without such permission, the Court may if it thinks fit, on the application of the judgment debtor or any other person whose interests are affected by the sale, by order set aside the sale, and the costs of such application and order, and any deficiency of price which may happen on the re sale and all expenses attending it shall be paid by the decree holder

Alterations in the rule —

1 The words subject to the provisions of section 73 are new See notes below under the head Amount due on the decree

2 The words any other person whose interests are affected by the sale in sub r (3) have been substituted for the words any other person interested in the sale This is merely a verbal alteration

No separate suit —Where a decree holder without leave of the Court buys the property of the judgment debtor at a Court sale the remedy of the latter is by application under this rule and s 4 and not by a separate suit a separate suit is barred under s 47 The question whether the sale should be set aside or not is a question between the parties to the suit relating to the execution of the decree within the meaning of s 4 and it must therefore be decided by the Court executing the decree and not by a separate suit ( ) Note the words may by *order* set aside the sale in sub r (3)

The Court may if it thinks fit set aside the sale —In *P u Ra lha Kri hna* v *Bi h l i Sahay* (a) their Lordships of the Privy Council in dealing with the corresponding s 294 of the Code of 1882 said Upon the construction of this section it is evident that a purchase by a decree holder who has not obtained permission is *not void nor a nullity* but is only to be avoided on the application of the judgment debtor or some other person interested It would be injurious to those interested in the sale if a decree holder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity and it would make all titles under such sales insecure if at a later period they were liable to be treated as nullities A sale is to be set aside upon application and upon cause shown Where a decree holder purchases without the permission of the Court the sale as stated above

(z) Ce u S Kh n (1898) Bo 1 | *Di ja B l t t* (1901) 3 All 4 8 I t | *a) t ua l e Lala* (1893) 16 Mal 8 | *I l of Upper Ind a F ul imes* (13)

108 I C 606 (8) A L 666 | ( ) (19) 49 I A 31 1 Pat 33 67 I C 914 ( ) A I C 8

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage

(2) Where, on the produce being put up for sale,—

(a) a fair price, in the estimation of the person holding the sale, is not offered for it, and

(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce

Place of sale of movable property—Except in the case of agricultural produce for which provision has been made by this rule a sale of movables in execution of a decree should ordinarily be held at some place within the jurisdiction of the Court ordering the sale Good and sufficient reasons ought to be shown for directing otherwise A mere contention that a higher price is likely to be bid in some other place is not a good and sufficient reason (*a*)

75 [*New*] Special provisions relating to growing crops (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it

76 [s 296] Negotiable instruments and shares in corporations Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker

May—A sale through a broker is permissive and not obligatory (*b*).

(*a*) *Lakhmibai* v *Sitapa* (1889) 13 Bom 24 | (*b*) *Baboo* v *Lekraj* (1867) 8 W R 415

77 [S 297] (1) Where movable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re sold — O r 7

Sale by public auction

(2) On payment of the purchase money, the officer or other person holding the sale shall grant a receipt for the same and the sale shall become absolute

(3) Where the movable property to be sold is a share in goods belonging to the judgment debtor and a co owner, and two or more persons, of whom one is such co owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co owner

Where movable property is sold by public auction —This does not apply to negotiable instruments or shares sold through a broker under r 76 above (c)

Payment of price —The officer holding the sale has a discretion to allow the price to be paid at a reasonable time after the sale (d)

In default of payment —The provisions of r 71 apply to a re sale under this rule (e)

Sub rule (3) —This sub rule is new It give a right of pre emption to the co owner See as to immovable property r 88 below

78 [S 298] No irregularity in publishing or conducting the sale of movable property shall vitiate the sale, but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery

Irregularity not to vitiate sale but any person injured may sue

Scope of the rule —This rule provides for the case of irregularity in publishing or conducting the sale of *movable* property Rule 90 deals with irregularity in publishing or conducting the sale of *immovable* property

Irregularity in publishing or conducting the sale —If the sale proclamation warrants a title which fails the injured party may apply to set aside the sale for this is not a case of irregularity (f)

At the hand of any other person —Where movable property not belonging to the judgment debtor is sold at the instance of the decree holder the real owner may sue the decree holder for the value of the property (g)

Money decree —A money decree is not movable property within the meaning of this rule (h) See O 21 r 53

(c) *B al H* (188) 9 Bo 518

(d) *Sh h Ka eed v Sh Ch ru* (18) 4 N W 1 H C R 3

(e) *P mithm v I j a* (1881) Cal 33

(f) *Framj Horm sj* (18 8) 2 Bom 8

(g) *Moh d Aki l* (186) 9 W R 118

(h) *M ing Lu Bye M g P Nyun* (19 3) 1 R n 360 81 C 6 9 (4) A R 21

79 [S 299, 300, 301] (1) Where the property sold is movable property of which actual seizure has been made, it shall be delivered to the purchaser

Delivery of movable property debts and shares

(2) Where the property sold is movable property in the possession of some person other than the judgment debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser

(3) Where the property sold is a debt not secured by a nogotiable instrument or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser

Sale of shares —A purchaser of shares of a limited Company at a sale in execution of a decree is not entitled as of right to have his name entered in the register of the Company as a shareholder He is subject to the same rules as those which apply to a private purchaser (i)

Forms —See App E forms nos 32 33 and 34

80 [S 302] (1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officers as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party

Transfer of negotiable instruments and shares

(2) Such execution or endorsement may be in the following form, namely —

A B by *C D*, Judge of the Court of (or as the case may be), in a suit by *E F* against *A B*

(i) *Ma ilal v Go dhan Sp nn ng and Manu fact ring Co* (1917) 41 Bom 6 37 I C 666 *Tadepalli v Sitam* (19) 45 Mad 53 541 O I C 659 (-3) A M 41

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same, and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself

Execution of deed of transfer of shares—Where a deed of transfer of shares is executed by a Judge under this rule the company has no option as to registering the shareholder who purchased the shares in execution and if the purchaser cannot obtain the original share certificates from the judgment debtor the company is bound to grant him new share certificates (j)

81 [S 303] In the case of any movable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct, and such property shall vest accordingly

Vesting order in case of other property

Sale of immovable property

82 [S 304] Sales of immovable property in execution of decrees may be ordered by any Court other than a Court of Small Causes

What Courts may order sales

83 [S 305] (1) Where an order for the sale of immovable property has been made, if the judgment debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immovable property of the judgment debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount

Postponement of sale to enable judgment debtor to raise amount of decree

(2) In such case the Court shall grant a certificate to the judgment debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale

Provided that all monies payable under such mortgage lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree holder is entitled to set off such money under the provisions of rule 72, into Court

(j) Toolsee Das v East India Ry Co (186) — Ind Jur N S 133

33 Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property

Alterations in the rule—The words save in so far as a decree holder is entitled to set off such money under the provisions of rule 72 in sub r (2) have been added to make it clear that where a decree holder is entitled to a set off under r 72 he should not be required to pay in the monies A similar saving has been introduced into r 84 sub r 2 and r 85

Postpone the sale for such period as it thinks proper—The postponement of sale under this rule is discretionary with the Court (*k*) But the postponement should be for a reasonable period (*l*)

The amount of the decree can be raised—No sale should be postponed and no certificate should be granted under sub r (2) unless the *whole* amount due on the decree can be raised by mortga e lease or sale (*m*)

Notwithstanding anything contained in section 64—On compliance with the conditions of this rule a private alienation notwithstanding s 64 becomes absolute not only against the claim of the decree holder but against all claims enforceable under the attachment (*n*)

Confirmation of sale by Court—Where permission to raise the amount of decree by private sale has been granted to the judgment debtor by two Courts in each of which a decree has been passed against him it is enough if the sale is confirmed by one Court it is superfluous to apply to the other Court for confirmation of the same ale (*o*)

Guardian and Wards Act 8 of 1890 s 29—A private alienation of property though confirmed by the *executing Court* under this rule is not valid if such alienation is made by a guardian and the sale is not confirmed by the *Court by which the guardian was appointed* (*p*)

Decree for the enforcement of a mortgage—This rule does not apply to a sale of property directed to be sold in execution of a decree for the enforcement of a mortgag The reason is that in the case of a mortgage decree the right of sale does not depend upon the *attachment* in execution but is confirmed by the decree itself (*q*)

Rateable distribution—Money paid into Court under the provi o to sub r (2) is liable to ratable distribution under s 73 as it is paid under a pending execution application (*r*)

(*k*) *B sh mun* v *J d Mortgag Ba k* (1884) 1 I A 7 10 11 Cal 44 48 *V A R R M Chetty* v *M Sut ja* (19 5) 3 Rang 13 136 89 I C 300 ( ) A R 271

(*l*) *Moh ee* v *R m Kant* (1871) 15 W R 3 *Suh j* v *P m Pershad* (18 4) 21 W R 146 *R m Dutt* v *Land Mortgage Bank* (187) 1 W R 193

(*m*) *Venkatas mi Guru am* v *Chanbas ppa* (1891) 14 Mad 7

(*n*) *Sh el gappa* v *Cha basappa* (1906) 30 Bom 33

(*o*) *Anl apa* v *Bh m ao* (189) 19 Bom 539

(*p*) *Dattar m* v *Cang ra* (1899) 3 Bom 8 *Sarj* v *D st ict Judge of Be ares* (1909) 31 All 378 2 I C 356 Se al o *D j ndra* v *Ma orama* (19) 49 Cal 911 0 I C 990 ( ) A C 150

(*q*) *Womda Kh m* v *Raj Roop* (18 8) 3 Cal 33 *I ora L l* v *I u j b Nat on l Ba k* (19 3) 5 Lah L J 6 5 I C 818 ( ) A I 384 The d ci io | *Kri hnaj* v *M ha lev* (1901) 25 Bom 104 is no longer good l w

(*r*) *Thi r y m* v *J lehma a* (1918) 41 Mad 616 47 I C 538 *Pr h l mdas* v *Su aj bl th* (188) 6 Bom 549

Revision —No appeal lies from an order refusing to postpone a sale under this rule But the party aggrieved may apply to the High Court under s 115 for a revision of the order and the High Court may in a proper case set aside the order (s)

84 [S 306] (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty five per cent on the amount of his purchase money to the officer or other person conducting the sale and, in default of such deposit, the property shall forthwith be re sold

Deposits by purchaser and re sale on default

(2) Where the decree holder is the purchaser and is entitled to set off the purchase money under rule 72, the Court may dispense with the requirements of this rule

Declared to be the purchaser —An execution sale is not complete until the presiding officer has accepted the bid and declared the purchaser (t)

Material irregularity —It has been held by the High Courts of Calcutta and Madras that failure to deposit the 25 per cent *immediately* as required by this rule is no more than a material irregularity within the meaning of r 90 which would render the sale *voidable* if substantial injury has resulted by reason of such irregularity (u) It was at one time held by the High Court of Allahabad that such failure rendered the sale altogether *void* (v) but these decisions have now been overruled by a Full Bench the view taken by the Full Bench being the same as that of the Calcutta and Madras High Courts (w)

Sub rule (2) —This sub rule is new See notes to r 83 Alterations in the rule

Ratable distribution —See notes to s 73 Before the receipt of the assets

85 [S 307] The full amount of purchase money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property

Time for payment in full of purchase money

Provided that, in calculating the amount to be so paid into Court the purchaser shall have the advantage of any set off to which he may be entitled under rule 72

On the fifteenth day from the sale —The purchaser is bound to see that the money reaches the Court in time to satisfy the requirements of this rule If the purchase-money is not received by the Court in time it will not avail him that he had posted the money in time for the Post Office is not the agent of the Court (x)

Material irregularity —The time for payment cannot be extended without the consent of the decree holder and the judgment debtor If it be extended without their consent the case is one of material irregularity within the meaning of r 90 below (y)

(s) N K R I M Chetty v S b aja (19 5) 8 R g 13 13 83 I C 300 ( ) A R 1

(t) Ja b h i r v M t Idh i (19 3) 2 Pat 548 76 I C 113 (3) A I 5 5

(u) Bhim v Narain (1889) 16 Cal 33 Ve lata v Nimi (1891) 14 Mad ?

(v) I tsam v Nirai (1 3) 5 All 316 Amir B gam v Ba k of Uppe Ind a Ltd (1909) 30 All 3

(w) Sita Ram v J H P m (19__) 44 All 66 6 I C 813 (__) A A 00 [F B]

(x) Ramcha dra v Belya (1898) 2_ Bom 415

(y) Subram yam v Vykunda (19) 43 Mad L J 4 7 69 I C 1001 (3) A M 48

Where the Court or office is closed on the fifteenth day—In such a case the payment may be made on the next day on which the Court or Office is open See General Clauses Act 10 of 1897 s 10

Proviso—The proviso is new See notes to r 83 above Alterations in the rule

86 [s 308] In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold

Procedure in default of payment

Alteration in the rule—The words may if the Court thinks fit have been substituted for the word shall See notes below

Forfeiture of deposit to Government—The old section provided that the deposit *shall* be forfeited to Government This provision led to hardship in certain cases (z) To obviate the hardship the words may if the Court thinks fit have been substituted for the word shall It is no longer obligatory upon the Court to forfeit the deposit

87 [s 309] Every re sale of immovable property, in default of payment of the purchase money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale

Notification on re sale

Fresh notification—A fresh notification is only necessary where the re sale is in default of payment of the *purchase money* within the time allowed by r 85 No fresh notification is necessary for a re sale in default of payment of the 25 per cent deposit required by r 84 (a)

88 [s 310] Where the property sold is a share of undivided immovable property and two or more persons, of whom one is a co sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co sharer

Bid of co-sharer to have preference

See as to movable property r 77 sub r (3) above

Co sharer—A *defeasible* title to a share is not sufficient to support a claim for pre emption under this rule (b) The Allahabad High Court has held under the rules framed under s 70 of the Code that where a sale is confirmed by the Collector in favour of one bidder in default of appearance of the other bidder of the same sum claiming a preferential right as a co sharer he is not entitled to maintain a separate suit to set aside the sale by virtue of a right of pre-emption (c)

(z) See *Samba iva* v *Vydinadasami* (190?) 25 Mad 535
(a) *Vall bha* v *Pangu* (1889) 1? Mad 454
(b) *Kamta Prasad* v *Mohan* (1910) 3 All. 45 3 I C 8 *Abdul Chaf r* v *Ghulam* (1913) 35 All ?96 18 I C 959
(c) *Bad i S gh* v *T In Ram* (19?3) 4 All ?03 9 I C 8 (?3) A.A 186

89 [S 310A] (1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court,— O [illegible]

Application to set aside sale on deposit

(a) for payment to the purchaser, a sum equal to five per cent of the purchase money, and

(b) for payment to the decree holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree holder

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale

Alterations in the rule —

1 The words any person either owning such property or holding an interest therein by virtue of a title acquired before such sale have been substituted for the words any person whose immovable property has been sold under this Chapter See notes below Who may apply under this rule

2 The words unless he withdraws his application and the words or prosecute in sub r (2) are new See notes below under the head Sub rule (2)

Immovable property —This rule applies only to sales of immovable property A simple mortgage bond is movable and not immovable property The provisions of this rule do not therefore apply to a sale of such a bond in execution of a decree (d)

This rule applies to sales under money and mortgage decrees —This rule obviously applies to sales in execution of decrees for the payment of money The transfer into this Code (see O 34) of the sections of the Transfer of Property Act [illegible] to decrees in suits on mortgage shows that the provisions of the present rule apply [illegible] to sales under mortgage decrees Hence a mortgagor whose immovable property [illegible] been sold in execution of a decree for the sale of the mortgaged property [illegible] O 34 r [illegible] may apply under this rule to set aside the sale (e) As to the [illegible] it was doubtful whether its provisions applied to mortgage decree [illegible]

(d) [illegible] (19 4) [illegible] All L J 840 80 I C 890 (4) A L 96

(e) [illegible] Cal 69 60 I C 106 [illegible]

Calcutta holding that they did not (*f*) while the other Courts holding that they did (*g*) The Calcutta decisions are no longer law In a Calcutta case it was held that the present rule applies also to sales under a mortgage decree on the original side of the Calcutta High Court (*h*) In a recent case it was held that this rule though well adapted to mofussil practice is not in terms applicable to the practice of the Court on its original side inasmuch as no amount is specified in any proclamation of sale as that for the recovery of which the sale was ordered nor are sales ordered for recovery of the amount of costs before they are taxed A mortgagor can therefore apply to set aside the sale on deposit of a sum equivalent to 5 per cent of the purchase money and the amount of the decree (*i*)

Whether the rule applies to other sales —This rule has been held to apply when the sale is under a decree passed in terms of an award made on an order of reference in a partition suit (*j*) The High Court of Madras has held that this rule does not apply to a sale by a receiver of partnership property for realising the partnership assets (*k*)

Who may apply under this rule —*Under the old section* the application to set aside a sale could only be made by any person whose immovable property has been sold under this Chapter that is the Chapter relating to execution These words it was held included—

(1) the judgment debtor

(2) any person though not a party to the suit or decree (*l*) whose interests were affected by the sale

A person whose interests were not affected by the sale could not it was held apply under that section (*m*)

Under the present rule the application to set aside a sale of immovable property held in execution of a decree may be made by—

(1) any person owning the property or

(2) any person holding an interest in such property by virtue of a title acquired before the sale

Any person either owning such property or holding an interest therein by virtue of a title acquired before such sale —Under the old section the application to set aside a sale on deposit could be made by any person whose immovable property has been sold Under the present rule the application may be made by any person either owning such property or holding an interest therein by virtue of a title acquired before such sale There is no doubt that a judgment-debtor whose immovable property has been sold may apply under this rule as a person owning such property But what if the judgment debtor has transferred his interest in the property? Now a judgment debtor may transfer his interest in the property before the Court sale or he may do so after the Court sale Is he entitled after a transfer in either case to apply under this rule? Is the transferee from the judgment debtor entitled to apply under this rule? The cases give the following answers to these questions

First as regards transfers before Court sale —Under the old section there was a conflict of decisions whether if the judgment debtor had transferred his interest in the property before the Court sale the *transferee* could apply under that section to have

(*f*) *Fetir Nath* v *Jal Ch rn* (1898) C I 03

(*g*) *P* j *Iam* v *Churni Lal* (189) 19 All 0 *Kast aj* v *Mal der* (1901) 5 Bom 101 *M ll k* j *at* v *I* g *t* (190) 5 Mad 14

(*h*) I j *ba Da* v *B se w Lal* (19 1) 43 C I 69 60 I C 406 (1) C 169 o err ill g *re tri* v *Ca* (1915) 4 C W N 536

(*i*) *K l Hari* (19 9) 56 C I 477 (3) A C 74

(*j*) *ode* v *H* 1 *Hi* (19) C W N 466 I C 4 (3) A C 5

(*k*) *T* lj v *I m h dra* (19 1) 41 Mad I J 46 64 I C 916 (l) A M 491

(*l*) *Balir m* (1911) 38 Cal. I 6 I C 810

(*n*) *P mel ira F kh bai* (1899) 3 Bom 4 0 *Abdul* v *Mat jar* (1903) 30 C L 4 5

the same set aside In *Srinivasa* v *Ayyathorai* (n) for instance it was held that the transferee could apply while the contrary was held in *Ramchandra* v *Rakhmabai* (o) Under the present rule it is clear that a transferee acquiring title *before* the Court sale is competent to apply to have the sale set aside Further it was held under the old section that a judgment debtor who had effected a private sale of his property subsequently to the attachment and prior to the Court sale was entitled to apply under that section to set aside the sale (p) This ruling is still good law (q)

Next as regards transfers after Court sale — A obtains a decree against J In execution of the decree certain immovable property belonging to J is sold to C for Rs 166 After the sale to C but before its confirmation under r 92 J sells the property to P for Rs 500 It is clear that if J could apply under this rule to have the sale set aside on payment of the amount mentioned in the rule the pecuniary benefit to him would be great for while the property was sold at the Court sale for Rs 166 it fetched Rs 500 at the private sale Is J the judgment debtor entitled to apply under this rule to have the sale set aside ? Is P the purchaser at the private sale entitled to apply under this rule ? It was at one time held by the Allahabad High Court (r) that neither the judgment debtor nor the subsequent purchaser was entitled to apply under this rule the reason for the decision being that the present rule gives the judgment debtor a last chance of saving the property *for himself* and that it was no part of the intention of the Legislature that the property should be saved for persons to whom it might be privately sold after the Court sale had taken place The Madras High Court held in its earlier decision that the judgment debtor is not entitled to apply (s) but that the subsequent purchaser is entitled to apply (t) The ground of these decisions was that the judgment debtor having parted with his interest in the property before the application under this rule and so *having no interest* in the property *at the date of the application* he was not entitled to apply under this rule unless the sale to the subsequent purchaser was by an unregistered document in which case the judgment debtor would continue to be the owner of the property and could as such owner apply under this rule (u) On the other hand the High Court of Bombay held that the judgment debtor is entitled to apply under this rule but that the subsequent purchaser is not so entitled (v) The ground of the Bombay decision is that as the sale to the auction purchaser has not been confirmed the judgment debtor remains the owner of the property and that he is therefore entitled to apply as a person owning the property within the meaning of this rule As regards the Allahabad decision the Bombay Court said that the object of the present rule was not only to preserve the property in the hands of the judgment debtor but also to save the judgment debtor from monetary loss that might be occasioned to him if the property was sold at the auction sale at an inadequate price As regards the reasoning of the Madras High Court in its earlier decisions the Bombay Court observes that it was not necessary for the purposes of this rule that the judgment debtor should own or have an interest in the property *at the date of the application* under this rule and that it was sufficient if he owned the property or had an interest in it *at the date of the Court sale* The High Court of Patna has followed the Bombay decision (w) In a recent case a Full Bench of the Madras High Court overruled its earlier decision and agreeing with the Bombay and Patna decisions held that the judgment debtor was entitled to apply but

(n) (1 98) 1 Mad 413 (mortgagee)
(o) (1 99) 3 Bom 4 0 (purchasers)
(p) *M ja l l v D shi* (1901) Bom 631
(q) *l v M* (19 1) 44 Mad 554 6 63 I C 937 (1) A M 15 (F B) *l r v S ti ji* (19 7) 5 Mad L J 157 100 I C 8 (7) A M 44
(r) *Ish r D v As f Al* (1911) 34 All 186 *l bte l l l l a v S l r S gh* (19 3) 4 All 4 4 I C 77 (3) A A 39
(s) *S bb raj l v Lakshm ara* (1913) 38 Mad 77 I C 193
(t) *Lak hm v S ra* (1915) 4 Mad 18 I C 79 *S thar jada v Jak sh n na mma* (1913) 38 M 7 I C 193 *Ana tha v A nnamla* (1913) 24 Mad L J 0 18 I C
(u) *S th ra m v yd Mir H sa* 4 Mad 503 49 I C 806
(v) *Pand ra q Go d* (1916) 40 Bom I C 11
(w) *Dhan l v Shea S a l* (1) L J 340 51 I C 873

89 that the subsequent purchaser was not entitled to apply under this rule (x) The Allahabad High Court also has overruled its earlier decisions and held that the judgment debtor can apply but not the purchaser (y) The High Court of Calcutta has held that the subsequen tpurchaser is not entitled to apply under this rule The reason given is that the interest if any which he held in the property was not by virtue of a title acquired by him before the execution sale and consequently he is excluded by the very terms of the rule ( ) Where two applications are made one by the judgment debtor and another by a mortgagee from him after the sale and each applicant deposits a portion of the aggregate amount required by this rule the deposits and the applications may be treated as made by the judgment debtor and therefore within this rule (a)

Miscellaneous cases —Under the old section it was held that a Mahomedan co heir was not entitled to apply to set side the sale (b) This would seem to be the law under the present rule But it was held that a co sharer was entitled to apply (c) It is doubt ful whether a co sharer is a person entitled to apply under this rule A coparcener in a joint and undivided Hindu family can apply for he has an interest in the whole of the property (d) It has been held under the old section that a durmukaridar can apply (e) The purchaser of a portion of a non transferable occupancy is entitled to apply although the landlord is the auction purchaser (f)

A person who has obtained a mortgage of the property before the Court sale may apply under this rule (g) So also a usufructuary mortgagee in possession (h) But a person who has *merely agreed* to purchase the property cannot apply under this rule for a mere agreement for sale of immovable property does not of itself create any interest in the property (i) Similarly a person who is out of possession of the property and is litigating to establish his right thereto is not entitled to apply under this rule (j) A lessee subject to whose interest the property is sold is entitled to apply under this rule (k)

Unsuccessful application to stop sale —The mere fact that the applicant had already unsuccessfully applied to stop the sale on payment of the decretal amount and had also put in a claim petition under r 58 above does not preclude him for applying under this rule (l)

Deposit without application —An application is necessary before the Court can act under this rule Mere deposit of the required amount is not enough (m) See notes below Limitation

Deposit of five per cent —The deposit of 5 per cent must be made even though the purcha er may be the decree holder The 5 per cent is intended as a compensation to the purchaser for his trouble and disappointment for the loss of that which was perhaps a good bargain (n)

Mistake in calculating amount to be deposited —No sale will be set aside under this rule unless the whole amount specified in sub r (1) is deposited by the applicant

(x) S nd r m v Ma a (19 1) 44 Mad 54 63 I C 937 (1) A M 157 (F B) G pala v Visvanatha (1920) 39 M d L J 84 58 I C 8 6 [mortg g]

(y) Fat ma ul Hasna B ldeo S ha (19 6) 48 All 188 93 I C 91 (6) A A 904

(z) S roda v H endra (19) 49 Cal 454 68 I C 289 ( ) A C 971

( ) Malh ri Sa a v B ha h (19) 49 All 839 10 I C 471 (27) A A 61

(b) See Ibd I v Mat y r (1903) 30 Cal 4

( ) T h I m v L t 41 (190) 30 All 19 19 196

(d) I am h d a S as (19 3) 51 M d 46 109 I C 97 ( ) A M 309

( ) Na n v So end i (190) 3 C 1 107

(f) La Ia oo v S li n Ahmed (19 7) 5 Cal 108 106 I C 143 ( ) A C 81

(g) S n asa v Ayyartlorai (1898) 1 Mad. 416

(h) Ren Madho v S ward t (19) 0 All. L. J 4 64 I C 918 (3) A A 1 7

(i) M h l o v I as l (1899) 3 Bom 181

(j) Na I K h e v Paraoo M a (191) 2 Pat. L. J 676 4 I C 839

(k) Ad nna Cl a (19 8) 51 Mad 7 0 109 I C 168 (9) A M 1191

(l) Dhan m I v I er r gh (19 3) 44 Mad L. J 3 7 I C 33 (3) A M. 487

(m) Iech y v I lla m th (19 3) 48 Mad L. J 40. 87 I C 437 ( ) A M 639

( ) T rum I v Syed Ibrahim (1899) Mad. 58 Ch d Ch ran v I t Lekary Lal (1899) 6 Cal 449 451 5 M nshi v I p S (19) 6 Pat 346 103 I C 4 ( ) A I 48

within thirty days from the date of sale If the full amount is not deposited within the aforesaid period even though the default was due to a mistake of an officer of the Court in calculating the amount the sale cannot be set aside But it will be set aside if the officer was charged by the Court to make the calculation and to inform the parties as to the amount to be deposited (o) See notes below Limitation

Less amount received by decree holder—The term received contemplates an actual *receipt* of the amount by the decree holder A mere *payment into Court* of the sale proceeds does not constitute *receipts* within the meaning of this rule (p)

In determining what amount has been received by the decree holder the Court should not give credit to the judgment debtor for any amount paid by a co judgment debtor who has not joined in the application under this rule (q)

Failure to deposit full amount—Where a judgment debtor brought into Court not the amount for the recovery of which the sale was ordered but only the amount realized by the sale plus five per cent with an undertaking to pay the balance it was held that he had not complied with the provisions of this rule and the Court refused to set aside the sale (r) In a Pangoon case the deposit was one day late and a few rupees less than the full amount and the Court said that the small shortage did not vitiate the deposit but that the delay could not be excused (s)

Conditional deposit—A deposit under this rule must be unconditional (t)

For payment to the decree holder*—*Rateable distribution—The expression decree holder in sub sec (1) (b) refers only to the decree holder for satisfaction of whose decree the sale has been ordered It does not include other decree holders who would have a right to claim rateable distribution out of the sale proceeds under sec 73 It is therefore enough if the judgment debtor deposits such amount as is sufficient to satisfy the claim of the decree holder at whose instance the property was sold It is not necessary that the amount deposited by him should be sufficient to satisfy decrees held against him by other decree holders also (u) Again when a judgment debtor deposits in Court a sum sufficient to satisfy the claim of the person for satisfaction of whose decree the property was ordered to be sold the other decree holders are not entitled to a rateable distribution thereof under s 73 (v)

Sub rule (2)—Where a judgment debtor applies to set aside a sale under this rule and subsequently applies under r 90 also he is not entitled to prosecute the application made by him under this rule (w) But the Court should in such a case put the judgment debtor to his election whether he would withdraw the application under r 90 and if he refuses to do so it should dismiss the application made under this rule (x) An application though purporting to be made under r 90 may not really be one under that rule but one under s 47 the provisions of sub r (2) do not apply to such a case (y)

Court—The word Court in this rule means the Civil Court and not in the case of decrees transferred to the Collector for execution the Collector ( ) Hence an

(o) *Ch nd Ch n v B le Beh ry Lal* (1899) 6 Cal 449 dl tl guishing *M kbool v La le S bh* (1898) — Cal 609 *Lgr h L ll v Iath I h d* (1891) 18 Cal —55 See also *Abd l Na r v Jalta* (19 3) —1 All L J 16 166 167 71 I C 1018 (3) A A 318

(p) *Tr mbal v Fi chand a* (1899) 23 Bom 7 3 *A run la a v Ar I* (1916) 39 Mad 4 9 27 I C 9 *Tola am v Chlot ram* (19—3) — Bom L R 446 73 I C 4 4 (—3) A B 39

(q) *Karunak ra v Kr h a* (1916) 39 Mad 429 27 I C 9 *bb yy n Thopp* (19) 4 Mad L J 71 6 I C 983 (—) A M 54

(r) *M aj v Ar I* (19—) 46 Bom 171 63 I C 39 ( ) A B 193

(s) *Mah m d Cas v D rid* (19—3) 6 Rang 490 I C (—3) A R 286

(t) *D l b n v B s dha* (1911) 10 I C 880 *Sh m S der v M h* (19 3) 2 Pat 534 7 I C 907 (3) A I 418 *Raghu La v Deokal* (19 8) 7 Pat 30 I C (—8) A I 193 *V jen v Amg da* (19 1) 45 Bom 1094 6 I C 104 (1) A B 169

(u) *Ga esh v I th l* (1913) 37 Bom 387 19 I C 4 5 *I ta Ch n l l* (1907) 31 Bom 20

(v) *Hara v Faul r* (1913) 40 Cal 619 18 I C 839

(w) *F jendra v N l Palan* (1 96) 23 Cal. 9—3

(x) *S re Beg m v I am Ch d r* (19—) 47 All 850 8 I C 500 (—) A A. 8

(y) *Harihar Ka t v I ma Pand* (1909) 33 Bom. 698 4 I C —3

(z) *Fa al Ma* (1918) 40 All. 425 43 I C

39 application under this rule must be made to the Court and not to the Collector If the judgment debtor applies to the Collector he cannot stop limitation running against him It is the duty however of the Collector in such a case to return the application to the applicant and tell him that the application should be made to the Court (*a*) See notes Limitation below

Sale of property by separate lots—Where property is sold in separate lots in execution of a decree it is not open to the judgment debtor to apply under this rule to set aside the sale of some only of such lots The application must be to set aside the sale of all the lots (*b*)

Necessary parties—The auction purchaser as well as the decree holder are necessary parties to an application under this rule (*c*) See the proviso to r 92 sub r (?)

Limitation—The application under this rule must be made within 30 days *from the date of sale* [Limitation Act 1908 Sch I art 166] The Court has no power to extend the time under s 148 (*d*) The words date of sale means the date on which the property is put up for sale and knocked down to the highest bidder and not the date on which the sale is confirmed by the Court [r 92] (*e*) At the same time it is to be remembered that if for any reason the final bid remains unaccepted for some days by the sale officer the period of 30 days does not begin to run until such bid is accepted by him (*f*)

The words may apply to have the sale set aside *on* his depositing in Court etc show that not only the application but also the deposit should be made within 30 days from the date of sale It is not enough to make the application within 30 days (*g*) Nor is it enough to make the deposit within 30 days (*h*) Both the application and the deposit must be made within 30 days from the date of sale

The law does not impose any period of limitation for the issue to the parties of *notice* of the deposit (*i*)

Appeal—The law as regards appeal from an *order setting aside or refusing to set aside a sale* passed on an application under the present rule is quite different from what it was under the Code of 1882 Such an order under the Code of 1882 [s 310A] was not appealable *as an order* for it was not included in the list of appealable orders given in s 588 of that Code [now O 43 r 1] But the order being one made in proceeding in execution (*j*) it was appealable *as a decree* if the question as to whether the sale should be set aside or not was one between the parties to the suit or their representatives within the meaning of s 244 [now s 47] (*k*) and in such a case a *second appeal* also lay from the order passed in first appeal And it was held that if the question was one between the judgment debtor and the decree holder in other words between the parties to the suit it did not cease to be so merely because the auction purchaser (not a party to the suit) was interested in the result (*l*) But where the question was one between a party to the suit on the one hand and the auction purchaser on the other there was a conflict of

(*a*) *T pangarda* v *Lam ga da* (19 0) 44 Bom 50 54 I C 6 0 *Sha tm rl* v *N i ay n* (19 1) 45 Bom 113 6 I C ? 1 (1) A B ?00 See al o *(ad q ppa* v *Sh daj pa* (19 4) 48 Bom 639 88 I C 155 (4) A B 49

(*b*) *Kr pa th* v *I am L k mi* (1897) I C W N 703

(*c*) See *M s mm t B b* v *I a a N th* (1923) Pat 800 75 I C 430 (4) A I 37

(*d*) *Ch dhry I am she r* v *Ch lhry N r k w* (1917) Pat L J 164 39 I C 664

( ) *Ch wdhry Keeri* v *(i Poj* (190) ?9 Cal 6 6 631

(*f*) *M h Ial* v *Pam N r n* (1913) 35 All 65 17 I C 783

(*g*) *M homed Akbar* v *S khdeo* (1911) 13 Cal L J 467 10 I C 51 *M a I I* v *I dha K h n* (1915) 37 All 91 30 I C 186

See O 1 r 9 ( )

(*h*) *P oji* v *Ba lal* (1919) 43 Bom 35 53 I C 135

(*i*) *Mu ammat B b* v *I ma Nath* (19 3) Pat 800 75 I C 430 (4) A I 37

(*j*) *I t* v *Ch l l* (1907) 31 Bom 07 14

(*k*) *M l dh* v *4 a d a* (1901) 25 Bom 418 *N ra* v *4 vj thorai* (1 94) 1 Mad 416 *I h lch d* v *N r jh* (1901) 29 (I 3 In the la t two cases the d cree hol l r l imself was the purchaser an l it w h l l that he wa a *party* to the ult I ut see *Bh g ti* v *I amr ri L l* (1909) 31 All 8 1 I C 416 [F B]

(*l*) *I la* v *Ch n lal* (1907) 31 Bom 07 *H har K la* v *I ma I d* (1909) 33 Bom 69 4 I C 33

opinion as to whether an appeal lay from the order (m) In those cases however in which it was held that no appeal lay from the order it was held that the party aggrieved might apply to the High Court for a *revision* of the order (n) Under the present Code however an *order setting aside or refusing to set aside a sale* [r 92] passed on an application under this rule [r 89] is appealable *as an order* for it is included in the list of appealable orders given in O 43 r 1 [see cl (j)] The result is that under the present Code *only one appeal* lies from such an order (o) [see s 104 sub s (1) (i) and sub s (2)] An auction purchaser also can now appeal from an order under this rule Only one appeal is allowed in his case also (p)

Dismissal of application for default—Where an application under this rule is dismissed for default of appearance and the Court refuses to restore it to the file no appeal lies from the order refusing to restore the application (q)

Revision—The High Courts of Patna (r) and Madras (s) have held that the High Court can interfere in revision if an application under this rule has been dismissed on the ground that it was made by a person who was not entitled to apply the reason given being that the decision in such a case is the very foundation of jurisdiction and that the action of the lower Court in refusing to deal with the application in such a case amounts to a refusal to exercise jurisdiction within the meaning of s 115 On the other hand the Allahabad High Court has held that no revision lies in such a case the reason given being that the Court has jurisdiction to decide whether or not the applicant was entitled to apply to set aside the sale and a decision arrived at *in the exercise of* jurisdiction though wrong is no ground for interference in revision (t)

No revision lies from a decision that an application under this rule was made within time (u)

90 [S 311] (1) Where any immovable property has been sold in execution of a decree, the decree holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it

Application to set aside sale on ground of irregularity or fraud

Provided that no such sale be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud

Alterations in the rule—

1 The words or any person entitled to share in a rateable distribution have been added to give effect to decisions under the old section See notes below Who may apply under this rule

(m) *K h a v S t h* (1908) 31 Mad 177 *Mar nl l v Doshi* (1901) 25 Bom 631 *J h l D v Jh gh* (1897) 19 All 140 *4 a l K v 4j Ilia v th* (1908) 30 All 3 9

( ) *M ya l l Dosh* (1901) 25 Bom 631 *P m v jh v S l g l im* (1906) 8 All 84

( ) *A tt v S da v* (1911) 38 Cal 339 10 I C 34

(p) *K h v Tr mbak* (1910) 44 Bom 47 56 I C 597 See also *G 3 g pi v Shid pi* (1914) 48 Bom 638 8 I C 155 (4) A B 49

( ) *Gha t B b v Abl l d* (1907) 29 All 536

( ) *Dha wa t v Sheo Shank r* (1919) 4 Pat L J 340 51 I C 8 3 *A lad Al v Abd l* (1923) 2 Pat 15 4 I C 10 (23) A P 490

( ) *S l am v M a* (1921) 44 Mad 5 4 63 I C 93 (21) A M 1 (F B)

(t) *S d Ram v S I r S gh* (1923) 4 All 4 74 I C 8 (23) A A 39 (F B)

( ) *M mm t B b v I ra N th* (1923) 2 Pat 800 I C 430 (4) A I 3

90 2 The words any person whose interests are affected by the sale have been substituted for the words any person whose immovable property has been sold under this chapter The expression now substituted is what the Courts held in several cases was the meaning of the expression any person whose immovable property has been sold See notes below Who may apply under this rule

3 The words or fraud have been added after the word irregularity The addition of these words affects the *right of appeal* as will be seen from the notes below under the head Fraud in publishing or conducting sale "

4 *The words unless upon the facts proved the Court is satisfied* have been substituted for the words unless the applicant proves to the satisfaction of the Court This alteration has been made with a view to set at rest the doubts raised under the old section as to the *evidence* upon which the Court could act See notes below Unless upon the facts proved the Court is satisfied etc

Who may apply under this rule—The only persons that may apply under this rule are—

(1) the decree holder

(2) any person entitled to share in a rateable distribution of assets under s 73

(3) any person whose interests are affected by the sale—an expression obviously of a wider import than the expression a person holding an interest in the property sold used in r 89 above (v)

The words any person entitled to share in a rateable distribution of assets did not occur in the old section but it was held that the expression decree holder included such person (w)

The expression any person whose interests are affected by the sale has been substituted for the expression any person whose immovable property has been sold which occurred in the old section The latter expression was construed as meaning any person whose interests are affected by the sale in the Full Bench case of *Asmutunnissa Begum* v *Ashruff Ali* (x) and this interpretation has now been substituted for the original expression Where an application therefore is made by a person other than a decree holder or one entitled to share in a rateable distribution of assets such person must be one *whose interests are affected by the sale* It cannot be said of a person claiming by title paramount to the judgment debtor that his interests would be affected by the sale inasmuch as his title to the property cannot be effected by the sale whether it were regular or irregular Hence a person who claims to be a purchaser of immovable property from the judgment debtor prior to the attachment cannot apply under this rule for the sale being prior to the attachment his interest cannot be legally affected by the sale (y) It has similarly been held that where joint Hindu family property is sold in execution of a decree against a member of the joint family another member claiming the whole property on the death of the judgment debtor by survivorship is not entitled to apply under this rule (z) A co sharer cannot apply under this rule for his share does not pass under the sale (a) But a reversioner entitled to succeed on the death of a

(v) *Abdul Aziz* v *Tafazzuddi* (1914) 19 C W N 3 6 S 8 93 I C 839

(w) *Lakshmi* v *Kutti* (188) 10 Mad 5 *Chakrapani* v *Dla j* (1901) 4 Mad 311 *I jow Singh* v *H k m Cha d* (190) 9 Cal 549 *Ajudhia Prasad* v *Na d Lall* (1893) 15 All 318

(x) (1888) 15 Cal 488 49

(y) *Asmutunnissa Begum* v *Ashruff Ali* (1888) 15 Cal 488 491 40

(z) *S bb y du* v *Jedda S bbaraju* (1893) 16 Mad 4 6

(a) *Pi h h K r* v *H rl S gh* (1883) 5 All 4 K Joi l v *Id ral* (19) 9 I C 5 (8) A C 8 As to members of a joint Hindu family see *Med i Prasad* v *Na d K hwar* (19 3) Pat 3 6 85 I C 1014 (3) A I 431

Hindu widow has been held to be entitled to apply under this rule (*b*) A person who claims to be the purchaser of a *tenure* prior to attachment from the judgment debtor whose interest in the tenure has been sold in execution of a decree *for its own arrears of rent* is entitled to apply under this rule for his interests are affected by the sale (*c*) Where immovable property has been sold in execution of a decree against the ostensible owner as his property a person claiming to be the beneficial owner is entitled to apply under this rule (*d*) unless his right to the property is in dispute and a suit by him for a declaration of his right is still pending at the date of the application (*e*)

It has been recently held by the High Court of Calcutta that the expression persons whose interests are affected by the sale is not limited to persons whose *proprietary* or *possessory* title is affected by the sale and that it includes persons whose *pecuniary interest* is affected by the sale Hence it has been held that a decree holder who has attached the property of the judgment debtor *in execution of his decree* has such interest as would entitle him to apply under this rule to set aside a sale of the property held in execution of a decree obtained by another creditor (*f*) But a plaintiff who has obtained an attachment *before judgment* is not entitled to apply under this rule (*g*)

Auction purchaser —In a case under s 311 of the Code of 1882 their Lordships of the Privy Council held that an auction purchaser was not entitled to apply under that section as he was not a person whose immovable property has been sold within the meaning of that section (*h*) There is a conflict of opinion whether an auction purchaser is entitled to apply to have the sale set aside under the present rule He is so entitled if he is a person whose interests are affected by the sale within the meaning of this rule The High Court of Madras has held that he is entitled to apply under this rule The Court said If an auction purchaser s interests are affected by an order setting aside the sale it is difficult to see why his interests are not also affected by the sale (*i*) The High Court of Patna has dissented from this view and held that an auction purchaser is not entitled to apply under this rule In the view taken by that Court the expression interests affected by the sale means interests in the property existing *before the sale* (*j*) The Allahabad High Court has declined to follow the Patna decisions and has held that an auction purchaser is entitled to apply under this rule The Court said In the ordinary use of the word [interests] in the English language it is a term covering every sort of interest recognized by law such as in the case of an auction purchaser liability to pay the money liability to complete and take a transfer of the property, and from his own point of view the necessity of finding the necessary funds and also the necessity of carrying through to fruition the provisional contract into which he has entered If the expression were interests in the property it would of course be confined to an interest in the property sold *antecedent to the sale* If the word were merely interest without the plural and without the words in the property it might be possible to hold that the word interest was confined to interest in the thing itself at the time of the sale But that is not the expression (*k*) The High Court of Rangoon has held that an auction purchaser is not entitled to apply under this rule (*l*)

(*b*) *B j h sho e v P t b* (1919) 4 Pat L J 360 51 I C 3 9 *Jankh bati v Nan Lal* (1914) 19 Cal L J 9 1 I C 07

(*c*) *Aubhoya Dassi v Pudmo Lochun* (189) Cal 80

(*d*) *Abd l Ga v D e* (1893) 0 C 1 418 *T mmana v Mahabala* (1896) 19 M d 167

(*e*) *Ha dw ı Lal v S lamat u l h Khan* (1916) 38 All 359 34 I C

(*f*) *Dh e d a N th v Ram* (19 4) 51 Cal 495 84 I C 119 A C 86

(*g*) *Joge d a v M m tha* (1913) 1 C W N 80 15 I C 668 *Hat N S rada* (19 5) 4 Cal L J 8 89 I C 683 (5) A C 1103

(*h*) *B rj M hun v F ı Uma Nath* (1893) 0 Cal 8 19 I A 154

(*i*) *G p lakrish ayya v San a* (19 0) 33 M d L J 8 55 I C 333

(*j*) *Kh tro M hon v She kh* (1919) 3 Pat L J 516 46 I C 614 *K rt k Ch ndr v Na) ndra Nath* (19 3) 4 I C 60 (24) A I 349

(*k*) *Pam a dan v Jaga ath* (19) 47 All 4 9 87 I C 2 8 (5) A A 459 followed in *S N I R S S brama ian v N L M Chetty r* (19) 5 Rang 516 10 I C 465 ( ) A F 01

(*l*) *K 1 4 L Chettyar Firm v Maricar* (19) 6 Rang 6 1 114 I C 38 (29) A R 33.

Persons entitled to rateable distribution—It is expressly provided by this rule that a person entitled to share in a rateable distribution of assets under s 73 is entitled to apply under this rule Hence a person who is not entitled to a rateable distribution as where the application for execution is not made *until after* the receipt of assets by the Court cannot come in under this rule a a person whose interests are affected by the sale (m)

Conditions of applicability of the rule—A sale held in execution of a decree can be set aside under this rule only if the following conditions concur —

1 There must be a *material irregularity or fraud*
2 The material irregularity or fraud must be in *publishing or conducting the sale*
3 The applicant must have sustained *substantial injury*
4 Such injury must have been caused *by reason of* the material irregularity or fraud

Material irregularity in publishing or conducting sale—The following are instances of material irregularity in publishing or conducting a sale in execution —

1 Service of notice under O 21 r 22 upon a wrong person as legal representative see notes to O 21 r 22 Notice to wrong person as legal representative

1A Omission to specify in the proclamation of sale the extent of the property to be sold or the revenue assessed on it (n) or the amount of income derived from it or the incumbrances to which the property is subject (o) But it has been held that where a sale is held at an earlier hour than that stated in the proclamation (p) or at a place different from that specified in the proclamation (q) the case is not merely one of material irregularity within the meaning of this rule but that the sale is void altogether See r 66 of this Order

2 Misstatement of the value of the property or of Government revenue in the proclamation of sale such as is calculated to mislead intending bidders (r) See r 66 of this Order

3 Omission to affix a copy of the sale proclamation as required by r 67 of this Order (s)

4 Omission to have a drum beaten as required by r 67 of this Order read with r 54 (t)

5 Holding a sale of immovable property before the expiration of 30 days from the date on which the copy of the proclamation has been affixed on the Court house of the Judge ordering the sale (u) See r 68 of this Order

6 Non specification of the hour to which a sale is adjourned (v) See r 69 of this Order

(m) Kath n v Fa a am (1914) M I L J 30 6 I C 93

( ) 4th pp v I m kri h (1895) 21 Mad 51 M d h v I I app (1900) 3 M d 6 8 B I am v S th Na n gtas (19 3) 45 M I I J 403 5 I C 546 (3) A I C 93 [I C]

(o) M I La I v Bhaw (190) 6 C W N 836

(p) Ba h t U v Lma Ch (18 9) 16 Cal 94 ... I b I m I m U h (19) 49 All 40 99 I C 9 6 ( ) A A 41

(q) J v m v I radh gn (19 1) 44 Mad 3 9 I C 16 (1921) A M 5 ... ce I I m I m h d (19 1) 41 M I L J 46 6 I C 916 (1) A M 4 4 [s e l y Off ial R f ree—place of sale not specified in proclamation held no irregularity]

(r) Saad tm I v Ph I Kuar (1898) 0 All 41 5 I A 146 Ma ghi v Mah I r I r hai (1883) 9 C I 6 6 10 I A 5 (Iha S gh IIu d N (18 6) 6 W R 44 3 I A 30 Lm I v Sri I ja I I y II (191) 38 Mad 3 I 1 U 3 9

( ) N a h m r v (ol m Ch nd r (1891) 1 (1 4

(t) Trimbak v Na a (1886) 10 Bom 504 Cop Chand v B a s D s (1919) 1 Lah L J 19 199 00

( ) Ta dd k v 4hm I (1894) 1 C I 66 0 I A 1 6 I ji H Bh k ri ham (19 3) I at 64 I C 363 (3) A I 4

( ) Su o Mo ee v D Ih a (1 9) 4 C I 91 Bh Ih v N j Mo i (1901) 6 C W N 45

6A Holding a sale on a day other than the one to which it is adjourned (*w*) See r 69 of this Order

7 Omission to issue a fresh proclamation where a sale is adjourned (*x*) unless the proclamation has been waived (*y*) Where a sale proclamation had been issued at the instance of the judgment debtor six times and a fresh proclamation was subsequently issued notifying that in the absence of any order of postponement the sale would be held at the monthly sales commencing on 13th July 1903 at Monghyr but the monthly sales did not begin until 17th July owing to the absence of the presiding officer from the station and the sale in question was held on 20th July *in the course of the monthly sales* without a fresh proclamation their Lordships of the Privy Council expressed the opinion that in holding the sale on 20th July the Court did not act in contravention of the provisions of the Code and that there was no irregularity in publishing the sale and held that assuming there was irregularity there was no evidence of substantial injury and that the sale was therefore valid ( ) See r 69 of this Order

8 Default in payment of the deposit of 25 per cent as required by r 84 of this Order (*a*) See notes to r 84

8A Extending time for payment of purchase money (*b*) See notes to r 85

9 Omission on the part of the plaintiff to have a *guardian ad litem* appointed of a defendant where *after* decree but before sale the defendant has been adjudged to be of unsound mind (*c*) See O 32 r 15

10 In a case that went to Privy Council the following irregularities occurred (1) property belonging to a judgment debtor was attached and the judgment debtor died pending the attachment leaving a widow and a minor son but no notice of the subsequent proceedings in attachment was served on any person representing the minor (2) though the property consisted of 109 mouzahs the proclamation of sale was read out without beat of drum in one only of the mouzahs and affixed to a tree in that village and (3) the proclamation did not specify the encumberances to which the property was liable but stated merely the annual profit income and the value of the property with the result that the property was sold at a gross undervaluation Their Lordships of the Privy Council held that the above irregularities were all material irregularities and they accordingly set aside the sale (*d*)

It is to be noted in this connection that if the act or omission complained of amounts *to a material irregularity* the sale is not void but voidable *Being voidable it is liable* to be set aside under this rule on the application of any of the persons mentioned in the rule but it cannot be set aside *unless* it is proved that *substantial injury* has resulted from the irregularity see the proviso to the rule But where the act or omission complained of amounts to an *illegality* it render the sale void ab initio and no proof of *injury* is required In cases (3) (5) (8) and (9) above it was contended that the omission complained of amounted to an *illegality* and that the sale was therefore void ab initio and that it should therefore be declared void without proof

(*w*) *Har Sadl* ɪ v *Sh b* (*p l* (19) 3 Cal I J 140 6 I C 46 (21) A C 59

(*x*) *Gopee Nath* v *I* ɪ *h erp* t (18 8) 3 Cal 54 *Sat l Ch nder* v *Th as* (188) 11 Cal 658 *B j l Ch* ɪ *ter* v *I nesh* (1891) 18 C 1 436

(*y*) *Bip Beh* ɪ *Mitr* v *Jat d anath* (1910) 3 C 1 89 6 I C 813

(*z*) *P* ɪ *q I l* v *jh* v *I ara esl a* (191) 39 Cal 6 38 I A 00 1 I C 1 4

( ) *Ah nad Bakh h* v *Lalta* (1906) 8 All 238 *Bhim S ngh* v *Sarwan* (18) 16 Cal 33

(*b*) *S b na wam* v *I yku da* (19) 43 Mad L J 4 69 I C 1001 (3) A.M 48

( ) *Na ay a* v *K hanasu dar m* (1896) 19 Mad 19 See *Kal pada* v *H* (191) 44 Cal 6 3 I C 6

(*d*) *K* ɪ *sh a I rshad* v *Motcha d* (1913) 40 C 1 63 40 I A 140 19 I C 96

r 90 of substantial injury But it was held that the omission amounted to a *material irregularity* only and that the sale was not void but voidable only and it could not therefore be set aside unless *substantial injury* was proved For instances of sales void ab initio see notes to s 65 Sale when void and when voidable See also notes to O 21 r 22 Omission to give notice and Notice to wrong person as legal representative

No material irregularity—No notice of a sale need be given to a receiver who is not in possession of the property sold. A sale therefore without notice to him is not irregular (*e*)

Publishing or conducting the sale—Where property not covered by the decree has been proclaimed and sold the case is one of material irregularity in publishing and conducting the sale within the meaning of this rule (*f*) *So is an irregular preparation* of the proclamation of sale (*g*)

The expression conducting the sale refers only to the action of the officer who holds the sale The expression does not apply to anything done antecedent to the order of sale (*h*)

Omission to attach property before sale—The question whether an irregularity in *attaching* the property as where the attachment is not properly notified effects the sale or is merely an irregularity in conducting the sale within the meaning of this rule was left open by the Judicial Committee in the undermentioned case (*i*) in *Mahadeo* v *Bhola Nath* (*j*) a full Bench of the High Court of Allahabad held that a regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money and when there has been no such attachment the sale is not merely voidable but void In a later case (*k*) however the same High Court held that the omission to attach immovable property prior to sale amounted to a material irregularity in conducting the sale within the meaning of this rule An attachment it was said is a step towards the *sale* of the judgment debtor s property As to *Mahadeo s case* the Court said that it could no longer be treated as good law since the decision of the Privy Council in *Tasaddul* v *Ahmad* (*l*) where it was held with reference to a proclamation of sale issued in violation of the provisions of O 21 r 68 that it was nothing more than a material irregularity and did not *ipso facto vitiate the sale* *On the other hand in a case decided under the Code of 18 0 the* High Court of Calcutta expressed the opinion that an attachment is not an essential preliminary in sales in execution of decrees it is merely a measure for the protection of the decree holder and the purchaser of the property and the absence of attachment is not therefore an objection which the judgment debtor is competent to raise (*m*) This view was adopted by the same High Court in later cases where it was held that after a sale had been confirmed the sale was not to be considered a nullity merely by reason of the absence of attachment (*n*) The same High Court has held that where an objection that the property proclaimed for sale has not been attached is taken *before* the sale it is the duty of the Court not to proceed with the sale and to direct an attachment (*o*) In the more recent case of *Panchanan* v *Kunja* (*p*) decided in 1917 the High Court of Calcutta held that the Court had no jurisdiction to sell property in execution which had

( ) *M j Ohn Tin* v *I R M I S R M Chetty Firm* (19 9) 7 Rang 4 ( ) A R 311
(*f*) *Imt a Nisa* v *Ch tt Lal* (19 4) 47 All 304 84 I (46 ( ) A A 36 I it see (g v J m I ra (19) 3 All I J 88 I (337 ( ) A A 5 I
(*g*) *J ti S th* v *Da d* (19 3) 4 Lah 43 45 I (103 (3) A I 9
(*h*) *I mel ba* v *Becku* (1) 7 All 641 64
(*i*) *Macnaght* v *Mah ti Ie Lal* (1883) 9 Cal 656 660 10 I A 25
(*j*) (1883) All 86
(*k*) *Sh odhy* v *Bhola th* (1899) 1 All 311
(*l*) (1891) 1 Cal 66 01 A 1 6
(*m*) *Sharoda M y* v *Booma Moyee* (186) 8 W R 9 10
( ) *Ki hory Moh* v *M hom d* (1891) 18 Cal 188 *T o* v *Shib Ch nd a* (1891) I (1 63) *S l ma* v *M h ba* (1911) 13 Cal L J 13 91 C 918
( ) *Sa ama* v *Meherban* (1911) 13 Cal L J 43 19 0 9 1 C 918
(*p*) (1917) 4 I C 9

not been duly attached and that omission to attach rendered the sale void *ipso facto* This decision it is submitted is not good law In a Bombay case where the property was sold without previous attachment the sale was set aside the case being treated as one under s 47 (q) The High Court of Rangoon has held that though the absence of attachment is an irregularity it does not render the sale absolutely void but merely voidable and further that the objection as to the absence of attachment does not come within this rule but within s 47 the substantial question involved being one of notice to the judgment debtor (r) The High Court of Patna has taken the same view as was taken in the earlier Calcutta decisions and refused to follow the decision in *Pacchanan s* case In the Patna case the application to set aside the rule was made *before* the sale was confirmed while in the Calcutta cases the application was made after the sale was confirmed As to this the Patna Court said that it did not make any difference because if the sale was in fact a nullity by reason of the absence of attachment its subsequent confirmation could not make it valid (s) The High Court of Madras has held that a sale without an attachment is an irregularity within this rule (t) **O 21**

Fraud in publishing or conducting sale—The words or fraud are new The present rule requires that an application to set aside a sale on the ground of *fraud* in publishing or conducting the sale should be made *under this rule* In the absence of these words in the corresponding s 311 of the Code of 1882 it was held that an application to set aside a sale on the ground of fraud could only be made under s 244 [now s 47] Had it not been for the newly added words or fraud in this rule such applications would have to be made under s 47 of this Code The result would then have been as under the Code of 1882 that a *second appeal* would lie from an order made on such application for an order made under s 47 has the force of a decree (s 2) and every decree is open to second appeal subject of course to the provisions of ss 100 102 (u) The effect of adding the words or fraud into the present rule is to transfer applications setting up fraud in publishing or conducting the sale from s 47 to the present rule The result is that *no second appeal will now lie* from an order made on such application whether the order be one setting aside the sale or refusing to set aside the sale for the order is no longer one under s 47 but one under r 92 and only one appeal lies from an order made under r 92 (i) [see O 43 r 1 cl (j) and s 104 sub s (2)] It will thus be seen that the object of the Legislature in requiring applications to set aside a sale on the ground of fraud in publishing or conducting the sale to be made under the present rule instead of under s 47 is to exclude the right of second appeal from orders made on such applications with a view to bring proceedings on such applications to a speedy termination But though only one appeal is allowed an appeal now lies in every case from an order made under this rule and r 92 even at the instance of an auction purchaser though he may not be a party to the suit in which the sale was held See notes to s 47 Execution purchaser ill (1), p 159

It may here be observed that in a large majority of reported cases in which applications were made to set aside a sale on the ground of fraud in publishing or conducting the sale the applicant was the judgment debtor and the fraud alleged was that the decree holder had fraudulently kept him in the dark by omitting to serve him with the writ of attachment (r 54) and that no copy of the proclamation of sale was affixed on the

(q) *S r bji v Fala* (191) 36 Bom 156 1 I C 911 See also *Fa lu t v Ma ij th* (19 0) 44 Bom 860 69 8 I C 17

(r) *M I ra v Maho ned* (19 3) 1 Ran 533 I C 369 (4) A R 1 4

( ) *Raj Nazir v Bh k i F m* (19 3) 2 Pat 0 68 I C 363 (3) A P 45

(t) *Sil mania v Krish a* (19 6) 51 Mad L J 17 9 I C 833 (6) A M 11

(u) *Nemai Chand v De o Nath* (1898) 2 C W N 691 *Bhubon Moh n Pal v N nda L l* (1899) 26 Cal 3 4 *H ra Lal Gho e v Chu dra K to Ghose* (1899) 6 Cal 539 In all these ca es it wa held that a second appeal would li

(v) *She kh Ma la Bux v Ragh ba* (1918) 3 Pat L J 645 48 I C 560 *Sheo Prasad v Premna K nwar* (1918) 40 All 1 2 43 I C 5 *J gan Nath v Da d* (19 3) 4 Lah 43 5 I C 103 (3) A L 59

property so as to inform him of the execution proceeding In all these cases it was also alleged that the fraud first became known to the judgment debtor when the auction purchaser instituted proceedings to recover possession of the property In some of these cases again the auction purchaser was charged with collusion with the decree holder in perpetrating the fraud upon the judgment debtor (*w*) The observations of their Lordships of the Privy Council in *Lalla Bunseedhur* v *Koonwar Bindeseree* (*x*) have a material bearing on the question now under consideration (*y*) In that case their Lordships said that where a sale is impeached on the ground of fraud a difference must be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale The question is in the former case which of two innocent parties shall suffer in the latter whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong doing A Court exercising equitable juris diction may withhold its hand in the one case and yet set aside the sale with or without terms in the other

A charge against a decree holder that he and those who acted in concert with him have acted in such a manner as to prevent the best price from being obtained *does not of itself* amount to a charge of fraud within the meaning of this rule *A* obtains a decree against *B* and obtains leave to bid at the auction sale *A* then enters into an agree ment with a third person that if that person would not bid at the sale *A* would sell the property to him if *A* should become the purchaser The property is put up for sale and purchased by *A* The agreement does not constitute a fraud within the meaning of this rule though it may have discouraged competition at the auction ( ) In a recent case Sir Lawrence Jenkins C J said The word fraud is very loosely used in this cla s of cases that is cases under r 90 any irregularity is taken to be fraud with the consequences that such a finding involves But a finding of fraud should be reserved for that which is dishonest and morally wrong and it is not sufficient to come to a *vague* finding of fraud actual fraud must be established (*a*) The Patna High Court has recently held that where after the publication of the sale proclamation the decree holder agrees with the judgment debtor not to hold the sale if payment was made within a speci fied time and he then proceeds to sell the property in contravention of the agreement it amounts to fraud in the matter of the conduct of the sale within the meaning of this rule (*b*)

In a recent case (*c*) their Lordships of the Privy Council said Charges of fraud and collusion—must no doubt be proved by tho e who make them—proved by e tab lished facts or inferences legitimately drawn from those facts taken together as a whole Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before the verdict can be properly found against him If this were not so many a clever and dexterous knave would escape

( ) *Golam Ahad* v *Jt ll iste* (1903) 30 Cal 14 153 *Lurga Ch ran* v *Kali P san a* (1899) 26 Cal 7 3 *W t d un nis a* v *Girdh* (190) All 0 03 (appl ca tion to s t aside al on ground of fraud *after confirmat* f sale) *Nemai Cha d* v *D o Nath* (1898) C W N 691 *Bh bon Mohun Pal* v *N da Lal* (1899) 6 Cal 3 4 *Hi Lal Cho e* v *Ch dra I a to Cho* (1899) 6 C 1 539 (c ses rais in que tion of *seco d app al* from ord r on appli ation to set a i le sal o ground of fraud) *P os o Ki ar K il D* (189) 19 Cal 683 19 I A 166 *S dho* v *Abhen d* (1904) 6 All 101 *Gaja P f* v *R dh r S gh* (1906) 8 All 681 *Math a Das* v *Lachma* (190) 4 All 239 *Durg P nwar* v *Bal want* (1901) 23 All 4 8 (c es ra i g q es tion of a *reg l s l* to et a id al o g ounl of fraud)

(*x*) (1866) 10 M I A 454 4 3 474

(*y*) *Paresl Nath* v *H r Ch in* (1911) 38 Cal 6 6 6 10 I C 361

(*z*) *M hom d Mira Ra uther* v *S vas Jiyu Raghunatha* (1900) 3 Mad 7 I A 1

(*a*) *P re h N th* v *Hari Ch ra* (1911) 38 C l 6 6 6 10 I C 361

(*b*) *Sh ik M ula B x* v *P gh b ir* (1918) 3 Pat L J 645 48 I C 560

(*c*) *Bo B har* v *Satish Ka tha* (19 4) 39 Cal L J 165 1 1 3 I C 31 (3) A I C 3

O 21,

Substantial injury—Material irregularity or fraud standing by itself is no ground for setting aside a sale There must be *substantial injury occasioned by* the irregularity or fraud If the Court fails to find *both* irregularity and injury occasioned thereby it is bound to dismiss the application In other words if there be material irregularity or fraud in publishing or conducting the sale but no substantial loss is occasioned by the irregularity or fraud the applicant is not entitled to have the sale set aside (d) The substantial injury alleged by the applicant must be *proved* it cannot be *assumed* from the mere fact that there was a material irregularity or fraud in publishing or conducting the sale The mere fact that there was a material irregularity or fraud in publishing or conducting the sale will not justify the Court in assuming that substantial injury has thereby been caused Hence although an applicant under this rule may prove material irregularity such as non specification of Government revenue in the proclamation of sale (e) or inadequate description of the property sold (f) or the holding of the sale before the expiry of the period prescribed by r 68 above (g) the sale will not be set aside unless it is *proved* that had it not been for the irregularity the property would have realized a substantially larger price than what it did at the sale The same rule applies where the sale is impeached on the ground of fraud in publishing or conducting the sale

Unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud — These words form part of the proviso to the rule The language of the proviso to this rule differs from the language of the proviso to the corresponding section 311 of the Code of 1882 which was as follows —

> But no sale shall be set aside on the ground of irregularity *unless the applicant proves to the satisfaction of the Court* that he has sustained substantial injury by reason of such irregularity

The words unless upon the facts proved the Court is satisfied have been substituted for the words unless the applicant proves to the satisfaction of the Court The object and effect of these alterations will now be explained

If an applicant under this rule proves *material irregularity* or *fraud* and if he also proves gross inadequacy of price realised at the sale in other words if he proves *substantial injury* —is this sufficient to entitle him to succeed under this rule? The answer is that it is not he must also prove that the inadequacy of the price has been caused *by reason of* the material irregularity or fraud Now there are two possible modes in which this may be proved namely —

(a) by *direct* evidence that is by evidence connecting the material irregularity or fraud with the inadequacy of price as cause and effect or

(b) by *circumstantial* evidence that is by evidence of circumstances which will warrant the necessary or at least reasonable inference that the inadequacy of price was the result of the irregularity or fraud complained of

In *Tasadduk* v *Ahmad* (h) where a sale was sought to be set aside under the corresponding s 311 of the Code of 1882 on the ground that it was held before the expiration of 30 days from the date of the proclamation (r 68) their Lordships of the Privy Council after referring to that section said —

> In the application of that section [that is s 311] it was incumbent on the [applicants] to have proved that they sustained substantial injury by reason of such irregularity They gave no such evidence and it would be extremely improbable that injury

(d) *Harb n L l v K n l n L l* (1899) 1 All 140 ... Mad 19 ... 1 1
(e) *M ... g lte v Mah b r l er had* (1883) 9 Cal 6 8 10 I A
(f) *Aru acl ll ... v ... Ar na hell ...* (1889) 1
(g) *Ta dd k v Ah d* (1 94) 21 C L 66 20 I A 1 6
(h) (1 94) 1 C 1 66 0 I A 1 8

could have happened from the non compliance with the strict letter of s 290 [now r 68] Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was held without full compliance with the provisions of s 290 [now r 68] The section [that is s 311] clearly contemplates *direct evidence* on the subject

Relying on the above passage the High Court of Allahabad held that to succeed under *that section the applicant must prove that the inadequacy in the sale price* was the result of a material irregularity and that the co existence of an irregularity and an inadequacy however gross in the sale price was not sufficient in the absence of *direct evidence* to establish a casual connection between the one and the other In other words the applicant must connect the irregularity with the inadequacy of price as cause and effect *by means of direct evidence* (i) On the other hand it was held by the High Courts of Madras (j) and Calcutta (k) that the fact that the inadequacy of price fetched at the sale was the result of the irregularity complained of might be established *either* by direct evidence *or* might be inferred when such inference was reasonable having regard to *the nature of the irregularity* and *the extent of the inadequacy* As regards the words direct evidence the High Court of Calcutta said that their Lordships meant by that expression that there must be evidence showing that substantial injury was the *necessary* result of the irregularity complained of (l)

The distinction between the Allahabad decisions on the one hand and the Madras and Calcutta decisions on the other may be explained by an illustration In execution of a decree obtained by *A* against *B* *B* s one fourth share in certain property is sold for Rs 200 *B* seeks to set aside the sale alleging that the property was sold at an adjourned *sale that no hour was fixed for the sale as required by r 69 that consequently there* were only three bidders at the sale and that owing to that circumstance the property fetched the grossly inadequate price of Rs 200 It is proved that the hour to which the sale was adjourned was not fixed in other words *material irregularity* is proved *Substantial injury* is also proved by evidence of the sale of a share smaller than one fourth of the same property for Rs 4 000 The fact that there were only three bidders is also proved In such a case the High Courts of Madras and Calcutta would under the old section set aside the sale on the ground that the paucity of bidders *could reasonably be* ascribed to the non specification of the hour and the low price *could reasonably be inferred* from the fact of the paucity of bidders (m) The High Court of Allahabad however would not set aside the sale on such an *inference* That Court would require *direct evidence* to show that the paucity of bidders was due to the non specification of the hour and that the inadequacy of price was due to paucity of bidders

The words unless upon the facts proved the Court is satisfied have been substituted in the proviso to give effect to the Madras and Calcutta decisions What is necessary under the proviso is that the Court should be satisfied that the applicant has sustained substantial injury by reason of the irregularity or fraud complained of *and if the facts proved do so satisfy the Court* that is sufficient *It is no longer necessary* to connect the irregularity or fraud with the inadequacy of price as cause and effect by means of *direct evidence* The result is that a sale will be set aside under the present rule if there be either direct evidence connecting the irregularity with the inadequacy of price *or* evidence of circumstances which will warrant the necessary or at least reasonable inference that the inadequacy was the result of the irregularity complained of and the

(i) *Jagan Nath v Makund* (1896) 18 All 37 *Sh ri v Agha Ali Khan* (1896) 18 All 141
(j) *Venkat [illegible] bbar ja v Zem ndar of [illegible]nag r* (189) 0 Mad 1 9
(k) *Sheoratton v Nat Lall* (1903) 30 Cal 1 *Mahabir Pershad v Dh n kdha i* (1904) 31 Cal 815
(l) *S no Moyee v Dakh na* (1897) 4 Cal 91
(m) *S no Moyee v Dakh na* (1897) 4 Cal 91 *Venkat subba aj v Zam dar of Karvet nag* (1897) 20 Mad 1 9 See also *Mahabir Pershad v Dh n kdha i* (1904) 31 Cal 815

Allahabad High Court now follows this rule (*n*) If there be no such evidence the sale must be confirmed (*o*) O 21

The mere fact that the property realised at the auction sale only one half of the value entered in the proclamation of sale is no ground for setting aside the sale under this rule (*p*)

Necessary parties —The decree holder is a necessary party to an application under this rule (*q*) Under the Code of 1882 there was a conflict of opinion whether an auction purchaser was a necessary party to an application under the corresponding s 311 (*r*) Under the present Code he is clearly a necessary party see the proviso to r 92 sub r (2) Where property is bought at a Court sale by *A* in the name of *B* *A* the beneficial owner is not a necessary party to an application under this rule Hence if an order is made setting aside the sale in a proceeding to which *B* was a party it will bind *A* though *A* was not joined as a party to the proceeding (*s*)

Bona fide purchaser for value without notice —If the conditions of this rule are satisfied the sale will be set aside though the purchaser may be a *bona fide* purchaser for value without notice of the irregularity or fraud in publishing or conducting the sale (*t*)

Waiver and estoppel —If the judgment debtor knowing of an irregularity or fraud lies by and allows the sale to proceed without objection he will be estopped from impeaching the sale on the ground of irregularity or fraud though substantial injury has been caused In *Arunachellam* v *Arunachellam* (*u*) their Lordships of the Privy Council said It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment debtors could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold which they knew well but of which the execution creditor or decree holder might be perfectly ignorant that they should take no notice of that allow the sale to proceed and then come forward and say the whole proceedings were vitiated In *Girdhari Singh* v *Hurdeo Narain* (*v*) the notification of sale had stated the Government revenue to be Rs 3 146 instead of Rs 8 146 the sale being fixed for the 5th of August 1872 The judgment debtor applied for a postponement of sale and stated that he wished to raise money to pay off the decree holder and in his petition he added Under such circumstances it is prayed that a postponement of one month be granted *the attachment and the notification of sale being maintained* Upon that petition the sale was postponed for one month *without the issue of a second notification* The decretal amount not having been paid the property was put up for sale The judgment debtor applied to set aside the sale on the ground that the Government revenue was not correctly stated and that the property therefore fetched a very low price Upon these facts their Lordships of the Privy Council held that though the misstatement of the Government revenue amounted to a material irregularity in publishing the sale

(*n*) *B b R m* v *Inamull h* (19) 49 All 40 99 I C 9 6 ( ) A A 41

(*o*) *Mah bir Ie h d* v *Dhan ldh ri* (1904) 31 Cal 815 819 8 0 *Noor Mahammad* v *Noor M h mmad* (19 3) 5 Lah L J 30 1 I C 730 (3) A I 13

(*p*) *P jhana* v *Askar n* (19) 11 Pat 14 75 I C 185 ( ) A I 550

(*q*) *Al Gath r* v *Ba idhar* (1893) 15 All 40

(*r*) *Kara* v *M r Ali* (1891) 11 All W N 1 1 *Sure d Moh n* v *Ama e h Cha dra* (191) 39 Cal 687 14 I C 6 *Menajuddi* v *To m Ma d l* (191) 39 Cal 881 15 I C 1 6

(*s*) *Ba odi* v *Ch ler Kanta* (190) 9 Cal 63 685 68

(*t*) *P rem* v *Panch Ko ri* (19) C W N 58 4 I C 9 5 (3) A C 533 Distinguish *Chitambar* v *K h ppa* (1902) 6 Bom 543 [fraud in obt i i g decree—inadequacy of price at Court sale—*bo a fide* pur chas r—sale not set a ide]

(*u*) (1889) I Mad 19 15 I A 171 *Um di* v *Sr Faja l el joti* (1915) 38 Mad 38 1 I C 389 *b h i S gh* v *M kat S ngh* (1906) 8 All 2 3 *Ullam Cha dr* v *Kh t a N th* (190) 9 Cal 5 *M h n Lal* v *K l Ch* (19) 49 All 88 10 I C 1 6 (7) A A 513 *M ha aj Bahadur S ng* v *S chindra Nath* (19 7) 3 C W N 309 (9) A C 3 8 *Ma ng Ohn Tin* v *I I M I S R M Chettyar F rm* (19 9) 7 Ra g 4 5 (9) A R 311 *H rdu Lal* v *I m Nath* (19 9) 27 All L J 619 116 I C 448 (9) A A 04

(*v*) (18 6) 3 I A 30

0 the judgment debtor was not entitled to have the sale set aside as the petition amounted to an admission on his part that the notification was correct or that at any rate there was no such mistake or irregularity as would be likely to mislead But it is different where an application for a postponement of sale does not contain any such admission and moreover it is refused. In such a case there is no estoppel (*w*) The objection as to irregularity in publishing or conducting the sale cannot be taken for the first time in the Court of appeal (*x*) but it may be so taken if no fresh evidence is necessary (*y*)

Where no application is made under this rule—If no application is made to set aside a sale under the present rule an order will be made confirming the sale see r 92 below

Questions outside the scope of this rule—The question whether the decree in execution whereof the property was sold was obtained without service of summons on the judgment debtor (*z*) or whether the decree was obtained by fraud (*a*) or whether the Court had jurisdiction to sell the property (*b*) or whether the sale was brought about by the fraud of the decree holder the auction purchaser and others (*c*) is out ide the scope of this rule See note below application to set aside sale on other grounds

Objections not raised in the application—The Court should not under this rule consider objections not expressly taken in the application (*d*)

Compromise of proceedings under this rule—It has been held by the Patna High Court that a proceeding to set aside a sale under this rule is not a proceeding in execution within the meaning of O 23 r 4 but that it is a proceeding in the suit itself A compromise therefore of proceedings under this rule may be recorded under O 23 r 3 (*e*) But this decision is of doubtful authority

Whether O 9 applies to applications under this rule—The provisions of O 9 do not apply to proceedings in execution and therefore do not apply to an application under this rule (*f*) See notes to O 9 r 9 and O 9 r 13 Whether this rule applies to proceedings in execution See also notes below Appeal

Suit to set aside sale on ground of material irregularity—Where an application made by a judgment debtor under this rate to set aside a sale on the ground of material irregularity in publishing or conducting the sale is disallowed and the sale is confirmed under r 92 (1) he is precluded by virtue of the provisions of r 92 (3) from bringing a suit to set aside the sale on the same grounds (*g*) But this rule does not apply in the case of revenue sales in Madras (*h*)

Limitation—An application under this rule must be made within 30 days from the date of sale [Limitation Act 1908 Sch I art 166] But where the irregularity affecting the sale has by the fraud of the decree holder or other parties to the sale been kept concealed from the judgment debtor he is entitled to apply under this rule whether

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(*w*) *Thakor* v *L elanunl* (1891) 7 C L 613 *Iaman* v *Ku hajan* (1894) 17 M d 304

(*x*) *Olpherts* v *M l b I e shad* (1883) 10 I A 5 30 9 (al 656 661 *Mahadeo* *Dhob* (19 3) ? l at 916 918 4 I C 838 (3) A l 83

(*y*) *Se* *Mah* *d Meera* v *Sarr n* (1900) I A 1 at p *Teka t K* *h a* v *M t Ch* *d* (1913) 40 I A 140 14 40 C l 63 19 l (96

(*z*) *Net L ll* v *She kh K reen* (1896) 3 C l 6?6 689

( ) *Khaj ndra* v *Pran Nath* (190) 9 C l 39 9 I A 99

(*b*) *Sh r n* v *Agha Ali* (1896) 18 All 141 14

(*c*) *Bhajwa D* v *N j I* *ad* (19 4) 47 All. 1 84 I C 1031 ( ) A A 146

(*d*) *Harbans* v *Fundi* (1899) 1 All 140 *Copi hand* v *B n ir i D* (1919) 1 Lah L J 19

(*e*) *Cho dh ry* v *Cho dl* *y* (19 1) 6 P t J J 3 6 I C 608 (1) A l 10

(*f*) *Bhar t Chand a* *Ia i n* *S rkar* (191) 1 C l W N ?9 41 I C 596 *R* *a* *t llah* v *R azuddi* (19 6) 53 Cal 6 9 96 I C 05 (6) A C 3

(*g*) *B* *hma iya* v *App yya* (19 1) 44 Mad 3 1 6 I C 203 (1) A M 1 1 *Ma S w* v *Ma ng Ky m* (19 8) 5 Rang 606 104 I C 706 (8) A R 19 *Nand K ho e* v *S R* (19 6) 7 Lah 1 93 I C 1007 (6) A I 16

(*h*) *Jaga atha* v *A th p r m l* (19) 1 M d 6 10 I C 84 ( ) A M 103

the sale has been confirmed or not and the time for making the application is to be computed from the date when the fraud first became known to him (i)

The point of distinction as regards limitation between the old law and the new law is this that while under the Code of 1882 the application to set aside a sale on the ground of *fraud* in publishing or conducting a sale had to be made under s 244 [now s 47] and the period of limitation for the application was 3 years from the date of sale (j) such application must now be made under the present rule and the period of limitation is 30 days from the date of sale See notes below Application to set aside sale on other grounds

Application to set aside sale on other grounds —When the auction purchaser is the decree holder himself and when an application is made to set aside the sale on a ground other than that covered by the present rule and no application has been made under r 89 the case falls within s 47 and hence there is a second appeal (k) Similarly where a judgment debtor applies to have a sale set aside not only on the ground of material irregularity in publishing and conducting the sale but also on the ground that no notice of the application for attachment and sale was given as required by O 21 r 22 the case falls within s 47 and hence there is a second appeal (l) Neither this rule nor r 92 applies to such cases It must however be noted that where an application really comes under the present rule, the mere mention of s 47 in the application will not make it an application under s 47 for the purposes either of an appeal or of limitation (m) See note above Question outside the scope of this rule

Joinder of claim under this rule with claim under sec 47 —A claim to set aside a sale on the ground of material irregularity under this rule may be combined with a claim for a declaration that the sale is a nullity as the decree was passed after the death of the judgment debtor (n)

Whether sale can be challenged by way of defence in a suit for possession —See notes to r 92 below under the same head

Appeal —An appeal lies from an order under this rule and rule 92 setting aside or refusing to set aside a sale [O 43 r 1 cl (j)] But no second appeal lies from the order of the first appellate Court (o) See s 104 sub sec (2) and notes above Fraud in publishing or conducting sale Nor does an appeal lie under the Letters Patent from the order of the first appellate Court (p) See notes above Application to set aside sale on other grounds

It has been held by the High Court of Calcutta that an appeal lies from an order dismissing an application under this rule for default the reason given being that the effect of such an order is to confirm the sale under r 92 (q) *A fortiori* it is so if the order dismissing the application for restoring the original application on the file also confirms the sale (r) These decisions were doubted in a later case (s) which held that

(i) *M he d o* v *ra* v *Cop l* (1890) 1 C 1 69 [F B] *Golam Ahad* v *J d1iste* (1903) 30 Cal 14 153 *H ra I l* v *Ch ndra* (1899) 26 C 1 539 54 545 *Bhusa* v *Irof ll* (19 1) 48 Cal 119 60 I C 801 (1) A C 51

(j) Limitation A t 1908 s h I rt 181 *Ne Chand* v *De o Nath* (1894)—C W N 691 *Hira Lal Ghose* v *Ch ira I int Ghose* (1899) 6 Cal 39

(k) *Si p r I k Ilt v P dh S gh* (19 4) All L J 413 83 I C 10 8 (4) A A 693 N al o tk *l* v C r d j l (19 4) 4 Mal I J 549 84 I C 9 5 (4) A M 8

(l) *I j j p l I m ji hari r* (19 4) 4 M d 988 80 I C 9 (4) A M 431 [F B]

(m) *M tc r* v *Abd l* (19 5) 30 C W N 86 89 I C 6 (6) A C 109

(n) *B b J mila* v *Dav na l* (19_8) Pat 331 107 I C 843 (8) A 1 7

(o) *Mahade* v *Dhobi* (19 3) 2 Pat 916 74 I C 838 (3) A I 283 *Jagg n Nath* v *Da d* (19 3) 4 Lah 43 5 I C 103 (_3) A L 59 *Jiw S gh* v *S wan M l* (19 0) Lah L J 41 54 I C 941 *S tiend Nath* v *Charn Ch d a* (19) 45 Cal L J 5 104 I C 188 ( ) A C 6

(p) *M l n na l* v *I h ll h* (189) 14 All 2 6 [F B] *P l L l* v *M lan L l* (191) 39 All 191 39 I C 460 *I arja* v *M l ha d* (19) 6 Lah 50 94 I C 5 1 (5) A L 6 4

(q) *K l K l* v *Shy m Lal* (191) 25 Cal. L J 163 38 I C 598

(r) *Na e l* v *P Kh ld* (19 5) 41 Cal L J _96 91 I C 3 1 ('2) A C 510

(s) *Ba tull h* v *I ea_udd* (19 6) 53 Cal. 6 9 96 I C 05 (6) A C " 3 *La ta K ma Kh ole Ch d* (1928) 55 C 1 616 104 I C 59 ('8) A C 25

the judgment debtor was not entitled to have the sale set aside as the petition amounted to an admission on his part that the notification was correct or that at any rate there was no such mistake or irregularity as would be likely to mislead But it is different where an application for a postponement of sale does not contain any such admission and moreover it is refused In such a case there is no estoppel (*w*) The objection as to irregularity in publishing or conducting the sale cannot be taken for the first time in the Court of appeal (*x*) but it may be so taken if no fresh evidence is necessary (*y*)

Where no application is made under this rule—If no application is made to set aside a sale under the present rule an order will be made confirming the sale see r 92 below

Questions outside the scope of this rule—The question whether the decree in execution whereof the property was sold was obtained without service of summons on the judgment debtor ( ) or whether the decree was obtained by fraud (*a*) or whether the Court had jurisdiction to sell the property (*b*) or whether the sale was brought about by the fraud of the decree holder the auction purchaser and others (*c*) is outside the scope of this rule See note below application to set aside sale on other grounds

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Whether O 9 applies to applications under this rule—The provisions of O 9 do not apply to proceeding in execution and therefore do not apply to an application under this rule (*f*) See notes to O 9 r 9 and O 9 r 13 Whether this rule applies to proceedings in execution See also notes below Appeal.

Suit to set aside sale on ground of material irregularity—Where an application made by a judgment debtor under this rate to set aside a sale on the ground of material irregularity in publishing or conducting the sale is disallowed and the sale is confirmed under r 92 (1) he is precluded by virtue of the provisions of r 92 (3) from bringing a suit to set aside the sale on the same grounds (*g*) But this rule does not apply in the case of revenue sales in Madras (*h*)

Limitation—An application under this rule must be made within 30 days from the date of sale [Limitation Act 1908 Sch I art 166] But where the irregularity affecting the sale has by the fraud of the decree holder or other parties to the sale been kept concealed from the judgment debtor he is entitled to apply under this rule whether

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(*w*) *Th kor* v *Leelanu d* (1881) C I 613 *I m n* v *Ku haj n* (1894) 17 M d 304

(*x*) *Olpherts* v *Mahabir Persh ad* (1883) 10 I A 30 9 Cal 6 6 661 *Mahadeo* v *Dh l* (19 3) 1 at 916 918 4 I C 838 (3) A I 83

(*y*) S *Maho ed M era* v *Savvam* (1900) I A 17 at p 5 *Tekai Kri lna M t Ch d* (1913) 40 I A 140 145 40 C l 63 19 I C 6

(*z*) *Net L ll* v *She kh Kareen* (1896) 3 Cal 686 689

( ) *Khagendra* v *Pr Nath* (190) 29 Cal 39 9 I A 99

(*b*) *Shir* v *Agha Al* (1896) 18 All 141 145

(*c*) *Bhagwan D* v *Suraj I at* (19 4) 4 All 1 84 I C 1031 (5) A A 146

(*d*) *H bans* v *Ru d n* (1899) 21 All 140 *Copichand* v *Be si Das* (1919) 1 Lah L J 19

(*e*) *Clo lh ry* v *Cho idla j* (19 1) 6 Pat L J 53 6 I C 608 (21) A P 10

(*f*) *Bhar t Ch nd* v *Iasim Sa kar* (191) 1 Cal W N 69 41 I C 586 *H ru t illah* v *Rea l n* (19 6) 53 Cal 6 9 96 I C 0 (6) A C 7 3

(*g*) *B ahma j ja* v *Appajya* (19 1) 44 Mad 3 1 62 I C 03 (21) A M 1 1 *Ma Sa o M u j Ky* (19 8) 5 R g 606 10 I C 706 (8) A R 18 *Nand K ho S llan* (1926) 7 Lal 1 93 I C 1007 (6) A I 16

(*h*) *J q tha* v *Kath p r n al* (19) 1 Mad 6 10 I C 88 ( ) A M 103

the sale has been confirmed or not and the time for making the application is to be computed from the date when the fraud first became known to him (i) O 21,

The point of distinction as regards limitation between the old law and the new law is this that while under the Code of 1882 the application to set aside a sale on the ground of *fraud* in publishing or conducting a sale had to be made under s 244 [now s 47] and the period of limitation for the application was 3 years from the date of sale (*j*) such application must now be made under the present rule and the period of limitation is 30 days from the date of sale See notes below Application to set aside sale on other grounds

Application to set aside sale on other grounds—When the auction purchaser is the decree holder himself and when an application is made to set aside the sale on a ground other than that covered by the present rule and no application has been made under r 89 the case falls within 47 and hence there is a second appeal (*k*) Similarly where a judgment debtor applies to have a sale set aside not only on the ground of material irregularity in publishing and conducting the sale but also on the ground that no notice of the application for attachment and sale was given as required by O 21 r 22 the case falls within s 47 and hence there is a second appeal (*l*) Neither this rule nor r 92 applies to such cases It must however be noted that where an application really comes under the present rule the mere mention of s 47 in the application will not make it an application under s 47 for the purposes either of an appeal or of limitation (*m*) See note above Question outside the scope of this rule

Joinder of claim under this rule with claim under sec 47—A claim to set aside a sale on the ground of material irregularity under this rule may be combined with a claim for a declaration that the sale is a nullity as the decree was passed after the death of the judgment debtor (*n*)

Whether sale can be challenged by way of defence in a suit for possession—See notes to r 92 below under the same head

Appeal—An appeal lies from an order under this rule and rule 92 setting aside or refusing to set aside a sale [O 43 r 1 cl (j)] But no second appeal lies from the order of the first appellate Court (*o*) See s 104 sub sec (2) and notes above Fraud in publishing or conducting sale Nor does an appeal lie under the Letters Patent from the order of the first appellate Court (*p*) See notes above Application to set aside sale on other grounds

It has been held by the High Court of Calcutta that an appeal lies from an order dismissing an application under this rule for default the reason given being that the effect of such an order is to confirm the sale under r 92 (*q*) *A fortiori* it is so if the order dismissing the application for restoring the original application on the file also confirms the sale (*r*) These decisions were doubted in a later case (*s*) which held that

(i) *M I iro N n v C p l* (1890) 17 Cal 69 [F B] *Golam Ahad v J dl ster* (1903) 30 Cal 14 1 3 *H ra L l v Ch indr t* (1899) 6 C L 1 539 54 545 *Bhu v Irof H* (19 1) 48 Cal 119 60 I C 801 (1) A C 51

(j) Limitation A t 1908 s h 1 rt 181 *Vem Ch v Den Nath* (1898) C W N 691 *H v Lal Ch e v Ch l a Fa to Cl e* (1889) 6 C L 539

(k) *Si pe tor D k Ltd v R dh S gl* (19 4) All L J 413 83 I C 10 8 (4) A A 698 S 1 o 41 h v *Cor d j l* (19 4) 4 Mad L J 49 84 I C 9 5 (4) A M 8

(l) *I jag p la v I am j chari* (19 4) 4 M d 838 80 I C 9 (4) A M 431 [F B]

(m) *M r v Abd l* (19 5) 30 C W N 86 89 I C 6 (6) A C 109

(n) *B b J m la v D y d* (19 8) 7 Pat 331 107 I C 813 (28) A I 7

(o) *Mah deo Dhob* (19 3) 2 Pat 916 4 I C 838 (3) A I 83 *J ggan Nath v Da d* (19 3) 4 Lah 243 5 I C 103 (23) A L 59 *J w S gh v Saw n Mal* (19 0) Lal L J 41 54 I C 941 *S t dra N th v Cha Ch d a* (19) 4 Cal L J 5 104 I C 188 (7) A C 6

(p) *M l am I v I h ull h* (189) 14 All 6 [F B] *P I l v M la L l* (191) 39 All 191 39 I C 460 *I a ja v M lcha d* (19 5) 6 Lah 50 94 I C 5 1 (5) A I 6 4

(q) *K h K la Shy m Lal* (1917) 5 Cal L J 163 38 I C 59

(r) *v e d a P kh ll* (19 5) 41 C L J 6 9 I C 3 1 ( ) A C 510

(s) *Bi rat H k v Pe udd n* (19 6) 53 Cal 6 9 90 I C 05 (6) A C 3 *L sa la A m v Ah ode Chan l a* (19 8) 55 Cal 616 104 I C 59 (8) A C 5

an order of dismissal by default is not a confirmation of the sale and does not preclude the party from making a fresh application while a dismissal on the merits or when the applicant does not appear and the opposite party does appear is appealable under O 43 r 1 (j) The case last cited was dissented from by the same High Court in *Ansarali* v *Bhim Sankar* (t) where it was held that an appeal lies from an order dismissing an application under this rule for default where such dismissal is for the non appearance of the applicant or for non appearance of both the parties and even when no formal order is recorded under r 92 confirming the sale

Revision —No revision lies from an order dismissing an application under this rule for default (u) See notes above Appeal

Appeal to Privy Council —See notes to r 92 under the same head

91 [S 313] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment debtor had no saleable interest in the property sold

Application by purchaser to set aside sale on ground of judgment debtor having no saleable interest

Application to set aside sale —This rule enables the auction purchaser to proceed by an *application* to set aside the sale where the judgment debtor had no *saleable* interest in the property It does not apply where a sale is sought to be set aside by an auction purchaser on the ground that he had been induced by *misrepresentation or concealment* to buy the property for more than its real value (v) The remedy of the purchaser *in such a case is by a regular suit As to refund of purchase money when a sale is set* aside on the ground that the judgment debtor had no saleable interest see r 93 below In two recent Madras cases a decree holder brought to sale and purchased property which did not belong to the judgment debtor and notified satisfaction of his decree On discovering his mistake he filed a fresh execution application but the Court held that he could not execute again without first setting aside the sale under this rule (w)

No saleable interest —This rule applies only where a judgment debtor has no saleable interest *at all* Hence the rule does not apply if the judgment debtor has even a partial interest in the property sold (x) however small that interest may be In other words a purchaser is not entitled to have a sale set aside under this rule on the ground that the judgment debtor had a saleable interest in a very small portion of the property and had no saleable interest in the major portion of the property (y) For the purposes of this rule a mortgagor has a saleable interest in the mortgaged property even though a decree has been obtained by the mortgagee for the enforcement of the mortgage (z) and although the amount due under the mortgage exceeds the value of the property (a)

The decision that a sale cannot be set aside under this rule if the judgment debtor has any interest *in the property does not apply to a sale under a mortgage decree* held under the rules of the Calcutta High Court and the conditions of sale framed thereunder Therefore a purchaser under such a sale is entitled to have it set aside if the property

(t) (19 9) 33 C W N 332 (29) A C 407

(u) (19 5) 41 Cal L J 86 9 I C 351 ('25) A C 510 *supra*

(v) *Durga Sund* v *Gov da* (1884) 10 Cal 368 *B j Mohun* v *R Uma Nath* (1893) 0 Cal 8 19 I A 154 *Sh ogobinda* v *Dhanukdha* (1913) 19 C W N 1 91 1 I C 774

(w) *Muthu Kum rasam* v *Muthusami* (1927) 50 Mad 639 100 I C 5 (27) A M 394 *Jaga nada* v *Bas w ja* (19 7) 53 Mad L J 255 104 I C 614 ( ) A M 83

(x) *Ram Cooma* v *Shu hee* (1883) 9 Cal 6 6 *Ram Narain* v *Dw rka ath* (1900) 7 Cal 64

(y) *Sonaram* v *Moh ram* (1901) 28 Cal 3

(z) *Prot p Chunder* v *Paniotj* (1883) 9 Cal 508

(a) *Sa t Lal* v *Ramji* (188) 9 All 167

sold was under attachment at the date of sale and that the attaching creditor was not joined as a party to the suit (b)

Necessary parties —See the proviso to r 92 sub r (2)

Limitation —The application under this rule must be made within 30 days from the date of sale Limitation Act 1908 sch 1 art 166

Appeal —An appeal lies from an order setting aside or refusing to set aside a sale made under this rule and rule 92 [O 43 r 1 cl (j)]

Withdrawal of purchase money by auction purchaser from Court —See notes to s 151 case (bb)

Compensation for loss of part of property bought at a Court sale —A purchaser who is deprived of a part of the property bought at a Court sale is not entitled to compensation as against the judgment debtor for the loss of that part The principle is that apart from the case provided for by this rule and apart from fraud a purchaser at an auction sale must abide by his bargain What is sold and bought is the right title and interest of the judgment debtor in the property The Court which sells the property does not guarantee the title and the maxim *Caveat emptor* applies It does not make any difference that the property was sold in execution of a mortgage decree and the mortgagee himself is the purchaser (c) See notes to r 94 below What passes at a Court sale

Sale when to become absolute or be set aside

92 [Ss 312, 314] (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made

Alterations in the rule —

1 The corresponding s 312 of the Code of 1882 applied only to application referred to in r 90 The present rule applies also to applications referred to in rr 89 and 91 [Code of 1882 ss 310A and 313] see sub r (1)

2 In sub r (1) the words as regards the parties to the suit which occurred in s 312 after the words confirming the sale have been omitted.

3 In sub rule (3) the words on the ground of such irregularity which occurred in the old section after the words no suit to set aside have been omitted

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(b) *Moh n Lal v Na bala* (19 0) 33 C W N 177 118 I C 887 (9) A C 07

(c) *Abr a h v Bhub n* (19 1) 5 C W N 56 63 I C 1 6 ('21) A C 115 *Rakappalli v Th ndavaroy* (19 0) 43 Mad 3 54 I C 515

No suit will lie to set aside an order made under this rule— No suit will lie to set aside an order made under this rule by any person against whom such order is made The only remedy of the party against whom the order is made is to appeal from the order under O 43 r 1 cl (j) Now an order under this rule may be—

(1) either an order confirming the sale or

(2) an order setting aside the sale

Order confirming the sale —An order confirming the sale may be made—

(i) either where no application is made at all to set aside the sale or

(ii) where an application is made and di allowed

No suit will lie in either case to set aside an order confirming the sale (*d*)

Order setting aside the sale —The language of sub rule (3) makes it clear that no suit will lie to set aside an order *setting aside* a sale made on an application under rule 89 90 or 91 (*e*) The party against whom the order is made has a remedy by way of appeal under O 43 r 1 cl (j)

The suits barred under sub rule (3) are suits to set aside (1) an order confirming a sale under sub rule (1) and (2) an order setting aside a sale under sub rule (2) Sub rule (3) refers to applications under rr 89 90 and 91 A suit by an auction purchaser for a return of the purchase money on the ground that the judgment debtor has no saleable interest in the property sold is barred under sub rule (3) for the case is within r 91 above see notes to r 93 Suit for a return of purchase money where no saleable interest But a sale by a judgment debtor to recover property sold in execution of a mortgage decree which was neither included in the mortgage nor in the decree but which found its way into the certificate of sale in some unexplained manner is not barred by sub rule (3) such a case is not one of material irregularity within r 90 nor does it fall under r 89 or r 91 above (*f*) A person claiming title to a property attached and sold by the Insolvency Court as belonging to the insolvent is entitled to bring a suit to establish his title to the property though his claim has been disallowed by the Insolvency Court The present rule is no bar to such a suit (*g*)

Whether an execution sale can be challenged by way of defence in a suit for possession—Where a judgment debtor does not question the validity of a sale under r 90 above and a suit is brought by the auction purchaser against him for possession it is not competent to him to challenge the sale in that suit The penalty imposed upon a negligent judgment debtor is set out in r 92 and it is that the Court shall make an order confirming the sale and thereupon the sale shall become absolute This amounts to a judicial determination that none of the objections exists on which the validity of the sale could have been questioned (*h*) The dismissal however of an application made by a judgment debtor under r 90 does not preclude him in a suit for possession by the auction purchaser from pleading by way of defence that the property sold in execution of a mortgage decree passed against him and bought by the purchaser was not included in the mortgage suit or decree but was fraudulently inserted in the sale certificate (*i*)

(*d*) *Bhim Si gh* v *Sarwan* (1889) 16 Cal 33 40 *Damo la* v *I i ajal* (190) °6 Bom 40 *G ijrajmati Teor* v *4kbar Hu a n* (190) _9 All 196 34 I A 3 *Brahma i ja* v *App i ja* (19 1) 44 Mad 351 6 I C 03 (1) A M 1 1 [Mat rial irregularity] *Agta Hu in* v *Qasim Ali* (19) °3 All L J 946 (_6) A A 3 89 I C 1018 [Amendment of decr after sal] *Ma S o* v *Maung T i w* (19 8) 5 R ng 606 10 I C 706 (8) A R 18

(*e*) See *Sh b Si gh* v *Muk t S ngh* (1896) 18 All 43 *Sh am Beh ri I l* v *I ip kishore* (1898) 0 All 3 9 [no lo g r law

(*f*) *Bulaqi Da* v *Kesri* (19 8) 50 All 6°6 (28) A A 363

(*g*) *Harn m* v *G inp t* (19 3) 5 Lah L J 0 3 I C 36 (3) A L 4

(*h*) *Jag esi ar* v *ka la h* (19 3) 8 (W N 8 1 78 I C 1 6 ( ) A C 81 *Lak ha (l d a* v *Ramd s* (19 9) 33 C W N 95 118 I C 8 7 (9) A C 374

(*i*) *M h* v *M hi* (19 1) 41 Ma I L J 61 70 I C 303 (1) A M 79

O rr

Sale by receiver in a partnership action —A sale by a receiver under the directions of the Court given under a preliminary decree in a suit for dissolution of partnership is not a sale in execution of a decree The provisions of the Code relating to execution sales do not apply to such a sale (j)

Court —The word Court means the Civil Court and not the Collector when the decree is transferred to the Collector for execution (k)

Plea of bar of limitation after confirmation —No application can be entertained after confirmation of a sale to set aside a sale on the ground that the application for attachment and sale was barred by limitation (l)

Appeal —An appeal lies from an order under this rule setting aside or refusing to set aside a sale [O 43 r 1 cl (j)] But no second appeal lies from the order passed on first appeal (m) [see s 104 (2)]

Appeal to the Privy Council —An appeal lies to His Majesty in Council from an order passed under this rule and r 90 (n)

Return of purchase money in certain cases

93 [S 315] Where a sale of immovable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase money, with or without interest as the Court may direct, against any person to whom it has been paid

Section 315 of the Code of 1882 —The corresponding s 315 of the Code of 1882 ran as follows —

When a sale of immovable property is set aside under s 310A [O 21 r 89] 312 or 313 [O 21 r 91]

or when it is found that the judgment debtor had no saleable interest in the property which was purported to be sold and the purchaser is for that reason deprived of it

the purchaser shall be entitled to receive back his purchase money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid

The repayment of the said purchase money and of the interest (if any) allowed by the Court *may be enforced* against such person under the rules provided for by this Code for the execution of a decree for money

The second and fourth paragraphs of s 315 have been omitted in the present section. Further the words shall be entitled to an *order* for repayment have been substituted for the words shall be entitled to receive back which occurred in the third paragraph

No saleable interest —An auction purchaser may under r 91 apply to set aside the sale on the ground that the judgment debtor had no saleable interest in the property sold If the sale is set aside he may apply under this rule for an order for repayment of his purchase money But no sale can be set aside under r 91 nor can any repayment be ordered under this rule if it is found that the judgment debtor had some saleable interest in the property The reason is that in the case of a sale under a decree of the

(j) *Na n Das v Ram Chander* (19 6) 48 All 209 90 I C 116 (26) A A 1 1

(k) *Fazal v Manzur* (1918) 40 All 4 45 I C 3

(l) *Lakhi Ram v Maharaj Kishan Prasad* (191) 1 L J 15 3 I C 8 6

(m) *Jiwa Singh v Sawan Mal* (1919) Punj Rec no 168 p 446 54 I C 941 *Jagan Nath v Daud* (19 3) 4 Lah 43 5 I C 103 (3) A L 59

(n) *Krishna Prashad v Motichand* (1913) 40 Cal 635 40 I A 140 19 I C 296

93 Court there is no warranty of title either by the decree holder or by the Court as there is in the case of private sales The purchaser must be taken to accept the property with all risks and all defects in the judgment debtor s title It follows that the purchaser is not entitled to any refund even if the judgment debtor has no saleable interest at all Rules 91 and 93 however confer upon him a statutory right to a return of the purchase money in such cases (o)

Suit for return of purchase money where no saleable interest—The Code of 1859 did not contain any express provision for a return of the purchase money to the auction purchaser if it turned out that the judgment debtor had no saleable interest in the property at all Hence it was held that the auction purchaser was not entitled to a return of the purchase money even if the judgment debtor had no saleable interest (p) The right to a return of the purchase money was first given by s 315 of the Code of 1877 That section was in terms similar to s 315 of the Code of 1882 Under the Code of 1882 it was held by all the High Courts (q) following a Full Bench ruling of the Allahabad High Court (r) that a purchaser at a sale in execution of a decree could maintain *a suit* against a decree holder for recovery of the purchase money if it turned out that the judgment debtor had no saleable interest in the property sold and that he was not limited to the special procedure in the *execution* department mentioned in that section This view was based principally upon the words *may* be enforced which occurred in the last paragraph of s 315 It was also held under that section that whether the purchaser proceeded by an application for execution under that section or by a regular suit he was not entitled to receive back his purchase money unless the judgment debtor had *no saleable interest at all* if the judgment debtor had *some* saleable interest in the property however small he could not by *suit* any more than by *application* obtain a refund of the purchase money in proportion to the extent to which the judgment debtor had no interest (s) It was further held having regard to the words and the purchaser is for that reason *deprived* of it which occurred in the second paragraph of s 315 that the cause of action did not arise and the period of limitation for a suit under that section did not commence until the purchaser was *deprived* of the property sold to him (t) It was also held that the purchaser was entitled to proceed by way of suit even after rateable distribution against those among whom the purchase money was distributed (u) It was further held that a suit would lie even *after confirmation* of the sale if the purchaser was after confirmation deprived of the property as the result of a suit by the lawful owner (v)

(o) *Kunh med* v *Chattu* (1886) 9 M d 43 *Sha to Chanler* v *Na n Sukh* (1901) 3 All 355 3 6 357 *Muhammad* v *Bachcho* (190) 2 All 537 539

(p) *Sowdamini* v *Krishna* (1869) 4 Beng L R 11 *Hira Lal* v *Ka m un Nisa* (1880) 2 All 80 *Ram Narain* v *Mahtab* (1880) 2 All 8 8

(q) *Kish in Lal* v *M hammad* (1891) 13 All 383 *Sidheswari* v *Gosha n* (1913) 35 All 419 19 I C 986 *Muhammad* v *Ja Narai* (1914) 36 All 5 9 26 I C 59 *G rdha Das* v *Side hwari*(1918) 40 All 411 44 I C 697 *Gursh da ca* v *Gang ya* (1899) Bom 83 *Rustomji* v *I najak* (1911) 3 Bom 99 7 I C 9 5 *H ri* v *Sh ikh* (1900) 5 C W N 40 *N tja nd* v *Juggat* (190) 7 C W N 105 *Ram Kumar* v *Ram Co r* (1910) 37 Cal 67 I C 559 *Mak r Al* v *S fuddin* (19 3) 50 Cal 115 1 6 0 I C 606 (3) A C 8 *Lachajapp n* v *Na aya a* (1888) 11 Mad 269 *Nilaka ta* v *Imamsah b* (1893) 16 Mad 361 *Mol deen* v *Mahomed* (191) 3 Mad L J 487 17 I C 437 *T rumala ami* v *Subramanian* (1914) 40 Mad 1009 45 I C 109

(r) *Mu na Singh* v *Gajadhar Singh* (1883) 5 All 5 7

(s) *Shanto Ch indar* v *Na n S kh* (1901) 3 All 3 *Muhammad* v *Bachcho* (1905) 7 All 537 *Sundara* v *Venkata* (1894) 1 Mad 8 *Bhagwan Das* v *Allah Bakhsh* (1919) 1 unj Rec no 5 p 130 51 I C 59

(t) *Gurshidawa* v *Gangaja* (1899) 2 Bom 83 See also *Nilak ta* v *Imamsahib* (1893) 16 Mad 361 *Mohideen* v *Mahomed* (191) 3 Mad L J 487 17 I C 437 *Sideswari* v *Gosh in* (1913) 35 All 419 19 I C 986 *Ramk mar* v *Ram Gour* (1910) 37 C I 6 I C 559 *G dha Das* v *Siddeshwari* (1918) 40 All 411 44 I C 697

(u) *Ki h n L l* v *Mulamm d* (1891) 13 All 383 *G dhar Das* v *Sidhe ari* (1918) 40 All 411 44 I C 69

(v) (19 3) 0 Cal 11 0 I C 606 (3) A C 85 *st pr*

The second and fourth paragraphs of s. 315 of the Code of 1882 have now been omitted. The words *may* be enforced which occurred in s 315 are not reproduced in the present rule The present rule says that if an application is made by the auction purchaser under r 91 to set aside the sale—and such application must be made within 30 days from the date of sale—and the sale is set aside under r 92 the purchaser is entitled to an *order* for a return of the purchase money The result therefore under the present Code is that if the purchaser does not apply under r 91 to set aside the sale or if an application is made but it is disallowed the Court shall make an order confirming the sale under r 92 (1) If an order is made confirming the sale the purchaser is precluded by r 92 (3) from bringing a suit to set aside the order confirming the sale And it has been held by all the High Courts (*w*) that under the present Code an auction purchaser is *not* entitled as he was under the Code of 1882 to bring a regular suit for a return of the purchase money in cases where the judgment debtor has no saleable interest in the property unless he can bring himself within the equitable principles which justify a suit for money had and received to his use (*x*) The result of these decisions is that if in ignorance of the true facts the purchaser fails to make the application to set aside the sale under r 91 within the period of limitation he can get no relief and the judgment debtor is entitled to take credit for the price of property not belonging to him This may at first sight seem inequitable but the explanation is that while in a private sale there is in the absence of a contract to the contrary an implied covenant for title by the vendor there is no such covenant either by the decree holder or by the Court in the case of a sale in execution of a decree the doctrine of *caveat emptor* applies to a Court sale The right now given to the purchaser being a creation of the statute the remedy to enforce that right must be confined to that prescribed by the statute That remedy is to apply under r 91 to set aside the sale and if the sale is set aside to apply for a return of the purchase money under r 93 If the Court passes an order refusing to set aside the sale he may appeal from the order under O 43 r 1 (j) the order being one made under r 92 The judgment of the appellate Court is final there being only one appeal from such order He cannot as stated above bring a regular suit to set aside the sale and for a refund of the purchase money as he could under the Code of 1882 (*y*) O 21

But it is otherwise where the auction purchaser has bought the property in execution of a mortgage decree and *the decree as well as the sale* is set aside in a separate suit brought by parties interested in the mortgaged property In such a case it has been held that the auction purchaser is entitled to a return of the purchase money his remedy being by an application under s 47 above (*z*)

Where a sale took place and was confirmed by the Court before the present Code came into force it was held by the High Court of Calcutta that the rights of the purchaser must be determined with reference to the provisions of the Code of 1882 and that the purchaser was therefore entitled to maintain a regular suit for a return of the purchase money if the judgment debtor had no saleable interest in the property (*a*)

(*w*) *Nannu Lal* v *Bhagwan Das* (1917) 39 All 114 118 119 37 I C 9 *Ram Sarup* v *Dalpat* (1921) 43 All 60 58 I C 105 (21) A A 377 *Mohideen* v *Mahomed* (191) 23 Mad L J 48 1 I C 437 per Napier J *Tirumalaisami* v *Subramanian* (1917) 40 Mad (1009) 1011 45 I C 109 *Sabbu* v *Ioambala* (1918) Mad W N 655 49 I C 3 9 *Balvant* v *Bala* (19) 46 Bom 833 67 I C 360 ( ) A B 205 [*Rustomji* v *Vinayak* (1911) 3 Bom 3 7 I L 955 was a case under the Code of 188] *Juranu* v *Jethi* (1917) 2 C W N 760 46 I C 783 *Banka* v *Guru Das* (19 3) 8 C W N 0 80 I C 257 (4) A C 172 dissenting from *Prasanna* v *Ibrahim* (19) 36 ( ) L J 05 *Habib ud din* v *Hatim* (19 5) 6 Lah 83 86 I C 6 (25) A L 467 distinguishing *Asad Ullah* v *Karamchand* (19 3) 4 Lah 354 76 I C 60 (4) A L 115 *Maung Naung* v *Maung Ba Gyi* (19 8) 6 Rang 468 11 I C 436 (28) A R 7 *Hrishikesh* v *Manik* (19 6) 53 Cal 58 96 I C 64 (6) A C 971

(*x*) *Rishik h* v *M k Molla* (19 6) 53 Cal. 758 96 I C 64 (6) A C 771 see also *Dorab Ally* v *Abdul Azeez* (18 7) 3 Cal 806 5 I A 116

(*y*) See (19 1) 43 All. 60 8 I C 10 (1) A A 377 *supra* (19 5) 6 Lah 283 86 I C 6 (5) A L 467 *supra*

(*z*) *Bindeshri* v *Badal Singh* (19 3) 45 All. 369 74 I C 873 (3) A A 394 (F B)

(*a*) *Mir ka Ali* v *Sarfuddin* (1923) 50 C L 115 0 I C 808 (3) A C 85

Suit for return of purchase money where sale set aside on ground of material irregularity—Where a sale is set aside on the ground of material irregularity under rr 90 and 92 the auction purchaser may bring a *suit* for a refund of the purchase money Such right exists independently of the Code The mere use of the expression order in this rule has not the effect of taking away that right (*b*)

Interest—The Court has power by the express terms of this rule to award interest on the purchase money (*c*)

Limitation—The period of limitation for an application under this rule is 3 years from the accrual of the right under art 181 of the Limitation Act 1908 (*d*) The period of limitation for a regular suit in cases governed by the Code of 1882 to recover back the purchase money is 6 years from the accrual of the right under art 120 of that Act (*e*)

Be entitled to an order—Where an order is made under this rule it may be executed in the manner prescribed for the execution of decrees See s 36 above

94 [S 316] Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser Such certificate shall bear date the day on which the sale became absolute

Certificate to purchaser

Old section—This rule corresponds with the first part of s 316 of the Code of 1882 The second part of that section relating to the vesting of title has been reproduced in s 65 of this Code with an important alteration as regards the time when the property vests in the purchaser

Purchaser s title—See s 65 and notes thereto

The Court shall grant a certificate—The provisions of this rule are mandatory (*f*)

Certificate of sale—A sale certificate does not transfer the title It is evidence of the transfer (*g*)

Certificate to legal representative—Where the purchaser is dead the certificate may be granted to his legal representative (*h*) See s 146 above

What passes at a Court sale—As regards private sales there is in the absence of a contract to the contrary an implied covenant for title by the vendor as provided by the T a f r of Property Act 188 s sub ( ) But as regards sales under a decree of the Court there is no warranty of title either by the decree holder or by the Court Rule 13 of this Order shows that the decree holder when applying for execution has only to specify the judgment debtor s share or interest in the property to the best of his belief and so far as he has been able to ascertain the same Rul 66

(*b*) *Ia r H* v *Cor I* (1916) 9 M I 803 40 I C 8 S c al o *M* *I* *M* *j* I (1909) 36 I A 3 1 I C 1 Ir pr nt ti n t sal by C rt Officer th t th property was t in sol l *fr* *fr m* m tg g th t what w l g sold I f t w p op rt an l j tt m rt gee l ( ) *Ib r* v *Abd l M j d* (1 1) 19 All I J 530 63 I C 4 (1) A A 9 (l proclam ti n n t mention g n mb r nce l
( ) *M I* *j B hat* *St gh* v *F be* (19 1) 43 I A 4 9 I C 8 (1) A I C 7

(*d*) *((r H r* v *S I I* (1 9) 11 All 3
( ) *S Ih n a* v *(o h* (1913) 3 All 419 19 I C 9 6 *M k Al* *S f II* (1 3) 50 C I 11 0 I C 606 (3) A C 85
(*f*) *B I t* v *I t* (1916) 1 Pat L J 446 3 I C 861
(*g*) *Ha Al Haf* (1916) 43 Cal 1 1 1 9 30 I C 406 *Mal* v *A b I y I* (1915) Punj R no 81 p 3 31 I C *I m d/a* v *r* (19 0) 4 Cal W N 1011 58 I C 3
(*h*) *F(r k* v *r* In re (1900) 24 Bom 1 0

shows that the proclamation only professes to specify the particulars prescribed by O 21 that rule including the property to be sold and the judgment debtor's interest therein as fairly and accurately as possible. Hence what passes to a purchaser at a Court sale is the right title and interest of the judgment debtor whatever that interest may be. In other words a purchaser at a Court sale buys the property with all risks and all defects in the judgment-debtor's title except where it is found that the judgment debtor had no saleable interest at all (i). In the latter case the purchaser may apply to have the sale set aside under r 91 of this Order and he may then apply under r 93 for a return of the purchase money. If the purchase money has been distributed amongst the creditors of the judgment debtor under s 73 he may follow the money in their hands (j). But —and this is an important consequence of the purchaser buying only the right title and interest of the judgment debtor —the sale will not be set aside if the judgment debtor has even a partial interest in the property nor will the purchaser be entitled to a refund of the purchase money to the extent to which the judgment debtor had no interest unless the case be one of fraud (k). On the same principle a purchaser in execution of a money decree is bound by the estoppel which binds the judgment debtor whose interest he has purchased (l). The Madras High Court has held that he is not bound in all cases (m).

It has been stated above that what passes to a purchaser at a Court sale in execution of a money decree is the right title and interest of the judgment debtor in the property sold. To determine the nature and extent of the judgment debtor's right title and interest in the property sold the test is as stated by Lord Watson in the course of the argument in *Pitta hi Chettiar v Chinnathambiar* (n) what did the Court intend to sell and what did the purchaser understand that he bought? These are questions of fact or rather of mixed law and fact and must be determined according to the evidence in the particular case (o). This test was applied in *Balvant v Hirachand* (p) cited in the next following paragraph and in *Abdul A v Appayasami* (q) cited in the notes below.

Where a purchaser at a Court sale in execution of a decree against a member of a joint Hindu family buys 4 specific properties *A B C* and *D* alleged to belong to him and subsequently there is a partition decree by which properties *A B X* and *Y* are allotted to that member the purchaser is entitled only to such of the properties as are common to the sale certificate and the share of that member under the decree namely properties *A* and *B*. He is not entitled to have the equivalent of properties *C* and *D* out of properties *X* and *Y* (r).

A is entitled to 10 annas share in a village. Out of this share he mortgages 6 annas to *B*. In execution of a simple money decree obtained by *C* against *A* a 4 annas share is attached and sold. The presumption is in the absence of specific indications to the contrary that the share sold was the share which was not mortgaged (s).

(i) *D All Fx (s f Khaj l Molee o d e* (18 8) 3 C L R 6 5 I A 116 *Sla to Ch le v N r Sukh* (1901) 3 All 3 *S k a v I kat* (1894) 1 Mad 3 *S gh t H I d* (188) 6 Bom 133 *M the a Apa* (1913) 6 M 1 194 197 1 I C 444 [improvement by purchaser]

(j) *I l Lal v M l im l* (1891) 13 All 383

(k) *Sla to Cha l v N S h* (1901) 3 All 3 *M la l v B l ho* (190) All 53 *J N a n v D a k tt* (1900) Cal 64 *D j l v A r ta* (190) 9 C I 3 0 *A n t to (l Agl ore* (190) 9 C I 4 0 *Dto d v P j* (1 6) 4 B H C A C 114

(l) *P j I j S lh I r l* (1908) 3 C I 8 *M lo el M uff Hoo v K hor Moh I l* (189) C I J03 919 I A 1 J 13 See also *Po sl Nath v An th N tl* (1883) 9 Cal 6 *Nand L l v Jo dra* (19 3) 8 C W N 403 8 I C 94 (4) A C 881 Contrast *(esh v J r l tt m* (1909) 33 Bom 311 1 I C 106

(m) *Ve r ppa v J a n l* (19 0) 43 Mad 135 53 I C 9

(n) (188) 10 M 1 41 48 14 I A 84 See also *S mbl n th v C ol p S gh* (1887) 14 Cal 5 5 9 14 I A *Mal l r Per l l Moh l ar Nath* (1890) 1 Cal 584 588 89 1 I A 11

(o) *Abd l A v App y s* (1904) Mad 131 31 I A 1 *T ra L l v S robar S gh* (1900) Cal 40 I A 33

(p) (1903) Bom 334

(q) (1903) Mad 131 31 I A 1

(r) *S thap th v Th l ra oja* (19 0) 43 Mad 303 54 I C 51

(s) *She N r i v Noor M hamm d* (1907) 9 All 463

94 *Sale in execution of a mortgage decree* —Where mortgaged property is sold in execution of a *mortgage decree* obtained by the mortgagee against the mortgagor the interest both of the mortgagor and mortgagee passes to the purchaser (t)

Variance between proclamation of sale and sale certificate —O 21 r 66 requires that where property is ordered to be sold in execution of a decree the proclamation of sale should specify as fairly and accurately as possible the property to be sold By the present rule it is provided that where property is sold, and the sale becomes absolute the Court shall grant a certificate specifying the property sold. It sometimes happens that the property as described in the certificate of sale is different from that described in the proclamation of sale In such a case the description of the property in the proclamation of sale is *conclusive* as to what was the subject matter of the sale As stated by their Lordships of the Privy Council in *Thakur Barmha* v *Jiban Ram* (u) that which is sold in a judicial sale of this kind can be nothing but the property attached and that property is *conclusively* described in and by the schedule to which the attachment refers that is the schedule of the attached property in the proclamation of sale Thus where a judgment debtor owned a mahal of which a 10 annas share was mortgaged and the proclamation of sale stated that what was to be sold was a 6 annas share in the mahal included in the mortgage but the purchaser obtained a certificate of sale in which the property described was a 6 annas share in the mahal not included in the mortgage it was held that the sale certificate should be set aside The Court has no power to grant a certificate in which the property described is different from that specified in the proclamation of sale (v) Similarly where the proclamation of sale stated that the whole interest of five brothers in a mortgaged property was to be sold and by a mistake on the part of the officer in charge of the sale the certificate of sale omitted to mention the names of four of them it was held that what was sold to the purchaser was the property as described in the proclamation of sale and not the property as erroneously described in the sale certificate (w) The real question in such case under the present Code of Civil Procedure seems therefore to be what was the sale i e what was bargained and paid for and that must depend not on *erroneous statements* of what was offered for sale but on what was *actually* offered for sale and bid for What [is actually] offered for sale [is] determined by the order of the Court and the proclamation (x)

Effect of new interpretation of law on sale —*A* purchased at a Court sale the right title and interest of *B* in an impartible zamindari By the law as then interpreted the holder of such a zamindari was only entitled to a life interest in the zamindari [*A* must therefore be deemed to have purchased only the *life interest* of *B*] Subsequently this interpretation of the law was reversed by the Judicial Committee which decided that the holder of an impartible zamindari is entitled to an absolute interest in it and that such interest is alienable The new interpretation does not entitle *A* to claim that what he purchased at the sale was the *absolute* interest of *B* (y)

Amendment of certificate of sale —A purchaser at a Court sale may apply to the Court for amendment of the sale certificate where the description of the property in the certificate differs from that in the proclamation The Court may allow or refuse the amendment but no appeal lies from the order in either case Such an order is not appealable under s 104 Nor is it appealable as a decree under s 47 for the question cannot be regarded as one relating to the execution discharge or satisfaction of the decree the decree being fully executed The only question in such a case is whether the

(t) *Maganlal* v *Shakra* (1898) 22 Bom 945
(u) (1914) 41 Cal 590 41 I A 38 21 I C 936
(v) *Thakur Barmha* v *Jiban Ram* (1914) 41 Cal 590 41 I A 38 21 I C 936 *Uma Churn* v *Gobind Chunder* (18 8) I C L I 460 *Ramachandra* v *Haji Kasim* (1893) 16 Mad 207
(w) *Bisvant* v *Hirachand* (1903) 7 Bom 334 *Christian* v *Prasad* (19 5) 4 P t 60 90 I C 501 (-5) A P 615
(x) (1903) 27 Bom 334 341 *supra*
(y) *Abdul Aziz* v *Appayasami* (1904) 27 Mad 131 31 I A 1

certificate given to the auction purchaser gives a right description of the property sold (z)

Limitation —The provisions of the Limitation Act do not apply to an application for a sale certificate The reason is that it is the duty of the Court on the sale becoming absolute to issue a sale certificate and there is no duty imposed on the purchaser to *apply* for such a certificate The action of the Court in granting the certificate is ministerial and not judicial. The Limitation Act does not apply to applications to the Court to do what it has no discretion to refuse nor to applications for exercise of functions of a ministerial character Hence if the Court fails to issue a sale certificate and the purchaser has thereupon to apply to the Court for a grant of the certificate the application may be made *at any time* (a)

Effect of certificate of sale on irregularities —All irregularities though material are cured by the certificate of sale (b)

Certificate of sale and res judicata —A sale certificate is just like a deed of sale and it does not operate as a plea of res judicata Where a defendant contends that the act of the Court did not pass title to the property in dispute to the plaintiff and the plaintiff produces a sale certificate the defendant is barred not by sec 11 relating to res judicata but by sec 47 of the Code (c)

Delivery of property in occupancy of judgment debtor

95 [S 318] Where the immovable property sold is in the occupancy of the judgment debtor or of some person on his behalf or of some person claiming under a title created by the judgment debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same

Delivery of possession to purchaser —The possession contemplated by this rule is khas or actual possession See notes to r 35 of this Order For the form of the order for delivery see App E form No 39

Separate suit for delivery of possession —See notes to s 47 'Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand on p 160 above

Appeal —See notes to s 47 Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand on p 160 above

Limitation —The period of limitation for an *application* for delivery of possession is three years from the date when the sale becomes absolute [Limitation Act 1908 sch. I art 181] The period of limitation for a *suit* for delivery of possession is twelve years from the date when the sale becomes absolute [*ib* art 138]

(z) *Bhoja Roy* v *Ram Kumar* (1899) 6 Cal. 5 9 *Saddo* v *Banas* (1901) 23 All 476 *Mamod* v *Locke* (189) 0 Mad 487 see also *Nand Lal* v *Joge d a* (19?3) 28 C W N 403 8 I C 294 (4) A C 881

(a) *Kylasa* v *Ramasami* (1882) 4 Mad 172 *Vithal* v *Vithoj rao* (1882) 6 Bom [illegible]

(b) *Balkrishna* v *Masuma* (1883) [illegible] 9 I A 18 *Nagar* v *Bhasker* [illegible] Bom 444

(c) *Lakshan Chand* v *Ramdas* [illegible] W N 79 118 I C 87 [illegible]

Procedure under this rule—If the Court finds on inquiry that the property is in the occupancy (1) of the judgment debtor (2) or of some person on his behalf (3) or of some person claiming title under him the Court shall order delivery to be made by putting the purchaser in possession of the property If however the Court finds that the person in possession of the property is holding the property *on his own account* the Court has no option but to dismiss the application under this rule (*d*)

It may be observed that a purchaser at a Court sale is not bound to *apply* for possession under this rule He may at his option bring a regular suit for possession the period of limitation for the suit being 12 years as stated above The remedy by way of application and that by way of suit are concurrent (*e*) Further the fact that an application has been made under this rule and it is rejected as being time barred (*f*) or on any other ground (*g*) is no bar to a regular suit for possession

96 [S 319] Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94 the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment debtor has been transferred to the purchaser

Delivery of property in occupancy of tenant

Delivery of possession to purchaser—The possession contemplated by this rule is *symbolical possession See notes to r 35 above*

Limitation—See notes to r 95 above

Resistance to delivery of possession to decree holder or purchaser

97 [Ss 328 334] (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction

Resistance or obstruction to possession of immoveable property

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same

Rules 97 98 and 99—These rules are to be read together

(*d*) Sohla v T (1904) 46 All 693 696 83 I C 9 3 (4) A A 49
(*e*) A ... v ... (188) 14 C 1 644
(*f*) ... v ... Muhammad (190) All 463
(*g*) Seru v Bhagoban (1893) 9 Cal 60

When rule applies —This rule does not apply unless the auction purchaser has made an attempt to obtain possession of the property either through Court or out of Court and he is resisted or obstructed in obtaining possession (*h*)

Regular suit —The decree holder may either resort to the summary remedy provided by this rule or he may bring a regular suit Failure on the part of the decree holder to avail himself of the remedy under this rule does not deprive him of his right to bring a regular suit against the party obstructing execution of the decree (*i*) But if he applies under this rule and fails the order against him is conclusive unless he brings a suit to establish his right to possession as provided by r 103 below Such a suit must be brought within one year from the date of the order (*j*) See Limitation Act 1908 Sch I art 11 A

Limitation —The period of limitation for an *application* complaining of resistance or obstruction to delivery of possession of immovable property decreed or sold in execution of a decree is 30 days from the date of the resistance or obstruction (Limitation Act 1908 Sch I art 167)

Fresh application for delivery of possession —Under the present Code a holder of a decree for possession of immovable property applies for possession under O 21 r 35 while an auction purchaser applies for possession under O 21 r 95 The present rule deals with *obstruction or resistance* in obtaining possession An important question that arises in this connection is whether if a decree holder or auction purchaser who is obstructed or resisted in obtaining possession omits to apply under this rule within 30 days from the date of obstruction or resistance the only other remedy open to him is to proceed by a regular suit or whether he is entitled to a fresh writ of possession It has been held by the High Courts of Madras (*k*) and Patna (*l*) that he is entitled to make a fresh application for delivery of possession and to a fresh warrant for possession On the other hand it has been held by the High Courts of Bombay (*m*) and Allahabad (*n*) that he is not so entitled and that his only remedy is by a regular suit

Whether O 9 applies to proceedings under this rule —The provisions of O 9 do not apply to proceedings under this rule See notes to O 9 r 9 Whether this rule does apply to execution proceedings

98 [Ss 329, 330] Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days

Resistance or obstruction by judgment debtor

When this rule applies —This rule deals with two cases namely where the obstruction is occasioned without just cause (1) by the judgment debtor or (2) by some other person at his instigation No order can be made under this rule if the obstruc

(*h*) *Sobhas T* (1924) 46 All 633 696 83 I C 9 3 (24) A A 40

(*i*) *B Ir nt v Babaj* (1884) 8 Bom 60

(*j*) *Sobhas T* (1924) 46 All 633 698 83 I C 9 3 (24) A A 40

(*k*) *M tt v Appasa i* (1890) 13 Mad 04

(*l*) *Fath l r a Ch r* (1919) 4 Pat L J 94 49 I C 150

(*m*) *I j kran v Derr o* (188) 11 Bom 4 3 dissent *Balva t v I b j* (1884) 8 Bom 60

(*n*) *Kesri v Abdul Hasan* (1904) 6 All 36

Procedure under this rule—If the Court finds on inquiry that the property is in the occupancy (1) of the judgment debtor (2) or of some person on his behalf (3) or of some person claiming title under him the Court shall order delivery to be made by putting the purchaser in possession of the property If however the Court finds that the person in possession of the property is holding the property *on his own account* the Court has no option but to dismiss the application under this rule (*d*)

It may be observed that a purchaser at a Court sale is not bound to *apply* for possession under this rule He may at his option bring a regular suit for possession the period of limitation for the suit being 12 years as stated above The remedy by way of application and that by way of suit are concurrent (*e*) Further the fact that an application has been made under this rule and it is rejected as being time barred (*f*) or on any other ground (*g*) is no bar to a regular suit for possession

Delivery of property in occupancy of tenant

96 [S 319] Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94 the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment debtor has been transferred to the purchaser

Delivery of possession to purchaser—The possession contemplated by this rule is *symbolical* possession See notes to r 35 above

Limitation—See notes to r 95 above

Resistance to delivery of possession to decree holder or purchaser

Resistance or obstruction to possession of immoveable property

97 [Ss 328, 334] (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same

Rules 97 98 and 99—These rules are to be read together

(*d*) Sell v T (19 4) 46 All 693 696 83 I C 9 3 (—4) A A 493
(*e*) A A rl () d r (188) 14 C 1 614
(*f*) Sh \ \ r M A mm I (190) All 463
(*g*) S n v Bh gol (1883) 9 C 1 60

When rule applies—This rule does not apply unless the auction purchaser has made an attempt to obtain possession of the property either through Court or out of Court and he is resisted or obstructed in obtaining possession (*h*)

Regular suit.—The decree holder may either resort to the summary remedy provided by this rule or he may bring a regular suit. Failure on the part of the decree holder to avail himself of the remedy under this rule does not deprive him of his right to bring a regular suit against the party obstructing execution of the decree (*i*). But if he applies under this rule and fails the order against him is conclusive unless he brings a suit to establish his right to possession as provided by r 103 below. Such a suit must be brought within one year from the date of the order (*j*). See Limitation Act 1908 Sch. I art 11 A.

Limitation—The period of limitation for an *application* complaining of resistance or obstruction to delivery of possession of immovable property decreed or sold in execution of a decree is 30 days from the date of the resistance or obstruction (Limitation Act 1908 Sch I art 167).

Fresh application for delivery of possession—Under the present Code a holder of a decree for possession of immovable property applies for possession under O 21 r 35 while an auction purchaser applies for possession under O 21 r 95. The present rule deals with *obstruction or resistance* in obtaining possession. An important question that arises in this connection is whether if a decree holder or auction purchaser who is obstructed or resisted in obtaining possession omits to apply under this rule within 30 days from the date of obstruction or resistance the only other remedy open to him is to proceed by a regular suit or whether he is entitled to a fresh writ of possession. It has been held by the High Courts of Madras (*k*) and Patna (*l*) that he is entitled to make a fresh application for delivery of possession and to a fresh warrant for possession. On the other hand it has been held by the High Courts of Bombay (*m*) and Allahabad (*n*) that he is not entitled and that his only remedy is by a regular suit.

Whether O 9 applies to proceedings under this rule—The provisions of O 9 do not apply to proceedings under this rule. See notes to O 9 r 9. Whether this rule does not applies to execution proceedings.

98 [Ss 329, 330] Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days

Resistance or obstruction by judgment debtor

When this rule applies—This rule deals with two cases namely where the obstruction is occasioned without just cause (1) by the judgment debtor or (2) by any other person at his instigation. No order can be made under this rule if the obstru

(*h*) Sobha v. Turn (1924) 46 All 693 696 83 I C 9 3 (1924) A A 49

(*i*) Balvant v. Balaji (1884) 8 Bom 60

(*j*) Sobha v. T (1924) 46 All 693 698 83 I C 9 3 (1924) A A 49

(*k*) M[illegible] [illegible] (1890) 13 Mad [illegible]04

(*l*) R[illegible] v [illegible] (1914) [illegible] Pat L J 94 40 I C 1[illegible]0

(*m*) [illegible] v Deora (188[illegible]) 11 [illegible] But see Balvant v. Balaji (1884) 8 Bom 60

(*n*) Ke[illegible] v Al[illegible] (1904) 6 All [illegible]

tion is caused by a person other than the judgment debtor unless the Court is satisfied that the person was acting at the instigation of the judgment debtor (o)

Purchaser from a judgment debtor pending attachment—The High Court of Madras has held that proceedings can be instituted under this rule against a purchaser from a judgment debtor pending attachment though such a purchaser is not expressly mentioned in the rule The reasons given are (1) that this rule is to be read with r 95 which expressly provides for the institution of proceedings against such a purchaser under that rule and (2) that such a purchaser is a representative of the judgment debtor within the meaning of s 146 so that proceedings which can be instituted against a judgment debtor can also be instituted against him (p)

Presidency Small Cause Court—This rule applies to proceedings under Chapter 7 of the Presidency Small Cause Courts Act 1882 relating to recovery of possession of immovable property by virtue of s 48 of that Act (q)

Appeal—See notes to s 47 Questions between the auction purchaser on the one hand etc See also notes to r 101 below under the head Appeal. It is submitted that r 103 excludes an appeal from an order under this rule

Resistance or obstruction by *bona fide* claimant

99 [*Cf* Ss 331, 335] Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application

When this rule applies—The present rule deals with two cases of claimants in good faith namely (1) persons claiming on their own account and (2) persons claiming on account of some person other than the judgment debtor

Person other than judgment debtor claiming to be in possession on his own account—The word possession as used in this rule is not limited to actual *physical* possession It includes also *constructive* possession such as possession through tenants or servants Hence a landlord who is in possession of a property through his tenant is a person in possession of the property *on his own account* within the meaning of this rule (r)

Where in a suit brought by a plaintiff against two defendants a decree is passed by consent against one of them only the other defendant is not a judgment debtor He is a person other than the judgment debtor within the meaning of this rule (s)

Sub tenants—*A* lets his house to *B* *B* sub lets the house to *C* *A* files a suit against *B* for possession and obtains a decree against *B* *C* is not joined as a party to the suit *C* obstructs *A* in obtaining possession of the property Can *C* be said to be in possession on his own account within the meaning of this rule? The High Court of Calcutta (t) has held that the words any person claiming to be in possession on his own account mean any person claiming to be in possession *as a matter of fact* on his own account and that a sub tenant is such a person. On the other hand

(o) *Ezra v Gubbay* (19 0) 47 Cal 90 , 911 91 , 60 I C 969 *Muncha am v Fakir Chand* (1901) 25 Bom 478 486

(p) *Kuppanna v Kumara* (1911) 34 Mad 450 7 I C 418

(q) *Daroga v Mohideen* (19?3) 45 Mad I J 66 73 I C 935 (??4) A M 4

(r) See *Mancharam v Fakirchand* (1901) 25 Bom 478

(s) *Jathavedun* *K n hu* (190) 30 Mad —

(t) *Ezra v Gubbay* (19 0) 4 Cal 90 60 I C 969

the High Court of Bombay (*u*) has held that the words any person claiming to be in possession on his own account means any person claiming to be in possession *on his own title*, and that a sub tenant is not such a person. According to the former view *A* is not entitled to an order for possession against *C* According to the latter view he is.

The Bombay High Court has also held that *C* is not entitled to claim the benefit of the Bombay Rent Act against *A* there being no privity of contract between him and *A* (*v*)

Transferee pendente lite —See r 102 below

Appeal —See notes to rr 98 and 101 under the head, Appeal

100 [S 332] (1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession

Dispossession by decree holder or purchaser

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same

Rules 100 and 101 —These rules are to be read together

When this rule applies —This rule refers to a person who has been dispossessed by an auction purchaser who has taken possession of the property through the Court He complains to the Court of such dispossession and the Court makes a summary investigation and if it holds that the applicant was in possession of the property on his own account and not on account of the judgment debtor it directs under r 101 that possession be given back to the applicant The party against whom the order is made may then institute a suit under r 103 to establish the right which he claims to the present possession of the property (*w*)

Any person other than the judgment debtor —See notes to s 47 Representatives on p 156 A purchaser of a portion of a holding from a judgment-debtor is his representative and is not entitled to apply under this rule (*x*) The Patna High Court has held that a purchaser from a judgment debtor of a non transferable holding is also a representative and not entitled to apply (*y*) But the Calcutta High Court has come to the opposite conclusion and says that so far as the decree holder is concerned he is a trespasser and is entitled to apply under this rule (*z*)

Is dispossessed —Where mere symbolical possession is delivered to the decree holder or purchaser under r 96 the person in possession cannot be said to be dispossessed within the meaning of this rule so as to entitle him to apply under this rule (*a*) It is only the delivery of actual possession (r 95) that can constitute dispossession within the meaning of this rule A person who is in possession through his tenant

(*u*) *Jairam* v *Vow oj* (1921) 23 Bom L R 1316 6 I C 1 (2) A B 449

(*v*) *Jafferji* v *Miyadin* (19 -) 46 Bom 5 6 64 I C 69 (2) A B 2 3

(*w*) *Ambica* v *Ram Prosad* (19 5) 30 C W N 163 166 90 I C 575 (26) A C 3 7

(*x*) *Bhikhia* v *Brij Bihari* (1917) 2 Pat L J 478 4 I C 5 6

(*y*) *Panchratan* v *Ram Sahay* (1918) 3 Pat L J 579 43 I C 969

(*z*) *Purna Chanda* v *Manobi Devi* (19 7) 53 Cal 913 99 I C 718 (7) A C 1 6

(*a*) *Ibrahim* v *Ramjadu* 1903) 30 Cal 710

will be said to be dispossessed within the meaning of this rule if the tenant is
01 ousted from the property by the delivery of actual possession to the decree holder or purchaser (*b*)

Dispossession under order of Collector—When a person has been dispossessed under an order made by the Collector to whom execution proceedings are transferred he should apply to the Collector and not to the Court complaining of such dispossession This rule has no application when execution has been transferred to the Collector (*c*)

Limitation—The application under this rule must be made within 30 days from the date of the dispossession Limitation Act 1908 sch I art 165

Dismissal of application for default—It was held by the Patna High Court in the undermentioned case (*d*) that when an application made under this rule by a person not bound by the decree is dismissed for default the order may be set aside under O 9 r 9 and the application may then be reheard But this decision was disapproved by a Special Bench of the same Court in a later case (*e*) See notes to O 9 r 9 Whether this rule applies to proceedings in execution

Bona fide claimant to be restored to possession

101 [Ss 332 335] Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment debtor, it shall direct that the applicant be put into possession of the property

Was in possession on his own account—A member of a joint Hindu family cannot be said to be in possession of any particular portion of the joint property *on his own account* His possession is the possession of the family (*f*)

Ex parte order for delivery of possession—Where an order even though ex parte is made under rule 101 the remedy of the other party is by way of suit under rule 103 and not by proceeding under O 9 r 13 O 9 r 13 does not apply to execution proceedings in any event not to proceedings under rules 100 and 101 of the present Order (*g*) See notes to O 9 r 13 Whether this rule applies to execution proceedings

Appeal—The Chief Court of the Punjab has held that no appeal lies from an order made under this rule (*h*) On the other hand it has been held by the High Court of Madras that where an application under r 100 is contested between persons who were parties to the suit or representatives of parties the case falls within s 47 and an appeal lies from the order (*i*) The Madras decision assumes that questions arising under r 100 are questions relating to the execution discharge and satisfaction of the decree within the meaning of s 47 Upon this point there is a conflict of decision The matter is discussed fully in the notes to s 47 Questions between the auction purchaser on the one hand and etc It is submitted that r 103 excludes an appeal from the order

(*b*) *B j bala* v *G rudas* (1906) 33 Cal 4
(*c*) *I gh* v *H m ti* (1913) 3 Bom 4 19 I C 903
(*d*) *S r a* v *Gom I* (1918) 3 P t I J 43 I C 9 1
(*e*) *Bh b* v *T laldh ri* (1919) 4 Pat L J 13 49 I C 61
(*f*) *C r j* v *I w ey* (18 3) 1 1 m 18
(*g*) *H n Ch r* v *Ma m tta* (1914) 41 C 1 1 19 I C 693
(*h*) *G l I b* *l lam kh* (191) Punj L no p 01 41 I C 891 ce al F Ma I kdl I (19 3) Bom L R 14 149 1 0 I C 6 (3) A B 14
(*i*) *Appu* v *K ttuw* (1 1) 41 M L J 63 I C 0 (1) A M 61 *yapp* *Ch f mla m* (19 0) M L J 603 61 I C 349 *M y* (1) 43 M 1 696 I C 01

102 [S 333] Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person

Rul s not applic ble to tran f r e *pendent l te*

If an order is made under r 99 or r 101, it is conclusive against the party against whom it i made unless he brings a suit to establish his right as provided by r 103 below This rule provides that nothing in rr 99 and 101 applies to resistance by a transferee pendente lite from the judgment debtor If an order is made in execution proceedings in such a case r 103 does not apply The Oudh Court has held that where a transferee pendente lite pays off a prior usufructuary mortgage and enters into posse sion of the property and re ists the decree holder in obtaining possession he must be treated in relation to his position as a purchaser from the possessory mortgagee and that the case falls within r 99 above and is not affected by the rule of pendente lite (*j*)

103 [S 332 **fourth para** S 335, **second para**] Any party not being a judgment debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property but subject, to the result of such suit (if any), the order shall be conclusive

Or lers conclu ive ubject to r s la suit

Suit to establish right to present possession—The suit must be brought within one year from the date of the order Limitation Act 1908 sch I art 11A If no suit is brought within the aforesaid period the order will be conclusive (*k*)

This rule does not apply *unless an order has been made* under r 98 r 99 or r 101 Therefore where an application is made under r 97 or r 100 but the Court declines to pass any order upon the application thinking it best that the applicant should be referred to a separate suit the present rule does not apply and any suit which the applicant may subsequently institute for possession is not a suit under this rule and it is not therefore governed by art 11A of the Limitation Act (*l*) Not only is it necessary that an actual order should have been made but the order must have been one *made after investigation* as contemplated by r 97 sub r (2) and r 100 sub r (2) An order dismissing an application for default of prosecution is not an order made after investigation. The present rule therefore does not apply to such an order (*m*)

Scope of suit under this rule—It must not be supposed that a suit under this rule is concerned only with actual possession at the date of the order The suit is to establish the right which the plaintiff claims to the present possession of the property and this right may be established without showing that the plaintiff was in actual possession at the date of the order against him (*n*)

Suit by auction purchaser for possession under a different right—An auction purchaser against whom an order is made under r 99 or r 101 may bring

(*j*) *M mmat Fat ma v Ra a Ali* (19 7) Luck 69 9 I C 19 (6) A O 610

(*k*) *Ch l Beh v K da S th* (1919) I Lal 5 51 I C 87

(*l*) *Meerud n v l ahi a* (1904) M d 5

( ) *Sa al Cha d a v T Prasad* (1907) 34 Cal 491

(*n*) *Unni v Pocker* (19 1) 44 Mad 2 60 I C 109 (1) A M 317

a suit under this rule to establish the right which he claims to the present possession of the property Where a suit is brought by him under this rule the suit is one for possession *under his auction purchase* and *the cause of action* in the suit is the adverse decision under r 99 or r 100 A suit under the present rule is quite irrespective of *any other cause of action* which such person *apart from his character as auction purchaser* may have against the opposite party It is therefore competent to the auction purchaser to abandon all his right in the auction sale including the right to bring a suit under this rule *as auction-purchaser* and to bring a suit against the opposite party for possession *upon a different title altogether* To such a suit the provisions of the present rule do not apply and the suit need not be brought within one year from the date of the order as required by art 11 A of the Limitation Act (o)

Order dismissing application under rule 101—*A* makes an application und r 100 The application is dismissed under r 101 *A* is a party against whom an order is made under r 101 within the meaning of the present rule though there is no express provision for *dismissal* of an application under r 101 (p)

Order dismissing an application under r 95—An order dismissing an application under r 95 cannot be treated as an order under r 99 so as to attract the application of the present rule (q)

ORDER XXII

Death, Marriage and Insolvency of Parties

1 No abatement by party's death if right to sue survives

1 [S 361] The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives

Application of order to appeals—The provisions of this order apply to appeals. See s 107 sub s (2) and r 11 below

Application of Order to execution proceedings—The provisions of this order apply to execution proceedings except rr 3 4 and 8 See r 12 below

Right to sue —The right to sue means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death (r)

In what cases the right to sue survives and in what cases it does not.—To answer this question we may turn to the provisions of—

I the Indian Contract Act 9 of 1872 sec 37 and

II the Indian Succession Act 39 of 1925 sec 306

I *Contract Act s* 37—Section 37 of the Contract Act runs as follows Promises bind the representatives of the promisors in case of the death of such promisors before performance *unless a contrary intention appears from the contract* The words in italics refer to contracts involving the exercise of special skill or involving special personal confidence for these are not binding on the representatives of the promisors. *A* promises to paint a picture for *B* by a certain day at a certain price *A* dies before the day The contract cannot be enforced either by *A* s representatives against *B* or by *B* against *A* s representatives The reason is that the right to sue does not survive to or against the representatives of *A*

(o) *Ambica v Ram Prasad* (19..) 30 C. W N 165 90 I.C 575 ('26) A C 877

(p) *Zipru v Hari* (1918) 4? Bom 10 4. I C. 73

(q) *Sobha v Turai* (1921) 46 All 603 83 I.C 923 ('21) A.A 49

(r) *Sarat Chandra v Nani Mohan* (1909) 36 Cal. 799 801 3 I C. 925

II *Indian Succession Act 39 of 1925 sec 306*—Section 306 of the Succession Act is as follows All demands whatsoever and all rights to prosecute or demand any action or special proceedings existing *in favour of or against* a person at the time of his decease survive *to and against* his executors or administrators except causes of action for defamation assault as defined in the Indian Penal Code or other personal injuries not causing the death of the party and except also cases where after the death of the party the relief sought could not be enjoyed or granting it would be nugatory

The effect of this section is that the right to sue does not survive in the following cases —

(i) Suits for defamation assault or other personal injuries not causing the death of the party [Where death *is caused* by a personal injury the legal representative of the deceased *may sue* the wrong doer for damages see Act 13 of 1855]

(ii) Cases where after the death of the party the relief sought could not be enjoyed or granting it would be nugatory

Illustrations

1 *A* sues *B* to recover possession of his minor daughter illegally detained by *B* *B* dies before decree The cause of action does not survive against *B* s representative and the suit abates *Sharifa* v *Munekhan* (1901) 25 Bom. 574

2 *A* claiming to be the nearest reversionary heir of a deceased Hindu bring a suit to set aside alienations made by the widow of the deceased. *A* dies before decree It has been held by the High Court of Madras that the suit abates and that it cannot be continued by the next reversioner *Salyahani* v *Bhavani* (1904) 27 Mad 588 *China* v *Lakshminarasamma* (1912) 37 Mad 406 15 I C 213 But this it would seem is no longer law *Venkatanarayana* v *Subbammal* (1915) 38 Mad 406 411 414 42 I A 125 129 132 29 I C 298

3 *A* applies to be appointed guardian of the person of *X* The application is opposed by *B* who claims that he has been *appointed guardian by the will* of *X* s father *B* dies *B* s representative is not entitled to continue the proceedings A claim based *on a personal trust* does not survive to the claimant s representative *Gangabai* v *Khashabai* (1899) 23 Bom 719 It is different however where the claim is not based on a personal trust In such a case the legal representative of the deceased is entitled to continue the proceeding and to contend that the applicant is not a proper person to be appointed guardian *Palamandi* v *Adaikalam* (1924) 47 Mad 459 84 I C 613 (24) A.M 484

4 *A* sues *B* to establish his right to the office of *Mahant* *A* dies before decree The suit abates for the right claimed is a personal right to an office *Sham Chand* v *Bhayaram* (1895) 22 Cal 92

5 The right of an unmarried Hindu daughter to claim the property left by her father to the exclusion of her married sister is not a personal right If a suit is brought to establish such a right and the plaintiff dies pending the suit the suit does not abate *Jadubansi* v *Mahpal Singh* (1915) 38 All 111 32 I C 104 dissenting from *Balak Puri* v *Durga* (1908) 30 All 49

6 *A* as the sole executor and residuary legatee under the will of *X* applies for probate of the will *B* files a caveat and the proceedings are thereupon converted into a suit Pending the hearing *A* dies Thereupon *C* *A* s widow applies to have her name substituted for that of *A* and to have the petition amended by asking for letters of administration with the will annexed instead of probate The application was rejected for *A* s right to apply for probate became extinguished on his death *Sarat Chandra* v *Rani Mohan* (1909) 36 Cal 799 3 I C 995 *Haribusan* v *Manmatha Nath* (1918) 45 Cal 862 51 I C 76

7 A sues B for an injunction to restrain him from preventing A from enjoying the honour of standing at a particular place in temple B dies pending the suit The suit abates *Josiari* v *Swami* (1910) 34 Mad 76 5 I C 937

8 A a Sunni Mahomedan sues B for pre emption A dies pending the suit It is not settled whether the right to sue is extinguished or whether it survives to his heirs or legal representatives *Muhammad* v *Niamat un Nissa* (1897) 20 All 88 *Sayyad Jiaul* v *Sitaram* (1912) 36 Bom 144 12 I C 720

9 An action to recover damages for breach of contract of marriage abates on the death of the plaintiff *Balubhai* v *Nanalal* (1920) 44 Bom 446 55 I C 624

10 A sues B for damages for malicious prosecution A dies pending the suit Does the right to sue survive? The Calcutta High Court has held that it does and that A s legal representative is entitled to continue the suit (s) On the other hand it has been held by the High Courts of Bombay (t) Patna (u) Madras (v) and Allahabad (w) that the right to sue does not survive and that the suit abates on A s death

11 The right to sue for damages for breach of contract the right to sue on a promissory note the right to sue for a debt the right to sue on a mortgage the right to sue for wrong done to property are all instances of rights that are not extinguished on the death of the plaintiff or defendant In all these cases the suit does not abate on the death of the plaintiff or defendant An agreement referring matters in dispute to arbitration is not in this country revoked by the death of any of the parties thereto before the award is made Hence the question whether the legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a purely personal nature or is one which survives to the legal representative (x)

Partial abatement—A suit may abate as to one of the reliefs claimed and not as to another Plaintiff sued under sec 92 for the removal of a trustee and for the settlement of a scheme On the death of the trustee the suit as for his removal abates but not so far as it prayed for the settlement of a scheme (y) See notes to sec 92 Death of defendant trustee pending suit on page 282 above

Death of either party pending appeal—Where a *decree* has been passed for the plaintiff in a suit in which the right to sue would not have survived had the plaintiff died before decree and either party dies pending an appeal preferred by the defendant from the decree the appeal does not abate (z) But if the plaintiff s suit is *dismissed* and the plaintiff has appealed from the decree and either party dies pending the appeal the appeal will abate (a)

Illustrations

1 A sues B for damages for defamation and obtains a decree for Rs 5 000 B appeals from the decree A dies pending the appeal The appeal does not abate and A may continue the appeal against A s representatives If B dies pending the appeal B s representative may continue the appeal against A

(s) *Kr l* v *Co po tion of Calcutta* (1904) 31 C 1 993 *Su l a men* v *S d a aja* (1903) 5 Mad 499

(t) *H l* v *I amd* (1889) 13 Bom 677

( ) *I jab S ngh* v *Ka na lar* (1919) 4 I t L J 6 6 5 I C 318

(v) *P a mj* v *S ar* (19 1) 44 Mad 3 6 I C 60 (1) A M 1 (F B) *Mu uj ppa* v *I mi* (19 1) 44 M d 8 8 6 I C 757 (1921) A M 405 *I la ap* v *I f I mnad* (19 6) 49 Mad 9 I C 366 (6) A M 13

(w) *M M l S gh* v *H b Lal* (19 6) 48 All 630 93 I C 90 (6) A A 610

(x) *I ra m lla* v *Per lla* (1904) 7 Mad 11 *D h* v *Khela* (1911) 33 All 615 11 I C 93

(y) *Arum g* v *Nam a ja* (19 5) 48 M d 688 91 I C 110 (6) A M 16

(z) *M l mmad* v *Kh k l* (188) 9 All 131 *(pal* v *I m k f* (1908) 6 Bom 9 *I men* v *S l ja* (19 3) 6 Mad 433 *M ru ppa* v *I m* (19 1) 44 M 8 6 I C 37 (1) A M 4

( ) *G pal* v *I m h dra* (1902) 6 Bom 53 at 601 *llu e* 333 *aly kant* v *Bh ra* (1904) 7 Mad 588

A su[illegible] for damages for defamation but the suit is *dismissed* A appeals from the decree. Pending the appeal A dies. A's representative is not entitled to prosecute the appeal. The reason is that the decree in the original suit being against A, what is sought to be enforced in appeal is A's *right to sue*. But the right to sue in a suit for defamation does not survive to the legal representative; hence the appeal abates. Similarly if B dies pending the appeal, A is not entitled to continue the appeal against B's representative, not even if A's suit was dismissed *with costs* (b).

2 [S 362] Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

Procedure where one of several plaintiffs or defendants dies and right to sue survives

Executors and trustees—Where a suit is brought *by* executors or trustees, the right to sue on the death of any one of them survives to the surviving plaintiffs alone. Where a suit is brought *against* executors or trustees, the right to sue survives against the surviving defendant alone.

Joint Hindu family—See notes to r 3 below, "Joint Hindu Family and legal representative".

3 [Ss 363, 365, 366] (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representatives of the deceased plaintiff to be made a party and shall proceed with the suit.

Procedure in case of death of one of several plaintiffs or of sole plaintiff

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Alterations in the rule.—

1. The words "so far as the deceased plaintiff is concerned" in sub-rule (2) are new. See notes below, "The suit shall abate so far as the deceased plaintiff is concerned".

(b) *Jo[illegible]* v *S[illegible]* (1910) 34 Mad [illegible] 6 5 I C 937; *S[illegible]klat* v *Bella* (19[illegible]4) Rang 91 80 [illegible] I C 744 ([illegible]4) A I R [illegible]17

2 The words the suit shall abate in sub rule (2) have been substituted for the words the Court may *pass an order* that the suit shall abate which occurred in sec 366 of the Code of 1882 The latter words gave rise to a conflict of opinion as to whether an order that a suit shall abate was appealable The High Courts of Bombay (c) and Madras (d) held that such an order was a decree and was therefore appealable The Allahabad High Court (e) held that the order was not appealable No such question *can arise under the present rule for it is no longer necessary to* make an *order* that the suit shall abate The suit abates *ipso facto* if no application is made under sub rule (1) within the time limited by law It has been so held by the High Court of Lahore (f) and a Full Bench of the High Court of Allahabad (g)

Limitation—The application under this rule must be made within 90 days from the date of the death of the deceased plaintiff or appellant Limitation Act 1908 Sch I art 176

The suit shall abate—See notes above Alterations in the rule No 2

The suit shall abate so far as the deceased plaintiff is concerned—Where one of two or more plaintiffs dies and the right to sue *survives* to the surviving plaintiffs or plaintiff *alone* the surviving plaintiff or plaintiffs may proceed with the suit This is the case dealt with in r 2 above The present rule provides inter alia that where one of two or more plaintiffs dies and the right to sue *does not survive* to the surviving plaintiffs alone the legal representative of the deceased plaintiff ought to be made a party to the suit For this purpose an application should be made to the Court and it must be made within 90 days from the date of the death of the deceased plaintiff Sub rule (2) provides that where no such application is made the suit shall abate *so far as the deceased plaintiff is concerned* The words italicized above mean that the suit shall *primarily* abate so far as the deceased plaintiff is concerned but they do not mean that the suit shall in no case abate *as a whole* If the suit is of such a nature that it can proceed in the absence of the legal representative of the deceased plaintiff it will abate so far only as the deceased plaintiff is concerned A suit by the partners of a firm to recover a partnership debt is a suit of this nature so that if one of the partners dies pending the suit and his legal representative is not brought on the record the suit will abate *only so far as the deceased partner is concerned* (h) But if it is of such a character that it cannot proceed in the absence of the legal representative it will abate as a whole A suit by some of the partners of a firm against the other partners for dissolution and for accounts is a suit of this character so that if one of the plaintiffs (or defendants) dies and his legal representative is not brought on the record the suit will abate *as a whole* (i) See notes above Alterations in the rule No 1

This rule applies to appeals—The provisions of this rule apply not only to the case of a deceased plaintiff but to the case of a deceased appellant [see sec 107 and r 11 below] Therefore where one of two or more appellants dies and the right to appeal does not survive to the surviving appellant alone the legal representative of the deceased appellant ought to be brought on the record If this is not done the appeal will abate *so far as the deceased appellant is concerned* But the appeal will abate *as a whole* if the case is of such a nature that the appeal cannot proceed in the absence of the legal representative of the deceased appellant

(c) *Bhikaji* v *Purshotam* (1886) 10 Bom 2 0

(d) *Subbayya* v *Saminadayyar* (1895) 18 Mad 496

(e) *Hamida Bibi* v *Ali Husein* (189) 17 All 172

(f) See *Ram Gopal* v *Hari Kishan* (1925) 7 Lah L J 517 519 88 I C 478 ( ) A L 598 *Qa m* v *Nura* (19 6) 7 Lah 73 94 I C 4 (26) A L 234

(g) *Ch rya* v *Ba eshwar* (19 6) 48 All 334 overruling *Guj ati* v *S tal Mi dir* (19) 44 All 459 66 I C 554 (2) A A 209 *Lachm* v *Muhammad* (19 0) 4 All 540 59 I C 903

(h) *S rju* v *I am Sarap* (19 1) 19 All L J 266 60 I C 7 (1) A A 34

(i) *Rajuchu der* v *Pamgat* (1904) 31 Cal 487 31 I.A 71

There is one class of cases in which the appeal cannot abate as a whole but abates only so far as the deceased appellant is concerned and these are cases which come within O 41 r 4 corresponding with sec 544 of the Code of 1882 O 41 r 4 provides that where there are two or more plaintiffs or defendants in a suit and the decree appealed from proceeds on any ground *common* to all the plaintiffs or to all the defendants *any one* of the plaintiffs or of the defendants may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of *all* the plaintiffs or *all* the defendants as the case may be Where several plaintiffs or defendants jointly appeal from a decree in a case to which O 41 r 4 applies and one of the appellants dies pending the appeal but his legal representative is not brought on the record within the period of limitation the appeal abates so far only as the deceased appellant is concerned and not as a whole *A* and *B* sue *C* *D* and *E* for possession of certain property alleging that it had been unlawfully dispossessed by the defendants The defence is that the land belongs to *C* *D* and *E* The Court finds that the property belongs to the plaintiffs and a decree is passed in favour of the plaintiffs *C* *D* and *E* appeal from the decree *E* dies pending the appeal but his legal representative is not brought on the record within the period of limitation. *A* and *B* (respondents) contend that the appeal has abated as a whole and it could not therefore be proceeded with. Does the appeal abate as a whole? No it abates only so far as the deceased appellant is concerned and the appeal should therefore be proceeded with. The reason is that the ground of appeal being *common* to all the appellants *viz* that they were the lawful owners of the land *any one* of them might have appealed from the whole decree under O 41 r 4 and so the death of one of the appellants cannot affect the right of the other appellants to proceed with the appeal. The same principle applies to suits for partition redemption and for a declaration of title to the property in suit (*j*) The High Court of Calcutta holds that O 41 r 4 does not apply on the grounds that a decree cannot be varied or reversed in favour of a person who is dead, and that the appeal having abated the rights between the deceased appellant and the respondents must be deemed to have been determined by the decree of the lower Court (*k*) In one Calcutta case *A* *B* and *C* sued *D* *E* and *F* for ejectment but the suit was dismissed *A* *B* and *C* appealed from the decree *A* died pending the appeal but no steps were taken to bring his legal respresentative on the record within the period of limitation It was held that the appeal abated as a whole It was also held that if at the hearing of the appeal *B* and *C* instead of asking for ejectment asked only for joint possession with *D* *E* and *F* the Appellate Court could grant leave to them to amend the plaint by asking for joint possession though on terms that they should pay all costs incurred up to that date (*l*) See notes to r 4 below Suit or appeal shall abate as against the deceased defendant or respondent

Suit for pre emption —A decree in a suit for pre emption passed *against* the defendants respondents in ignorance of the death of one of them and without bringing his legal representative on the record is a nullity as the right to sue in such a case does not survive against the surviving defendants alone (*m*) On the other hand when three plaintiffs appeal from a decree dismissing their suit for pre emption and one of them dies pending the appeal and his legal representatives are not impleaded the appeal abates as regards the deceased alone for each pre emptor has an independent right to

(*j*) *Ch nd ıra ng v Khima hai* (1898) Bom 718 (suit for po session) *R m Sewak* v *Lambar*(1903) 25 All (uit for partiti n) *Chinta n v Gangabai* (1903) 7 Bom 284 suit for partition) *S mas ndara* v *I ul li g* (1917) 40 Mad 846 868 41 I C 46 (s it for possession) *M d Singh* v *K b run u a* (1914) Punj Rec no 89 3 3 26 I C 4 6 (suit f r declaration of title) *I yare L l* v *Cl ramani* (1918) Punj Rec no 84 p 279 46 I C 50 (uit for posses ion) *Mau g Bya g* v *Maung Shue* (19 4) Rang 486 84 I C 1 0 (4) A R 376 (suit for redemption)

(*k*) *Vıamudd n* v *Maniraddin* (1927) 3° C W N 299

(*l*) *Hari Charan* v *Kalıpada* (19 9) 56 Cal. 6 (29) A C 579

(*m*) *Imam ud Din* v *Sadarath* (1910) 3° All 301 5 I C 897

pre empt (n) Where the plaintiffs obtain a joint decree for pre emption against the vendor and the purchaser without any adjudication under O 20 r 14 (2) of their respective rights they each have the right to pre empt the whole property If one or the plaintiffs respondents dies pending an appeal from the decree and the appeal is allowed without his representatives being joined the appeal abates as to that plaintiff only and the representative is entitled to possession if the pre emption money is paid over to the purchaser defendant with the consent of the surviving plaintiffs respondents A stranger purchaser cannot be required to submit to a partial pre emption nor is he entitled to demand it (o)

Legal representative of deceased plaintiff—The expression legal representative is defined in sec 2 (11) On the death of a Hindu widow pending a suit to recover property belonging to her deceased husband the reversionary heir of the husband are her legal representative within the meaning of this rule (p) On the death of a Hindu female to recover her father property from strangers the next heirs of the father are her legal representatives within the meaning of this rule (q) On the death of a reversioner pending a suit for a declaration against a Hindu widow that an alleged adoption is invalid the next reversioner is the legal representative and he is entitled to be brought on the record as such (r)

It has been held by the High Court of Madras that where a suit is brought by a minor Hindu for partition and the minor die pending the suit his legal representatives are not entitled to continue the suit the reason given being that the rule that the mere institution of a suit for partition effects a severance of the joint estate is not applicable to a suit by a minor as it is for the Court to determine in such a suit whether a decree for partition will be beneficial to the minor (s)

A suit brought by the head of a mutt on behalf of the mutt may be continued on his removal by his successor in office The successor is not a legal representative but a person on whom the interest in the trust property devolves within the meaning of r 10 below Hence r 10 and not the present rule applies to such a case (t)

Two or more legal representatives—We next proceed to consider the question whether if there are two or more legal representatives they should *all* be made parties? A Mahomedan plaintiff dies pending a suit brought by him leaving three sons *A* *B* and *C* A alone applies to be brought on the record in place of the deceased and he is brought on the record as plaintiff No application is made to bring *B* and *C* on the record within the period of limitation Does the suit abate? It does according to the Allahabad High Court (u) According to that Court the expression legal representative must when there are two or more legal representatives be read in the plural It has accordingly been held by that Court that all the legal representatives must be brought on the record as plaintiffs and if any one of them refuses to be joined as a plaintiff he should be joined as a defendant The High Courts of Bombay Madras and Lahore agree with the Allahabad High Court in holding that the expression legal representative must be read in the plural but hold that if some of the representatives are unwilling to join in the application or if one or more of the legal representatives

(n) *Mal d o St gh* v *T Ilb Al* (19_8) 0 All 79 I C (_8) A A 34 F B overruling *M tabir S gh* v *Abbas N nd n* (19) 43 All 7 6 10 I C 43 (_7) A A 543 and *B j d Al* v *Pi ra S gh* (19 5) 4 All 7 6 8 I C 66 ( ) A A 108 and *A b I rasa l J1 nak S gh* (19 3) 4 All 86 1 I C 3 1 (3) A A 11

(o) *W j d Al Ki* v *P S ngh* (19 9) 6 I A 80 51 All _6 114 I C 601 (9) A PC 58

(p) *P j o f I il* (1896) 3 C I 636 *Trill u* v *Sri Na* (1 98) 0 All 341 *I Ah I* v *Sh I j a S gl* (1910) 3 All I I C 9

(q) *I t n* v *P I ay i* (1916) 39 Mad 38 I C 1001 *Jad b n Malp il* v *S gh* (1916) 38 All 111 3 I C 104

(r) *Te k I y* v *S bba* (1915) 38 M d 406 4 I A 1 _9 I C 98

(s) *Cl I S I i I* (1918) 41 M d 44 4 I C 860

(t) *P I i* v *ta aja* (19 4) 46 M d L J 341 84 I C 00 ( ) A M 61

(u) *Gl a a d* v *A i B g* (1894) 16 All 11 *H ila H* v *Abd l Ah I* (1905) 27 All 117 See also *F joe B n* v *Toh m B x* (19_8) 3 C W N 1030 115 I C 184 (9) A C 6

are unknown a bona fide application by those who are willing to join in making the application is a sufficient compliance with this rule The same principles apply to appeal See notes to r 4 below under the same head (v)

Wrong person as legal representative—*See notes to r 4 below under the same head*

Joint Hindu family and legal representative—The High Court of Patna has held that this rule is to be applied even if the plaintiffs are members of a joint Hindu family and that r 4 is to be applied even if the defendants are members of a joint family According to that Court the legal representatives of a deceased coparcener within the meaning of sec 2 (11) are the surviving coparcener and the latter must be brought on the record in their representative character though they may be already on the record in their own capacity (w) On the other hand it has been held by the Calcutta High Court that the case of members of a joint Hindu family is governed by r 2 above that is the right to sue survives to or against the surviving coparceners alone and if they are already on the record it is not necessary to bring them on the record in their representative capacity also (x)

Legal representative already on record in another character—The Lahore High Court in one case (y) held that the fact that the legal representative of the deceased party is already on the record in his individual capacity does not dispense with the application of this or the next rule This decision was dissented from in a latter case (z) on the ground that rule 2 is independent of and in no way subject to the provisions of rule 4 (or of rule 3) The High Court of Patna has held that the fact that one of the legal representatives of a deceased party is already on the record but not as such does not prevent the abatement of the suit or appeal and the other party to the suit is not thereby relieved from the duty of applying within time for the substitution of the legal representative of the deceased (a) As to joint Hindu family see notes above

A *B* and *C* sue *D* and *E* for possession of certain lands *A* dies pending the suit leaving *B* and *C* as his heirs No application is made by *B* and *C* to bring them on record as the legal representatives of *A* *Held* by the Rangoon High Court that the suit abates only as to *A* and not as a whole the reason given being that the surviving plaintiffs themselves are the sole legal representatives of the deceased plaintiff (b)

Determination of question as to legal representative—The present rule presupposes that the party claiming to represent the deceased plaintiff is his legal representative If there is a dispute as to whether any person is or is not the legal representative of the deceased plaintiff it should be determined by the Court under r 5 below (c)

What pleas may be taken by a legal representative—The legal representative of a deceased plaintiff can only prosecute the cause of action as originally framed (d) Likewise the defendant can raise no defence against the legal representative other than what he could have raised against the deceased plaintiff himself (e) But this is not the case if the real defendant is an institution such as a temple which may be represented at different stages by different trustees For if the original suit is against the trustee

(v) *Bhikaji* v *Purshotam* (1886) 10 Bom 2 0 *Musala* v *R mayya* (1900) 23 Mad 125 *Abd l I l a* v *Sh lab ud D* (19 0) 1 Lah 441 5 I C 883

(w) *Lilo* v *Jaghru* (19 4) 3 Pat 8 3 8 I C ( ) A I 123 *Basist* v *Mod ath* (19 8) 7 Pat 8 108 I C 5 (8) A I 0

(x) *Chowdh y Shama nd* v *I jar n* (1906) 11 C W N 186

(y) *C rd t M l Muhammad* (19) 7 Lah L J 44 00 I C 41 (6) A L 3

(z) *G j l D s* v *Mulcl d* (19 6) 7 Lah 399 98 I C 900 (26) A L 607 *S dar Shah* v *Mst Sardar Bej n* (19 9) 10 Lah 531 113 I C 44 (28) A L 893

(a) *Lilo* v *Jaghru* (19 4) 3 Pat 853 8 I C ( ) A P 123 *Basist* v *Modnath* (19 8) 7 Pat 8 108 I C 55 (8) A P 0

(b) *M g P* v *Ma Shwe Ma* (19 4) Rang 44 84 I C 99 ( ) A R 9

(c) *O la* v *B epathee* (1894) 1 Mad 09

(d) *Shamcha d* v *Bh ja am* (189) Cal 9

(e) *S bb raja* v *M nik* (1896) 19 Mad 34 *G ll S wa* (19 3) 4 Lah 4 I C 146 (4) A L 45

3 who created a debt agreeing to pay it out of the temple funds and that trustee is removed it is open to his successor to raise the plea not taken by the first trustee namely that the temple funds were not liable for the debt The devolution of interest in such a case is the one contemplated by r 10 below and not r 4 (*f*)

A Hindu son sues his father and the purchaser from the father to set aside a sale of ancestral property made by the father alleging that the sale was without legal necessity The son dies pending the suit As the father s sale is impeached the father is not the proper legal representative but some other member of the family interested in setting aside the sale must be appointed (*g*)

Minor applicant—A minor is as much entitled to be made a party as the legal representative of a deceased plaintiff as an adult But he must apply through a next friend (*h*)

Death of plaintiff after perliminary and before final decree—In some cases (*i*) the rule has been applied where plaintiff dies after the preliminary decree but before the final decree These cases are however rendered obsolete by the dictum of Privy Council in *Lachmi Narain* v *Balmukund* (*j*) that a decree once passed confers rights and imposes liabilities which are fixed until the decree is reversed or varied in appeal The later decisions are that the suit cannot abate between preliminary and final decree (*k*)

Death after final decree—The provisions of this Order do not apply where a party dies after the final decree is passed Thus if *A* sues *B* but the suit is dismissed and *A* dies after the dismissal his legal representative may appeal from the decree without making any application under this rule to be brought on the record in place of the deceased (*l*) After a preliminary decree was passed on a mortgage a compromise decree was passed which operated as a final decree The plaintiff died after the final decree It was held that the legal representative could apply for execution under O 21 r 16 and there was no occasion for substitution (*m*) See also r 12 below

Death of pauper applicant—Where there is only an *application* for leave to sue in forma pauperis and the applicant dies before the leave is granted the right to sue as a pauper being a personal right cannot survive to his legal representative But the legal representative may present a *fresh* application for leave to sue in forma pauperis or he may institute a suit for the same relief which the deceased claimed if the right to sue survives (*n*)

Effect of abatement on rights of parties—Where a suit has abated and the abatement has not been set aside under r 9 below the defendant is entitled as long as he continues in possession of the suit property to plead against the plaintiff and those claiming under him that the order of abatement is conclusive of the rights to the property In such a case the order of abatement operates as a judgment in favour of the defendant to the same extent as a judgment on the merits (*o*)

Suit under section 92 and abatement—See notes to sec 92 Death of either plaintiff pending suit on p 282 above

(*f*) *S nd ras n* v *Visua ada* (1922) 45 Mad 03 72 I C 103 (2) A M 40

(*g*) *Gulli* v *Sawan* (19 3) 4 Lah 72 74 I C 146 (24) A L 45

(*h*) *Puckman* v *Jeeras m* (19 4) 4 Mad L J 370 80 I C 94 (4) A M 813

(*i*) *Lakshn* v *S bb rama* (1916) 39 Mad 488 49 9 I C 14 *Subba ayadu* v *R madasu* (19) 4 Mad 872 68 I C 94 (23) A M 37 *Natesa* v *Kannammal* (19 4) 46 Mad L J 181 8 I C 64 (4) A M 86

(*j*) (19 4) 51 I A 3 1 4 Pat 61 81 I C 747 (24) A PC 198

(*k*) *L kpat* v *Da lat Singh* (19 7) 2 Luck 464 101 I C 174 (27) A O 158 *Perumal* v *Perumal* (19 8) 51 Mad 01 11 I C 116 (8) A M 914 F B overruling *Subba ayadu* v *Ramadasu supra*

(*l*) *Ramanada* v *M natchi* (1881) 3 M d 30

(*m*) *Hem nd a* v *Fakir* (19 3) 50 Cal 6 0 74 I C 9 9 (23) A C 6 6

(*n*) *Lalit* v *Satish* (1906) 33 Cal 1163

(*o*) *Rahim* v *S asa* (19 0) 38 Mad L J 266 54 I C 56 *Naimudd a* v *Manraddin* (1927) 32 C W N 230 107 I C 7 6 (28) A C 184

Suit under O 1 r 8 and abatement—See notes to O 1 r 8, Abatement of suit and Abatement of appeal

Execution proceedings—This rule does not apply to proceedings in execution See r 12 below

Revision—When the legal representative of a deceased plaintiff applies within the prescribed period to have his name entered on the record the Court is bound under this rule to enter his name If the Court fails to do so it amounts to a failure to exercise jurisdiction vested in it by law under this rule and the High Court may interfere in revision under sec 115 (p)

Appeal—The decisions on the question of appeal are not uniform In some cases to be presently considered the alteration introduced in the present rule namely the substitution of the words the suit *shall abate* for the words the Court may *pass an order* that the suit shall abate which occurred in the corresponding sec 366 of the Code of 188_ has not been noticed see notes above Alterations in the rule No 2 We proceed to consider the decisions of each High Court separately

Madras—The Madras High Court has held that where on the death of a plaintiff two rival claimants apply to the Court to be brought upon the record as the legal representative of the deceased plaintiff and the Court decides in favour of one of them and against the other the party against whom the decision is given is not entitled to appeal the reason given being that there is no abatement of the suit in such a case as the suit can be proceeded with by the other claimant (q) A Full Bench of the Madras High Court has also held that even if a sole plaintiff dies and only one person claims to be his legal representative an order refusing his application to be brought on the record is not one from which an appeal lies (r) But the Court declined to express an opinion as to what the consequence would be if the petitioner appeals against the actual order of abatement or dismissal Presumably section 146 would enable him to do so as a person claiming under the deceased plaintiff

Allahabad—It has been held by the High Court of Allahabad that no appeal lies from an adjudication that a suit (s) or an appeal (t) has abated whether the abatement is due to the fact that no application was made to bring the legal representative of the deceased plaintiff on the record (u) or the abatement follows on the dismissal of the application made by a person to be brought upon the record as the legal representative of the deceased plaintiff (v) the reason given being that such an adjudication does not amount to a decree In a recent case where *A* had obtained an ex parte decree against *B* and *B* had applied to set aside the decree and thereafter *B* died and on *B* s death his son applied to continue the application and the application was granted notwithstanding opposition on *A* s part it was held that the case did not fall either under r 3 or r 4 of this order and that no appeal lay from the order (w) See sec 146 above

Lahore—In a case where a person applied to be brought on the record as the legal representative of a deceased plaintiff and the Court refused the application on the ground that he was not the legal representative *and also* made a separate order recording that the suit had abated inasmuch as no application by any legal representative had been made held by the High Court of Lahore that the *order dismissing the application*

(p) *J na dhan* v *R mchandra* (190) _6 Bom 317

(q) *Lakshmi* v *S bbar ma* (1916) 39 Mad 488 9 I C 14? *Ve kata* v *Gunn swa a* (19?4) 46 M d LJ 1 9 9 I C 860 (4) A M 6_ *Ruckmani* v *I erasami* (19 4) 47 Mad L J 3 0 80 I C 94 (4) A M 813

(r) *Venk takrishna* v *Kristna* (1926) 49 Mad 450 95 I C 489 (26) A M 586 overruling *Ayya Mudali* v *Veerayee* (19 0) 43 Mad 812 58 I C 498

(s) *Hamida Bibi* v *Ali Husein* (1895) 17 All 172 *Walayat* v *Raml l* (1914) 1 All L J 1113 25 I C 643

(t) *Muhammad* v *Manohar* (19__) 0 All L J 214 64 I C 838

(u) See (1914) 1 All L J 1113 25 I C 643 *supra*

(v) Se (1895) 17 All 17 *supra*

(w) *Mot Lal* v *Bishambhar* (19) 47 All 741 88 I C 9 (5) A A 431

was not appealable under the Code as it was really a matter collateral to the suit As to the *order recording the abatement* the Court said it would amount to a decree and be appealable as such if the applicant was already a party to the suit in another character (x) In another case (y) where an appeal was declared to have abated as a whole it was held following a Full Bench ruling of the same High Court (z) that whether the final decision was called an abatement or a dismissal it came within the definition of decree and was appealable as such the applicants having been parties to the suit

Oudh —The Oudh Court has held that a decision that a suit has abated coupled with a refusal to bring the legal representative on the record on the ground that the cause of action did not survive operates as a decree and is appealable (a)

4 [S 368] (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit

Procedure in case of death of one of several defendants or of sole defendant

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant

(3) Where within the time limited by law no application is made under sub rule (1), the suit shall abate as against the deceased defendant

Alterations in the rule —

1 The words used in sec 368 of the Code of 1882 were any person whom he alleges to be the legal representative of the deceased defendant The words used in the present rule are the legal representative of the deceased defendant See notes below Effect of decree against legal representative of deceased defendant

2 Sub rule (2) is new

3 The words as against the deceased defendant in sub rule (3) are new See notes below The suit shall abate as against the deceased defendant

Suit —The word suit in this rule includes an appeal and the word defendant a respondent see r 11 below

Limitation —The application under this rule must be made within 90 days from the date of the death of the deceased defendant or *respondent* Limitation Act 1908 sch I art 177 The alteration in the language of art 177 as it stood in the Limitation Act 1877 art 175 C clearly shows that the word respondent in the present article is not confined to a respondent only in first appeal as was held by the High

(x) *Ram Sarup* v *Moti Ram* (1920) 1 Lah 493 57 I C 137

(y) *Udmi* v *Hira* (1920) 1 Lah 58 60 I C 111

(z) *Wazira* v *Afzal* (1916) Punj Rec No 1 1916 p 399 38 I C 7

(a) *Rampal Singh* v *Abdul Hamid* (1928) 3 Luck 618 110 I C 826 (1928) A O 36 F B

Court of Madras under the old article (b) but that it includes a respondent also in second appeal was held by the High Court of Calcutta and Allahabad (c) See also r 11 below

Where no application made within the period of limitation—The application to bring the legal representative of the deceased defendant on the record should as stated above be made within 90 days from the date of the death of the deceased defendant If no such application is made within the aforesaid period the suit abates as against the deceased defendant [sub rule (3)] though the plaintiff was ignorant of the death of the deceased (d) After abatement the only course open to the plaintiff is to make an application under r 9 sub r (2) to have the abatement set aside Such an application should be made within 60 days from the date of the abatement [Limitation Act 1908 Sch I art 171] but the Court may entertain the application even after 60 days if sufficient cause is shown (e) [see r 9 sub r 3 and Limitation Act 1908 s 5] As to the inherent power of the Court to bring the legal representative of a deceased defendant on the record after abatement see notes below It may be stated that where a defendant dies pending a suit it is open to its legal representative to apply to be brought on the record notwithstanding the plaintiff s omission to implead him (f)

The suit shall abate—See note to r 3 Alteration in the rule No 2

The suit or appeal shall abate as against the deceased defendant or respondent—Where one of two or more defendants dies and the right to sue *survives* against the surviving defendant or defendants *alone* the suit should be proceeded with as against the surviving defendant or defendants This case has been dealt with in r 2 above The present rule provides *inter alia* that where one of two or more defendants die and the right to sue *does not survive* against the surviving defendant or defendants *alone* the legal representative of the deceased defendant ought to be made a party to the suit For this purpose an application should be made to the Court and such application must be made within 90 days from the date of the death of the deceased defendant Sub rule (3) provides that where no such application is made the suit shall abate *as against the deceased defendants* The word as against the deceased defendant are new In the absence of these words in the corresponding section 368 of the Code of 1882 it was contended in a large number of cases governed by that section that where no application was made to bring the legal representative of a deceased defendant or respondent on the record within the period of limitation the suit or appeal abated not only as against the deceased defendant or respondent but as a whole But this contention was overruled and the Courts held that a distinction ought to be made between cases in which a suit or appeal could proceed in the absence of the legal representative and those in which it could not In the former case it was held that the suit or appeal abated only as against the deceased defendant or respondent in the latter case that it abated as a whole Sub r (3) of the present rule makes it clear that where *no application* is made to bring the legal representative on the record within the time limited by law the suit or appeal abates primarily as against the deceased defendant or respondent only and that it does not abate necessarily as a whole This sub rule gives legislative recognition to the rulings under the Code of 1882 The result is that as under the Code of 1882 so under the present Code if a case is of such a nature that the suit or appeal can proceed without bringing on the record the legal representative of the deceased defendant or respondent the suit or appeal abates as against the deceased

(b) Su / I llt v 1 j la P R (1906) M 1

(c) Lp lr h r M L l (190) 34 C 1 10 0 M dl t D v D s (190) All 3

(d) S / l Mir b H l o (1911) I 1 n 60 3 1 I C 8 1 H l L (1J1) 1 no 41 1 1 I C 9 1 J S jt (1919) lu

R 6 p 166 I 10 I r n r d th m h er b l gr und t tt id th b t nt D ja S jl l t S jh (1916) Tur 1 118 p 63 33 I C 7

(e) S t rj f l t J h r L R (1914) 36 All 3 I C 48

(f) K jp t St j rit li (19 3) 4 Ma L J 33 I C 848 (3) A M 6

defendant or respondent only (g) A suit on a joint and several promissory note against the promisers is a suit of this nature But if the suit or appeal cannot proceed in the absence of the legal representative the suit or appeal will abate as a whole (h) A suit by a partner against his co-partners for dissolution of partnership and for accounts is a suit of this nature [see ill. (2) under the head II Cases in which suit or appeal held to abate as a whole

The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same litigation with respect to the same subject matter It is clear that a Court should not be called upon to make two inconsistent decrees about the same property and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole If on the other hand the success of the appeal would not lead to such a result there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it (i)

The High Court of Calcutta has held that where the plaintiffs are joint owners and a decree is passed for them for possession and the defendant appeals from the decree making the plaintiffs respondents and one of the plaintiffs-respondents dies pending the appeal the appeal abates *as a whole* the reason given being that the Court should not be called upon to make two contradictory decrees in the same litigation, which would be the result if the appeals were allowed as against the surviving joint owners, and the decree of the lower Court left undisturbed as against the deceased joint owner (j).

(g) *Cha dars g* v *Kh mabhai* (1898) 2 Bom 18 [uit for possession against trespassers —appeal] *Bai Full* v *Adesa g* (190_) 26 Bom— 03 [suit for possession against trespassers—appeal] *Jay Gobind* v *Monmotha* (1906) 33 Cal. 580 [suit for rent] *Upendra K mar* v *Sham Lal* (190) 34 Cal. 10 0 [uit for rent—ppeal] *M hd Huss in* v *Sugra Begam* (190?) 5 All 206 [suit a ainst mortgagee and surety] *Reng* v *Gnanap a Lasa* (1906) 30 Mad. 6 [uit on a mot a e appeal] *Abd l A zz* v *Lasdeo Si gh* (191) 34 All 604 17 I C 89 [suit for rent] *Zainah Bibi* v *Rohula* (191) Punj Rec. no _3 p 90 39 I C [ppeal] *Shan kerbha* v *Motilal* (19_) 49 Bom 118 8 I C 197 (2) A B 2 [appeal—suit by joint own rs for possession] following 2? Bom 18 *supra* *Rai Kashi Nath* v *Kailas S gh* (19_) 4 Pat 53 89 I C _6 (5) A P 480 [uit for rent] *Raghbi* v *S han* (19_) 6 Lah 33 86 L C 1 ( ) A.L 381 [suit against tran f rees from a Hindu widow] *Devi Das* v *Muhammad* (1919) 1 Lah. L J 26 [appeal —suit by tenants in-common for declaration of their interest in certain lands] *Lajja Ram* v *Shambu Nath* (19_3) 5 Lah L J 14 91 C 46 (3) A L [ppeal —suit by tenants-in-common for a declaration that defendant entitled to life interest only] *Nandoo Singh* v *Baljit Singh* (1923) 5 Lah L J ?03 69 I C 49 (4) A L 93 [appeal—suit for a declaration that plaintiffs entitled to succeed in preference to defendants] *Mahant Darshhan* v *Bikr majit* (19 5) 48 All. 81 89 I.C 9?3 (6) A A 1_3 [appeal —suit by Mahant against alienees from his predecessor ea h alienee having a defined hare in the property] *F q a* v *Hardewa* (19_) 50 All. 5 9 (8) A.A 1 F B [appeal—suit for declaration of right to a share as a ainst two sets of defendants] *Sarat S ngh* v *Gulab Si gh* (19 9) 10 Lah (28) A.L 5 [appeal—suit against vendee tenants in-common]

(h) *Raj Chu der* v *Ga ga Das* (1904) 31 Cal. 487 31 I.A 1 [appeal—partnership suit] *H m K nwar* v *Amba Prasad* (1900) 22 All 430 [ppeal—suit for joint possession] *Imam ud Din* v *Sadarath Rai* (1910) 3 All 01 5 I C 897 [ppeal—suit for pre-emption] *Dhara jit* v *Chandeshwa* (190) 11 C W N 504 [appeal—suit to set aside sale of land] *Khuda Bakhsh* v *Mathra Das* (1913) Punj Rec. no 62, p _34 18 L C 18 [ppeal—suit for j int possession] *Sardari Lal* v *Ram Lal* (19_0) 1 Lah 22? 5 I C 199 [appeal—suit by heirs of mortgagee] *Ma Zan* v *M ng Kyaw* (1923) 1 Rang 189 ?4 I. C 10_7 (?23) A R. 2 8 [appeal—suit for p rtition] *Wajid Ali* v *Pur n S gh* (19 4) 47 All. 100 8 I C 66 (2) A.A 108 [appeal—suit for pre-empt on] *Kal Dayal* v *Nagendra Nath* (1919) _4 C W.N 44 54 I. C 822 [appeal—suit f r d claration of ownership] *G rdas Mal* v *Kashi P m* (19 1) 3 Lah L. J 64 ('21) A L 160 [appeal—suit against co heirs] *Bhagwan S ngh* v *Jamal* (19 1) 3 Lah L. J 2_ [appeal—suit for red mption against several joint mortgagees] *Nank Chand* v *Ram Chand* (192_) 4 Lah L. J 189 77 I C 186 (2) A.L. 201 [appeal —suit for redemption by second mortgagee against prior mortgagee and mortgagor] *Shabbar Abbas* (19_) 23 All. L J 93? 90 I C 3_4 (6) A A 152 [appeal—suit for pre-emption]

(i) *Sant S ngh* v *Gulab Si gh* (19 9) 10 Lah 7, 13 ('28) A. L. 572 S also *Wajid Ali Khan* v *Puran S ngh* (19?9) 56 I.A 80 84 51 All 267 114 I C 601 (?9) A PC. 58

(j) *Dha j* v *Cha deshw r* (1907) 11 C W.N _04 *Kal D yal* v *Nagend a Nath* (1919) _4 C W N 44 54 I C. 822 *Manindra Chand a* v *Bhagabat* (1925) 30 C.W.N 45 *M inapur Zamindary Co., Ltd.* v *Amulya* (19 6) 53 Cal. 7? *Naimudin* v *Man rudd n* (19?7) 3 C.W N ?99 See also *Hari Charan* v *Kal pada* (19?9) 56 Cal. 6_2, ('29) A.C. 519

A and *B* sue *C* *D* and *E* for declaration of title and for possession and a decree is passed for them. *C* *D* and *E* appeal from the decree Pending the appeal *C* dies No steps are taken to bring his legal representative on the record within the period of limitation According to the Calcutta decision the appeal abates as a whole The reason given is that if the defendants succeed in the appeal then there would be two decrees one against the surviving plaintiffs respondents and another decree of the lower Court in favour of the deceased plaintiff to the effect that the property in suit belongs to the plaintiffs of which he was a proprietor Further as to O 41 r 4 the Calcutta High Court has said that the rule is limited to the case of appellants and does not apply to the case of respondents (*k*) On the other hand the High Court of Bombay has held that the appeal abates only as against deceased and it should be heard on the merits against the other joint owners After the appeal is heard on the merits the Court may pass such decree as the case may require (*l*) It has been held by the High Court of Allahabad that where a joint decree is passed in a suit for redemption of a mortgage brought by two or more plaintiffs and the defendants appeal from the decree and one of the plaintiffs respondents dies pending the appeal but his legal representatives are not impleaded within the period of limitation the appeal abates only so far as the deceased respondent is concerned but not as a whole (*m*) See notes to r 3 above This rule applies to appeals

Where there is no possibility of contradictory decrees the appeal abates only so far as concerns the deceased defendant or respondent but not as a whole A Hindu widow sells immovable property belonging to her husband to *A* *B* and *C* It is stated in the sale deed that the property is sold to *A* *B* and *C* *in equal shares* After the sale the next reversioner sues the widow and *A* *B* and *C* for a declaration that the sale is not valid beyond the life time of the widow but the suit is dismissed The reversioner appeals from the decree During the pendency of the appeal *A* dies but his legal representative is not brought on the record within the period of limitation The appeal abates as against *A* alone but not as a whole The reason is that the interest of *A* in the property is separate from those of the surviving respondents *B* and *C* the shares having been defined in the sale deed and that it could not therefore be said that the decree of the appellate Court if passed in favour of the appellant would prove ineffective or inconsistent with that part of the decree of the lower Court which had become final upon the abatement of the appeal *qua* *A* (*n*)

I Cases in which suit or appeal held to abate as against deceased defendant or respondent only —(1) *A* mortgages certain property to *B* *C* stands surety for repayment of the mortgage debt *B* sues *A* and *C* praying as against *A* for a sale of the mortgaged property and as against *C* for a decree for the payment of the mortgage debt *C* dies pending the suit No application is made by *B* to make the legal representative of *C* a party to the suit within 6 months [now 90 days] from the date of *C* s death The suit abates as against *C* only and not as a whole *Mehdi Husain* v *Sugra Begam* (1902) 25 All 206 [In this case it is clear that *B* could have abandoned his claim against *C* and sued *A* alone on the mortgage]

(2) *A* lets certain lands to *B* and *C* *A* then sues *B* and *C* for arrears of rent but the suit is dismissed *A* files an appeal the respondents being *B* and *C* *C* dies pending the appeal No application is made by *A* to substitute *C* s legal representative in *C* s place within 6 months [now 90 days] from the date of *C* s death The appeal does not

(*k*) (1925) 30 C W N 45 48 *supra*

(*l*) *Sh* *k* *bla* *M* *t* *l* *l* (19) 43 Bom 118 8 I C 197 ( ) A B 1 *Ch* *l* *g* v *Kh mabh* *i* (1898) L m 718 *I* *Full* v *Adesa g* (190) 6 Bom 03 See also *Ch ntaman* v *Ga gabai* (1903) 7 Bom 84 *I am Se k* *La bar* (1903) 25 All 7 *Somasunda m* v *Va thili ga* (1917) 40 Mad 846 868 41 I C 546 *M* *g Byaung* v *Maung Shwe* (1924) 2 Ran 486 84 I C 1 0 (24) A.R. 376

(*m*) *Na ain Das* v *Sheo Din* (19 6) 48 All 1 91 I C 8 9 (26) A.A 234

(*n*) *Sant S ngh* v *Gulab Singh* (19 9) 10 Lah 7 ('28) A.L. 57

abate as a whole but against *C* only *Joy Gobind* v *Monmotha* (1906) 33 Cal 680 *Abdul Aziz* v *Basdeo Singh* (1912) 34 All 604 17 I C 89, *Rai Kashi Nath* v *Kailas Singh* (1925) 4 Pat 53 89 I C 236 (25) A P 480 [In this case it is clear that *A* could have sued *B* alone without joining *C* as a party defendant see Contract Act 1872 s 43]

(3) *A* and *B* obtain a joint decree for redemption against *C* who appeals *A* dies pending the appeal and his legal representatives are not brought on the record The appeal abates against *A* alone *Narain Das* v *Sheo Din* (1926) 48 All 251 91 I C 859 (26) A A 234 (In this case either *A* or *B* could have sued to redeem)

II **Cases in which suit or appeal held to abate as a whole**—(1) *A B* and *C* are *joint* owners of certain property The property is sold for arrears of Government revenue and purchased by *D* *A* *B* and *C* sued *D* to set aside the sale on the ground of fraud and irregularities and a decree is passed in their favour *D* files an appeal from the decree against *A* *B* and *C* *C* dies pending the appeal but *D* makes no application to bring *C*s legal representative on the record within the period of limitation The appeal abates not only as against *C* but as a whole In this case it is clear that *A* *B* and *C* being *joint* owners the suit would have been bad if *C* were not joined as a party to the suit Again if the appellate Court heard the appeal in the absence of *C*s legal representative and came to the conclusion that the decree of the lower Court should be reversed the decree could then be reversed only as to *A* and *B* but it could not be reversed as to *C* for *C*s representative is not on the record But this would be a *reductio ad absurdum* for the whole appeal could not be reversed as to the *unascertained* shares of some *joint holders* [that is *A* and *B*] and confirmed as to the *unascertained* share of other joint holders [that is in this case *C*] The case therefore is one in which the appeal could not proceed in the absence of *C*s legal representative The appeal therefore must abate as a whole *Dharanjit* v *Chandeshwar* (1907) 11 Cal W N 504 *Kali Dayal* v *Nagendra Nath* (1919) 24 C W N 44 54 I C 822 *Bejoy Gopal* v *Umesh Chandra* (1901) 6 C W N 196 *Manindra* v *Bhagubatti* (1926) 30 Cal W N 455 90 I C 986 (26) A C 335 *Midnapore Zamindary Co* v *Amulya Nath* (1926) 53 Cal 752 95 I C 649 (26) A C 893 *Hadu* v *Lala* (1915) Punj Rec no 41 p 197 31 I C 951 *Jamna* v *Sarjit* (1919) Punj Rec no 67 p 166 52 I C 510 *Wali Mohammad* v *Mahlu* (1924) 5 Lah 429 86 I C 592 (25) A L 124 *Muhammad* v *Abdulla* (28) A L 869 According to the Bombay ruling the appeal abates as against *C* only and it should be heard on the merits against *A* and *B* The Court may after hearing the appeal on the merits pass such a decree as the case may require *Shankerbhai* v *Motilal* (1925) 49 Bom 118 85 I C 197 (25) A B 122 *Chandarsang* v *Khimabhai* (1897) 22 Bom 718

(2) *A* sues his partners *B* *C* *D* and *F* for dissolution and for accounts of the partnership A decree is passed in the suit by which it is ordered that a sum of Rs 9 000 should be contributed by *A* *B* and *C* and that out of that sum Rs 1 740 should be paid to *D* and the rest to *F* *A* appeals from the decree making *B* *C* *D* and *F* party respondent *B* and *C* also appeal from the decree making *A* *D* and *F* party respondents Pending the appeal *D* dies No application is made by the appellants in either appeal to bring on the record the legal representative of *D* within the period of limitation The appeal abates as a whole for as the suit is for partnership accounts it is not one in which the appeals could proceed in the absence of the legal representative of *D* *Raj Chunder* v *Gunga Das* (1904) 31 Cal 487 31 I A 71 *Moti Lal* v *Ram Narain* (1917) 39 All 551 40 I C 1006 *Jamnadas* v *Sorabji* (1891) 16 Bom 27

Suit for pre emption—See notes to r 3 above under the same head

Appellate Court and abatement—Where a defendant appeals from a decree and the plaintiff respondent dies pending the appeal without the legal representatives

being joined within the period of limitation it is the appeal which abates and not the suit (o) **O 22,**

Inherent power to add legal representative as a party after abatement — Notwithstanding the abatement of a suit the Court has the power in a proper case to bring on the record the representative of a deceased defendant under s 151 and O 1 r 10 A sues B and C for partition of joint family property A preliminary decree is passed and a commissioner is appointed to make a partition according to the rights declared in the decree B then dies but no application is made to bring his legal representative on the record within the period of limitation Though the suit abates as regards B the Court may add B s representative as a defendant (p) But no such order can be made if no preliminary decree has been passed (q)

Effect of decree against legal representative of deceased defendant — The words used in sec 365 were any person whom he alleges to be the legal representative of the deceased defendant The words used in the present rule are the legal representative of the deceased defendant It was accordingly held under the Code of 1882 that where a person alleged by the plaintiff to be the legal representative of the deceased defendant was brought on the record without any objection by him and a decree was passed in the suit the estate of the deceased was bound by the decree in the absence of fraud or collusion (r) But in view of the altered wording of the present rule it is not sufficient for the plaintiff to allege that a particular person is the legal representative of a deceased defendant and for such person to be brought on the record as representing the estate of the deceased Thus if the sole defendant dies pending a suit against him for the recovery of money leaving sons and daughters but in ignorance of the existence of these heirs his brother is brought on the record as his representative and a decree is passed against the estate of the deceased the decree is not binding on the estate and on the persons rightly entitled to that estate (s)

Two or more legal representatives —If there are several legal representatives it seems to suffice if at least one of them is impleaded whether in the suit (t) or in the appeal (u) The Lahore High Court in one case (v) held that rule 4 is sufficiently complied with if all the legal representatives known after diligent inquiry are joined But in another case (w) where only two out of three heirs of a deceased respondent were brought on the record the same Court held that the appeal abated as the whole estate was not represented See notes to r 3 above under the same head

Indian Succession Act and legal representative —In the case of a person subject to the Indian Succession Act his legal representatives within the meaning of s 2 (11) of the Code are his executors or administrators and not his heirs (x)

Joint Hindu family and legal representative —See notes to r 3 above under the same head

Legal representative already on record in another character —See notes under the same head to r 3 above

(o) Sund v M mm t I um (1919) 41 All 83 50 I C 93
(p) L k la I v Ka l bla (1911) 3 Bom 3 3 11 I C 9 Chanda g v J bl (1898) 2 B n 718 1 2
(q) Ma Z v M g Kyaw (19 3) 1 Rang 189 1 1 19 4 I C 10 (3) A R 8
(r) Kad r M Hul a (190) 6 Mad 30
(s) P Ih J Jam dji (19 6) 0 Bom 80 100 I C 18 (2) A B 63 See also J r ill v A r (8) A I 19
(t) Jehr \ Bis Hab (1 1) 26 Bo 1 R 8 80 I C 8 (24) A B 4 0 D p \ ra v L ch (19) 47 All 466 87 I C 39 ( ) A A 4 9 F r Mithuk si a p M h ini l Zafar l v Abd l (19 9) 50 All 857 111 I C 238 (9) A A 53
(u) Lilo v Jagirn (19 4) 3 Pat 8 2 8 I C ( ) A I 1 3 Shib D lla Sh Ih Ka (19) 4 Lat 3 0 89 I C 80 ( ) A I 1
(v) Beg Jan v Jam t B b (19) 7 Lah 438 98 I C 61 ( ) A L 6
(w) M h d Hasan v I y t (19) 100 I C 418 ( ) A I 94
(x) B rn tt Brot rs v Fo l (19) 3 Rang 4 8 I C 3 5 ( ) A I 186 F a ji v Ada ji (1894) 18 Bom 33

4 **Death of insolvent respondent**—An appeal preferred by the creditors of an insolvent against an order of adjudication abates on his death as the right to sue does not survive within the meaning of this rule (*y*)

Wrong person as legal representative—An application to bring on the record as legal representative of a deceased defendant a person who is not in fact such representative will be of no avail to save the running of limitation in the case of a subsequent application to implead the person who really is the legal representative (*z*) As already stated if the wrong person is impleaded as legal representative the decree will not bind the true heir (*a*)

What pleas may be taken by a legal representative—See sub r (2) and notes under the same head to r 3 above

Rehearing of suit or appeal—A plaintiff whose suit is heard and dismissed is not entitled to a rehearing of the suit on the ground that one of the defendants had died previous to the hearing of the suit and that the suit was heard without bringing the legal representative of the deceased defendant on the record The right to have the suit reheard is the right of the legal representative [which he would not care to exercise as the suit was dismissed] and not the right of the unsuccessful plaintiff The same rule applies to appeals (*b*)

Pro forma defendant—Omission to bring on record the legal representative of the defendant against whom no relief is claimed does not cause the suit to abate (*c*)

Death of defendant after preliminary and before final decree—It has been held in several cases that this rule applies where a defendant dies after the preliminary and before the final decree and that his legal representatives must be brought on the record otherwise the suit abates so far as concerns the deceased defendant (*d*) But it is difficult to reconcile these cases with the decision of Privy Council in *Luchmi Narain* v *Bal Mukund* (*e*) In a recent case the Oudh Court held relying upon *Lachmi Narain's case* that this rule does not apply where a defendant dies after the passing of a preliminary d ree (*f*) See notes to r 3 above Death of plaintiff after preliminary and before final decree

Decree for or against a dead person—A decree against a person who was dead *at the date of the institution of the suit* is a nullity (*g*) Similarly a decree passed against a defendant who died *pending the suit* without bringing his legal representative on the record is a nullity and it cannot be executed against the legal representative (*h*) A decree passed against a respondent in ignorance of the fact of his death is also a nullity (*i*) If one of several defendants is discovered to have been dead at the institution of the suit there is no question of abatement nor should the suit be dismissed as against him The

(*y*) *Na ain* v *Gurbaksh* (19 8) 9 Lah 306 107 I C 81 (28) A L 119

(*z*) *M hamm d* v *Aulia* (19 0) 4 All 497 61 I C 947 But see *Mallapraga lu* v *L gh m* (1910) 20 Mad L J 398 5 I C 514 commented upon in *Palchur* v *I emi* (19 3) 44 Mad L J 60 69 I C 5 9 (3) A M 36

(*a*) *P khraj* v *Jamsetji* (19 6) 50 Bom 80 100 I C 185 (27) A B 63

(*b*) *I llayam* v *J thi* (1915) 28 M d L J 138 8 I C 83

(*c*) *Brij I dar Si gh* v *Kanshi Ram* (191) 44 I A 218 8 45 Cal 94 110 4 I C 43 (191) Punj Rec no 104 p 393 at p 40 *Alla B ksh* v *Madho Ram* (1901) 23 All 24 *Abd lla* v *M hammad* (19 0) 2 Lah L J 601 *Ra i Labh ya* v *Kart r Si gh* (19) 7 Lah L J 466 9 I C 61 ( ) A L 6 1

(*d*) *Mot Lal* v *Ram Narain* (191) 3 All 551 40 I C 1006 [partnership suit] *Jag r Nath* v *Ram Karan* (192) 0 All L J 575 68 I C 51 ( ) A A 396 [mortgage suit] *Bhut ath* v *Tarachand* (19 0) 25 C W N 595 59 I C 177 [mortgage-s it] *Ju gl Lall* v *Laddu Ram* (1919) 4 Pat L J 240 50 I C 5 9 [mortgag -suit] *Manuje dra* v *Jnan* (19 6) 87 I C 818 (6) A C 308 (suit for ccounts)

(*e*) (19 4) 1 I A 3 1 4 Pat 61 81 I C 747 (4) A PC 198

(*f*) *Musammat Lakhpati* v *Daulat Singh* (19 7) 2 Luck. 464 101 I C 174 (27) A O 156

(*g*) *Mohun* v *Azeem* (18 9) 12 W R 45 *Veerappa* v *Tind l* (1908) 31 Mad 86 *Rampratap* v *G vrish nk r* (19 3) Bom L R 11 8 I C 464 (4) A B 109

(*h*) *Radha Prasad* v *Lal S heb* (1891) 13 All. 53 17 I A 150 *Ju gli Lall* v *Laddu Ram* (1919) 4 Pat L J 240 50 I C 5 9 *Seshamma* v *I e Lala* (19 4) 47 Mad L J 35 80 I C 39 (4) A M 713

(*i*) *Va ain* v *K lu R m* (19 0) Lah L J 144

Court should remove the name of the deceased from the record and proceed under O 1 r 10 (j) A decree in a suit for rent against several joint tenants of whom some are dead at the institution of the suit is a nullity as against those who are dead but is valid as a money decree as against those who are living for under sec 43 of the Contract Act because the liability of a joint promissor is joint and several (k) But it has been held that a decree passed by the Privy Council against the respondents in ignorance of the death of one of them is not a nullity though the legal representative of the deceased was not brought on the record the decree being an order of the Sovereign (l)

O
rr

O 41 r 20 and abatement.—O 41 r 20 does not override the provisions of O 22 of the Code (m)

Sub rule (2) Defence appropriate to his character as legal representative—See notes to r 3 above What pleas may be taken by a legal representative

O 1 r 8 and abatement.—See notes to O 1 r 8 under the same head

Execution proceedings—This rule does not apply to proceedings in execution of a decree see r 12 below

Appeal—It has been held by the High Court of Lahore that an adjudication that an appeal has abated as a whole amounts to a decree and is appealable as such (n) See notes to r 3 above Appeal

Determination of question as to legal representative

5 [S 367] Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court

Alterations in the rule —

1 The words where a question arises as to *whether any person is or is not the legal representative* have been substituted for the words if any dispute arises as to *who is the legal representative* The object is to make it clear that this rule applies not only where two or more persons claim to be the legal representative of a deceased party but where there is only one claimant and his representative character is denied This is in accordance with the interpretation put upon the words of the old section in the undermentioned cases (o)

2 Under the old section where a question arose as to whether any person was or was not the legal representative of a deceased party the Court *had* the power either to stay the suit until the question was determined in another suit or to determine the question itself Under the present rule the Court is bound to determine the question itself (p)

3 It is provided by rules 3 and 4 of this Order that once the Court determines who the legal representative is and the legal representative is brought on the record under those rules the Court *shall* proceed with the suit No objection therefore as to the representative character of such person can be entertained after he is brought on the record *though the hearing of the suit*

(j) *Palamal* v *Fauja Singh* (1926) 89 I C 661 (1926) A L 153 *Roop Chand* v *Sardar Khan* (1928) 9 Lah 56 110 I C 81 (1928) A L 353

(k) *Kesho Prasad* v *Shamnandan* (1926) 5 Pat 233 94 I C 23 (1926) A P 504

(l) *Dennandan* v *Jaiki Singh* (1920) 5 Pat L J 314 319 56 I C 32

(m) *M* ... *d a* v *Bhagbati* (1925) 30 C W N 45 48 49 90 I C 986 (1926) A C 335

(n) *Udmi* v *Hir* (1920) 1 Lah 58 60 I C 111

(o) *O la* v *Beepathee* (1894) 17 Mad 209 210 *Subbaiya* v *S minadayyar* (1835) 18 Mad 496 *Hanwant Singh* v *Ram Gopal* (1908) 30 All 348

(p) *Rooji* v *Anant* (1918) 4 Bom 535 54 46 I C 70

has not commenced Under the old section the objection could be taken at or before the first hearing of the suit But the words at or before the first hearing have been omitted in the present rule the object being that the objections as to whether any person is or is not the legal representative of a deceased party should be taken before such person is made a party under rules 3 and 4 above (*q*) But if a person alleging himself to be a legal representative is brought on the record as such *without notice to the other side* the other side is entitled to raise the objection at the hearing (*r*)

Legal representative —See s 2 cl (11) and notes to r 3 above Legal representative of deceased plaintiff

Shall be determined —If the Court of first instance fails to determine the question as to who is the legal representative it is necessary for the appellate Court to determine it (*s*)

Objection as to representative character when to be taken —See notes above Alteration in the rule No 3

Effect of order under this rule —The Allahabad High Court at one time seemed to decide that this rule provides a summary procedure for appointing a person to be the legal representative of the deceased plaintiff *for the purpose of prosecuting the suit* and that an order appointing a legal representative does not operate as a final determination of the representative character of the person appointed in other words it does not operate as res judicata (*t*) But in a later case the same High Court disapproved of this decision and held that an order under this rule does operate as res judicata (*u*)

Power of Court to correct its order —The Court has power to correct an *ex parte* order made under this rule (*v*)

Appeal —No appeal lies from an order under this rule (*w*) But a party aggrieved by the order may object to the order in an appeal from the decree [s 105] provided he was a party to the decree (*x*) But the order will not be set aside unless it is shown that it has affected the decision of the case (*y*) See notes to r 3 above Appeal

No abatement by reason of death after hearing

6 [*New*] Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place

(*q*) See *M e tel* v *Ina tha r i a* (1903) 6 M I 4 *B I* v (*I* (1903) B m 16 18 In both these case th ij was t k n at a lat stag of th l rl

(*r*) P lch v Fr (19 3) 44 M I L J 60 63 I C J (3) A M 36

(*s*) *T jat* v *D* (19) 4 I h L J 314

(*t*) I a v J I (1900) 3 All 103

(*u*) *I j B I I* v *J I a I* (19 6) 48 All 4 94 I C 1 7 (6) A A 43

(*v*) I *I I* v *Santhaj* (1919) 43 B 108 4 I C

(*w*) *D Cha I* v *(r)* (191) 3 All I C 93 *I* S *p* *Mot I* (19 0) I L h 43 7 I C 3 *l e k I K* v *Kr I a* (19) 4 Ma 1 450 9 I C 490 (6) A M 86 T B

(*x*) See *H* v *a* v *h r g* (189) 9 All 44 S I I v M t h (1880) All 90 I *th* *B* (18 0) 15 Bom 14

(*y*) *B I I a* v *G* *h* (1903) 27 Bo 16

O 22 rr 6

No abatement by reason of death after hearing—This rule is new It gives effect to the decision in the undermentioned cases (z)

In a mortgage suit the judgment referred to in this rule is the judgment supporting the final decree and not the judgment supporting the preliminary decree and the hearing referred to in the rule is the hearing of issue upon which judgment is to be delivered determining the plaintiff's right to a final decree Therefore this rule does not apply where a party to a mortgage suit dies before the application for a final decree is made and heard (a) See notes to r 3 above Death of plaintiff after preliminary and before final decree and notes to r 4 above Death of defendant after preliminary and before final decree

7 [S 369] (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and where the decree is against a female defendant, it may be executed against her alone

Suit not to abate by marriage of female party

(2) Where the husband is by law liable for the debts of his wife the decree may with the permission of the Court, be executed against the husband also, and in case of judgment for the wife execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject matter of the decree

Liability for wife's debts—See Pollock and Mulla's Indian Contract Act 18 and notes thereto

8 [S 370] (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct

When plaintiff is insolvent

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding

Procedure where assignee fails to continue suit or give security

(z) Su d o v D rj ... (18) 19 C l 13 38 1 I A 108 ... v ... ja (18) 1 B n 314 ... v B ... (1894) 1 All 314 ... v ... (1903) 6 Mad 101 ... Cod v Soo ... (1910) ... 3 I C ...

(a) Ju gh Lall v Lallu ... 40 50 I C 5 9

has not commenced Under the old section the objection could be taken at or before the first hearing of the suit But the words at or before the first hearing have been omitted in the present rule the object being that the objections as to whether any person is or is not the legal representative of a deceased party should be taken before such person is made a party under rules 3 and 4 above (q) But if a person alleging himself to be a legal representative is brought on the record as such *without notice to the other side* the other side is entitled to raise the objection at the hearing (r)

Legal representative —See s 2 cl (11) and notes to r 3 above Legal representative of deceased plaintiff

Shall be determined —If the Court of first instance fails to determine the question as to who is the legal representative it is necessary for the appellate Court to determine it (s)

Objection as to representative character when to be taken —See notes above Alteration in the rule No 3

Effect of order under this rule —The Allahabad High Court at one time seemed to decide that this rule provides a summary procedure for appointing a person to be the legal representative of the deceased plaintiff *for the purpose of prosecuting the suit* and that an order appointing a legal representative does not operate as a final determination of the representative character of the person appointed in other words it does not operate as res judicata (t) But in a later case the same High Court disapproved of this decision and held that an order under this rule does operate as res judicata (u)

Power of Court to correct its order —The Court has power to correct an *ex parte* order made under this rule (v)

Appeal —No appeal lies from an order under this rule (u) But a party aggrieved by the order may object to the order in an appeal from the decree [s 105] provided he was a party to the decree (x) But the order will not be set aside unless it is shown that it has affected the decision of the case (y) See notes to r 3 above Appeal

No abatement by reason of death after hearing

6 [*New*] Notwithstanding anything contained in the foregoing rules whether the cause of action survives or not there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place

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(q) See M [illegible] nath v Ananth [illegible] ar [illegible] na (1903) 6 M [illegible] 4 L [illegible] v G [illegible] (1903) B 16 18 In both these cases the objection was taken at a late stage of the hearing

(r) Pal [illegible] [illegible] en (19 3) 44 M d L J 60 69 I C [illegible] 3 (23) A M 36

(s) T [illegible] v D [illegible] (19) 4 Lah L J 314

(t) [illegible] v J [illegible] (190) 8 All 109

(u) [illegible] v [illegible] ya [illegible] (19 6) 48 All 4 94 I C 157 (6) A 431

(v) [illegible] v Sa [illegible] (1919) 43 P n 163 4 I C

(w) D [illegible] Chand v [illegible] (191) 3 All [illegible] I C 94 [illegible] (19 0) 1 Lah 4 [illegible] I C 3 [illegible] Kr [illegible] A [illegible] (19 6) 4 M [illegible] 489 (6) A M 86 F B

(x) See H [illegible] v [illegible] (188) 9 All 44 [illegible] M [illegible] (1890) 1 All 00 [illegible] Bh [illegible] (1890) 15 B 14

(y) B [illegible] v G [illegible] (1903) 7 P m 16

No abatement by reason of death after hearing.—This rule is new. It gives effect to the decision in the undermentioned case (z).

In a mortgage suit the judgment referred to in this rule is the judgment supporting the final decree and not the judgment supporting the preliminary decree and the hearing referred to in the rule is the hearing of the case upon which judgment is to be delivered determining the plaintiff's right to a final decree. Therefore this rule does not apply where a party to a mortgage suit dies before the application for a final decree is made and heard (a). See note to r. 3 above, "Death of plaintiff after preliminary and before final decree," and note to r. 4 above, "Death of defendant after preliminary and before final decree."

Suit not to abate by marriage of female party.

7. [S. 369.] (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and where the decree is against a female defendant it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

Liability for wife's debts.—See Pollock and Mulla's Indian Contract Act, 18 and 19 thereof.

When plaintiff's insolvency bars suit.

8. [S. 370.] (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

Procedure where assignee fails to continue suit or give security.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding

(z) S ... I o v. D ... J ... Soo ... (18 ...) 19 Cal. 13, ... 19 I. A. 108; R ... v. ... (1897) 1 Bom. 314; ... B ... (18 ...) 1 All. 314; ... v. ... (1903) 6 Mad. 101; Coda v. Soo ... ramall (1910) 33 Mad. 167, 3 I. C. 7 9.

(a) Jungli ... v. Laddu Ram (1919) 4 Pat. L. J. 40, 50 I. C. 5 9.

8 to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate

Insolvency of plaintiff—This rule lays down the procedure to be followed when a *plaintiff* becomes insolvent The suit should not be dismissed for default of appearance for O 9 r 8 cannot apply where there is known to be no person in the position of the plaintiff who has any right or duty to appear (*b*)

The procedure laid down in this rule applies to appeals see r 11 below Thus if a decree is passed in a suit by *A* against *B* and *B* appeals from the decree and pending the appeal *B* becomes insolvent and the Official Assignee does not give security for costs the Court must under this rule dismiss the suit If the plaintiff respondent has filed cross objections they could not be heard the dismissal of the suit being in effect an abatement of the appeal (*c*)

Insolvency of defendant—As to the case of the insolvency of a *defendant* in a presidency town it is now provided by sec 18 of the Presidency towns Insolvency Act 1909 that where a defendant to a suit has been adjudged an insolvent the Court may at any time after the making of the order of adjudication stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court The same section also enacts that any Court in which proceedings are pending against a debtor may on proof that an order of adjudication has been made against him under the Act either stay the proceedings or allow them to continue on such terms as it may think just As to cases governed by the Provincial Insolvency Act 1920 see sec 29 See also notes to r 10 below Insolvency of the defendant joinder of Official Assignee

Insolvency —This rule does not apply to a case where the adjudication has been annulled In such a case the dismissal for the non appearance of the plaintiff or the Official Assignee on the date fixed for the hearing is under O 9 r 9 (*d*)

Limitation—There is no limitation provided for the Official Assignee to appear and apply for substitution Again where the plaintiff's name is struck off and the Official Assignee is substituted for the insolvent plaintiff and the adjudication is thereafter annulled there is no limitation for the plaintiff to appear and apply for the restoration of his name on the record (*e*)

Insolvency of pauper applicant—In the case of a pauper who has applied for leave to sue as a pauper the present rule can be applied only after leave to sue is granted but not before (*f*)

Costs payable by plaintiff prior to his insolvency—The general principle is that a person who comes in by representation whether it be an assignee in bankruptcy or as an executor or administrator of an original plaintiff where costs are due by the person whom he represents the suit cannot be carried on except upon the costs of the original suit being paid It has accordingly been held that where a plaintiff who has been ordered to pay the costs of a proceeding in the suit becomes bankrupt and the suit is revived by his assignee the Court will stay proceedings until payment of the costs which the plaintiff has been ordered to pay (*g*) The security required of the Official Assignee is for costs incurred prior to the insolvency (*h*)

(*b*) *Kis e Gopal* v *S Mal* (19 6) 53 Cal 844 93 I C 81 ( ) A C 6
(*c*) *Mul Chand* v *Down e & Co Ltd* (19 9) 10 Lah 09 110 I C 910 (28) A.L 596
(*d*) *Amrit Lal* v *Lakhai* (1900) Cal 917
(*e*) *Khu Lal* v *Rame ar* (19 1) 43 All 6 1 64 I C 5 (2) A. A. 361
(*f*) *Ch la ibaram* v *Kother* (1925) 48 Mad L J 491 87 I C 0 (25) A M 791
(*g*) *Cook* v *H thwa* (1869) L P 8 Eq Cas 61
(*h*) *Gul m H e n* v *I arally Abd lla* (19) 3 Bom L. R 10 4 97 I C (9) A B 533

Costs of successful defendant—Where a suit is continued by the assignee in bankruptcy and the defendant obtains judgment with costs the defendant is entitled to be paid all his costs in full and not merely the costs as from the date of insolvency with liberty to prove for the costs previously incurred (i)

Practice—As to the form of the order under this rule see the undermentioned case (j)

Execution proceedings—This rule does not apply to proceedings in execution See r 12 below

Cause of action arising after insolvency—A an undischarged insolvent sues B for brokerage earned by him subsequent to his adjudication B applies for security for costs If the Official Assignee has not intervened no order should be made for security for costs (k) It may be observed that under the Presidency towns Insolvency Act 1909 property acquired by an insolvent after adjudication does not vest in the Official Assignee until he intervenes and claims it on behalf of the creditors In cases governed by the Provincial Insolvency Act 1920 such property vests immediately on the making of order of adjudication

Effect of abatement or dismissal

9. [Ss 371, 372A] (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal, and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit

(3) The provisions of section 5 of the Indian Limitation Act 1877, shall apply to applications under sub rule (2)

Sub rule (1) No fresh suit on the same cause of action—This rule prohibits a fresh suit on the *same* cause of action As to the meaning of Cause of action see notes to s 20 above Cause of action

A a member of a joint Hindu family sues *B* for redemption of a mortgage of ancestral property executed by *A* to *B* *A* then dies *A* s heirs are not brought on the record and the suit abates Subsequently *A* s son and grandsons institute another suit against *B* for redemption of the same mortgage There is no indication that *A* s suit was brought by him in a representative capacity that is as representing the joint family The second suit is not barred (l)

Sub rule (2) Who may apply under this rule—The following persons may apply under sub r (2) namely (1) *the plaintiff* where a suit has abated under

(i) *London Drapery Stores in re* [1898] Ch 684 following *Boynton v Boynton* (18) 4 App Cas 33 (a c of executors) See also *Datoobhoy v Vallu* (1899) 1 Bom L R 8 3

(j) *Lelli v Shamlal* (189) 16 Bom 404

(k) *Murray v East Bengal M h jan Flotilla Co Ld* (1919) 46 Cal 156 48 I C 6

(l) *Ramchandra v Shripatrao* (1916) 40 Bom 48 33 I C 7 1

r 9 r 4 (3) (m) (2) *the legal representative of a deceased plaintiff* where a suit has abated under r 3 (2) (3) *the assignee of an insolvent plaintiff* where a suit is dismissed under r 8 (2)

Limitation —An application under this rule for an order to set aside an abatement must be made within 60 days from the date of the abatement [Limitation Act 1908 sch I art 171] Similarly an application for an order to set aside the dismissal of a suit must be made within 60 days from the date of the order of dismissal [Ib Art 172] If no application is made within 60 days the Court has the power under s 5 of the Limitation Act to admit the application after the expiry of that period if the applicant satisfies the Court that he had sufficient cause for not making the application within 60 days See sub r (3) In an Oudh case a decree was passed against a defendant in ignorance of his death but on application of his legal representatives the decree was treated as a nullity delay was excused the representatives impleaded and the appeal heard *de novo* (n)

Sub rule (2) Sufficient cause —An application to bring upon the record the legal representative of a deceased *plaintiff* must be made within 90 days from the date of the death of the deceased [Limitation Act 1908 sch I art 176] An application to bring upon the record the legal representative of a deceased *defendant* must also be made within 90 days from the date of the death of the deceased [Ib Art 177] If no application is made within the prescribed period the suit abates in the case of a deceased plaintiff under r 3 (2) and in the case of a deceased defendant under r 4 (3) But the plaintiff or the person claiming to be the legal representative of a deceased plaintiff as the case may be may apply under r (9) (2) for an order to set aside the abatement The application to set aside the abatement must be made within 60 days from the date of the abatement If no application is made within 60 days the Court may under s 5 of the Limitation Act admit the application if the applicant satisfies the Court that he had *sufficient cause for not making the application* within 60 days see sub r (3)

An abatement ought not to be set aside as a matter of course or lightly The reason is that when a suit abates the setting aside of the abatement deprives the party in whose favour the abatement operates of a valuable right Under sub r (2) the applicant has to satisfy the Court that he was prevented by some sufficient cause from making the *application to bring the legal representative of the deceased upon the record* within 90 days from the date of the death of the deceased Under sub r (3) the applicant has to satisfy the Court that he had sufficient cause for not making the *application to set aside the abatement* within 60 days from the date of abatement (o) The two sub rules are distinct In dealing with an application under sub r (2) the Court has to decide whether there was sufficient cause for not bringing the legal representative of the deceased upon the record within 90 days from the date of the death of the deceased independently of sub rule (3) (p)

Ignorance of the death of the deceased (q) or of the whereabouts of the legal representatives of the deceased (r) may be a sufficient cause for excusing the delay unless the ignorance was due to negligence Where the defendants appealed from a

(m) *Secretary of State v Jawahir Lal* (1914) 36 All 93 25 I C 43 *Brij Indar Singh v Kanshi Ram* (1917) 44 I A 218 2 45 Cal 94 108 109 (1917) Punj Rec no 104 p 393 4 I C 43

(n) *Khalil v Ahaf* (1927) 2 Luck 592 101 I C 841 (2) A O 2?1

(o) *S t Ch d a v Ma h r Sto e & Lime Co* (19) 49 Cal 6 67 I C 917 ( ) A C 33

(p) *Lakhmi v Muhammad* (1920) 4 All 540 59 I C 903

(q) *Daya Singh v Bhuta Singh* (1916) Punj Rec no 118 p 360 38 I C 7 *Zainab Bibi v Rahila* (1917) Punj Rec no 3 p 90 3? I C 7 *Jam v Sarju* (1919) Punj 1 c no. 67 p 166 5 I C 510 *Ch dal v K la* (19) 4 Lah L J 1 1 67 I C 596 (2?) A L 61 *Jor la Ram v Hari* (19) 5 Lah 0 80 I C 690 (4) A L 4 9 *Raja v I fa Jyot* (192) C W N 10 75 I C 5 (4) A 90

(r) *Munshi Ram v Ra lha* (19 4) 6 Lah L J 19 80 I C 694 (4) 4 L 461

decree passed against them and one of the defendants died pending the appeal and the legal representative of the deceased was under the impression that the co defendants were prosecuting the appeal and challenging the validity of the entire decree it was held that it was a sufficient cause for excusing the delay in making the application to bring him on the record in place of the deceased (s)

Sub rule (3)—See notes above Sub rule (2) Sufficient Cause

Substitution without setting aside abatement—The Patna High Court has held that where a sole defendant dies and the suit has abated no order can be made for substituting his legal representative in his place until the abatement has been set aside under this rule (t) The Bombay High Court would treat the omission to set aside the abatement as merely a formal defect (u)

Minor and abatement—Where an application on behalf of a minor to be brought on the record in place of his deceased father who was the plaintiff in the suit was dismissed under r 3 above as being time barred and the minor then made a second application to be brought on the record and that application was also dismissed it was held that the lower Court should have in the circumstances of the case treated the second application as one under r 9 to set aside the abatement and that it should have in the circumstances of the case set aside the abatement (v)

Remand—When the High Court in second appeal declares the first appeal to have abated it has no power to set aside the abatement but should remand the case to the lower Appellate Court for disposal under this rule (w)

Cause of action in revived suit.—Where an abatement is set aside under this rule the suit is revived No fresh cause of action can be imported into the revived suit for the proceedings in the revived suit are a continuation of the proceedings in the original suit (x)

Appeal—An appeal lies under the Code from an order refusing to set aside the abatement or dismissal of a suit O 43 r 1 (k) But no appeal lies under the Code from an order *setting aside* an abatement But it has been held that if the order setting aside the abatement is passed without jurisdiction and is really not one under r 9 it is appealable or at least open to revision (y)

Letters Patent appeal—The High Court of Allahabad has held that an appeal lies under cl 10 of the Letters Patent of that Court (corresponding with cl 15 of the Letters Patent of the High Court of Calcutta from an order of a single judge of the High Court refusing to set aside the abatement of an appeal The decision proceeds upon two grounds namely (1) that an order rejecting the application to set aside an abatement would if unappealable be a *final* order determining once and for all the rights of parties and (2) that an appeal was allowed by the Code to the High Court from an order of a District Judge refusing to set aside an abatement of a suit and it would be strange if there was permission to appeal as undoubtedly there was from the lower appellate Court to the High Court that there should not also be the right of appeal not merely in a suit but when the question arose in a Court of appeal (z)

The High Court of Calcutta has held that an order *setting aside* the abatement of a suit is a judgment within the meaning of cl 15 of the Letters Patent and is

(s) *Ch nd a Kun r* v *S ndhyaman* (1909) 36 C 1 418 2 I C 412

(t) *Bib Khoza m* v *Official L quidator* (19 3) Pat 168 84 I C 1001 (23) A P 417

(u) *L kshmibai* v *Keshw nt* (19 3) 47 Bom 9 75 I C 83 (2) A B 449

(v) *Vijayas ng* v *Shivaj ra* (19 4) 6 Bom L R 3 8 80 I C 6 (24) A B 416

(w) *Ama sangj* v *D* (19 5) 27 Bom L R 91 86 I C 31 (25) A B 290

(x) *Sham Chand* v *Bhajaram* (189) Cal 9

(y) *Sesh nma* v *Ve kata* (19 4) 4 Mad L J 235 80 I C 397 (24) A M 713

(z) *Sadiq Al* v *A w Ali* (19 3) 45 All 66 0 I C 80 (23) A A 44

appealable as such the reason given being that when a suit has abated the setting aside of the abatement deprives the party in whose favour the abatement operates of a valuable right (*a*)

10 [S 372] Procedure in case of assignment before final order in suit

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved

(2) The attachment of a decree pending an appeal there from shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub rule (1)

Alterations in the rule—(1) The words either in addition to or in substitution for the person from whom it has passed which occurred in sec 372 of the Code of 188? after the words interest has come or devolved have been omitted It would seem to follow from some of the observations of their Lordships of the Privy Council in the undermentioned case (*b*) that the effect of the omission of those words is that a transferee *pendente lite* cannot under this Code be *added* as a party but that he may be *substituted* for his transferor It is not clear whether their Lordships intended to go that length If they did a difficulty would arise in every case where a mortgagee *pend nte lite* applied to be joined as a party

(2) Sub rule (2) is new See notes below under the heading Sub rule (2)

Other cases of assignment creation or devolution of interest.—It will be observed that the preceding rules deal with certa n specified cases of assignment creation and devolution of interest Rule 8 deals with the case of assignment on the insolvency of a plaintiff rule 7 with the case of creation of an int rest in a husband on marriage and rules 2 3 and 4 with the ca e of devolution of interest on the death of a party to a suit The present rule provides for cases of assignment creation and devolution of interest *other than* those mentioned above (*c*) See notes below Devolution of interest

Assignment of interest—This includes a sale or a mortgage or a lease (*d*) of the property in suit also an assignment of a mortgage (*e*)

Devolution of interest representative suits—Rules 2 3 and 4 relate to cases of devolution of interest on the death of a plaintiff or a defendant These rules however do not apply where a suit is brought by or against a person in his representative character *e g* by or against the head of a mutt or the manager of a temple as such In such a case the present rule applies so that if the head of the mutt or manager of the temple dies his successor may be substituted in his place But the rule is not confined to devolution of interest by death It also applies if the head of the mutt or manager of the temple resigns his office or is removed from office (*f*) In such a case also the

(*a*) *Sarat Chandra* v *Math St d L me Co* (19) 49 Cal 6 67 I C 917 (—?) A C 33

(*b*) *Ma d a* v *F mlal* (19?) 49 I A 2 0 2 6 1 Lat 81 588 63 I C 9 3 ( ) A I C 304

(*c*) *Bh gwan Das* v *Nalk ta* (1904) 9 C W N 171 173 *Al Bahad* v *Rafiullah* (19 7) 49 All 310 100 I C 288 ( ) A A 2 *S bba y d* v *P m dasu* (19??) 45 Mad 8 ? 68 I C 94 (3) A M 37 *overruled* on noth r point by *Perumal* v *Perumal* (19—8) 51 Mad 01 11 I C 116 ( ) A M 914

(*d*) *Ra Kuma Lal* v *R ja M k d S M* (1916) 1 1 t L J 596 38 I C 37

(*e*) *Ma leod* v *Kusan* (1906) 30 Bom ?50 57 8

(*f*) *Sourindra* v *S romini* (1901) ? Cal 171

successor to the head of the mutt (g) or to the manager of the temple (h) may be substituted as a party under this rule. But if the successor does not apply to be substituted as a party the original plaintiff may continue the suit and his successor will be bound by the result of the litigation (i). Where during the pendency of a suit brought by the manager of an encumbered estate the estate was released from management and restored to the owners it was held that the owners could apply under this rule to be made plaintiff in place of the manager (j).

Interest.—The word "interest" in this rule means interest in the property the subject matter of the suit (k).

Illustrations

1. *A* sues *B* for recovery of possession of certain property. Pending the suit *A* sells his interest in the property to *C*. *C* may apply under this rule to have his name substituted as plaintiff in *A*'s place.

2. *A* sues the firm of *B C* to recover Rs. 5,000. Pending the suit the firm of *B C* transfers all its assets and liabilities to the firm of *X Y*. Thereupon *A* applies to the Court under this rule to have the firm of *X Y* joined as a party defendant. The firm of *X Y* should not be joined as a party for the assignment cannot be said in any sense to be an assignment of the defendant's interest in the *subject matter of the suit*: *Harish Chandra* v. *Chandpore Co. Ltd.* (1903) 30 Cal. 961. [Here the subject matter of the suit is the amount claimed by *A*, namely Rs. 5,000.]

Insolvency of defendant: Joinder of Official Assignee.—This section applies to the devolution of interest by reason of an order of adjudication (l). See Mulla's Law of Insolvency in British India, p. 486 *et seq.*

(a) *A* sues *B* for recovery of possession of certain immovable property. The defence is that *B* is the full owner of the property. Pending the suit *B* is adjudged insolvent and his estate vests in the Official Assignee. The Official Assignee is entitled to be substituted as a party defendant under this rule. The reason is that the order of adjudication operates as a statutory transfer of the interest of the insolvent in the subject matter of the suit to the Official Assignee: see *Punithavelu* v. *Bhashyam* (1902) 25 Mad. 406; *Subbayar Bros* v. *J. K. Munuswami Aiyar and Sons* (1926) 51 Mad. L. J. 613.

(b) If the Official Assignee refuses to defend a suit relating to the insolvent's property the insolvent is not entitled to defend the suit independently of the Official Assignee: *Tribhovandas* v. *Abdulally* (1914) 39 Bom. 568, 28 I. C. 506; see also *Surendra Nath* v. *Thripura* (192?) 3? C. W. N. 304, 109 I. C. 282, ('28) A. C. 215. As to the old law on the subject, see the undermentioned case (m).

(c) *A* mortgages his property to *B*. *B* sues *A* for a sale of the mortgaged property. Pending the suit *A* is adjudged insolvent. The Official Assignee or Receiver is a necessary party to the suit: *Kala Chand* v. *Jaggannath* (1927) 54 I. A. 190, 54 Cal. 595, ('27) A. P. C. 108.

(d) *A* sues *B* to recover a debt or damages for breach of contract. Pending the suit *B* is adjudged insolvent and his property vests in the Official Assignee. Here there is a mere money claim against the insolvent and no vesting in the Official Assignee of any "interest" in the subject matter of the suit within the meaning of this rule. The Official Assignee therefore should not be added or substituted as a party defendant to the suit: *Miller* v. *Budh Sing* (1891) 18 Cal. 43; *Chanmull* v. *Ranee Soondery* (1895) 22 Cal.

(g) *Ratna ... v. A...am...* (19?4) 46 Mad. L. J. 341, 84 I. C. 200, ('24) A. M. 615.

(h) *S...da...esan* v. *...* (19..) 4? Mad. 03?, ... I. C. 103, ('..) A. M. 40.

(i) *R... Charan* v. *Biswa Nath* (1914) 20 Cal. L. J. 107, 111, 26 I. C. 410.

(j) *So...* v. *S...romon* (1901) 28 Cal. 1?1; *Ma...* v. *...* (1906) 30 Bom. ...0.

(k) *Harish Chandra* v. *Chandpore Co. Ltd.* (1903) 30 Cal. 961.

(l) *Punithavelu* v. *Bhashyam* (190?) 2? Mad. 406, 413.

(m) *Hunt, in re* (1864) 1 Bom. H. C. A. C. 2?1.

10 259 *Punithavelu* v *Bhashyam* (1902) 25 Mad 406 421 *Subbayar Bros* v *J K Munnuswami Aiyar and Sons* (1926) 51 Mad L J 613 See notes above Interest

Annulment of order of adjudication —Where a suit is brought by the Official Assignee and the order of adjudication is annulled pending the suit the insolvent is entitled to be substituted as plaintiff under this rule (*n*)

During the pendency of a suit —These words mean before a *final* decree or order has been passed or made in the suit [see the marginal note to the rule] Hence the provisions of this rule apply if the assignment creation or devolution of interest takes place before a *final* decree or order is passed or made in the suit In the case of an appeal the provisions of this rule apply if the assignment etc takes place before a *final* decree or order is passed or made in the appeal [see r 11 below] Though a suit may be compromised and the terms of the compromise filed in Court the suit will be deemed to be pending until a decree is passed in terms of the compromi e Until the decree is passed a transferee *pendente lite* is entitled to apply under this rule to be joined as a party (*o*) If he is joined as a party he is entitled to object to a decree being passed in terms of the compromise arrived at between his transferor and the opposite party (*p*) But if he is not joined as a party he is bound by the decree passed on the compromise (*q*)

Illustrations

1 A decree is passed in a suit respecting a will that a scheme should be settled Before the scheme is settled and a final order is made the interest of one of the parties to the suit passes by devolution to *A B* *A B* may be brought on the record under this rule *Gocool Chunder* v *Administrator General* (1880) 5 Cal 726

2 The devolution of the interest of a party to a suit after an order has been made directing the Commissioner to take accounts but before the passing of the *final* decree is within this rule *Keshub Roy* v *Krishto Miller* (1903) 30 Cal 609

3 The assignment of the interest of a mortgagee in a suit for sale of the mortgaged property after a preliminary decree for sale but before the passing of the final decree is within this rule *Chunni Lal* v *Abdul Ali Khan* (1901) 23 All 331

4 In a suit by *A* against *B* to recover certain immovable property a decree is passed for *A* *B* appeals from the decree *Pending* the appeal *A* sells the property to *C* *C* may be made a party to the appeal under this rule *Rajaram Bhagvat* v *Jibai* (188J) 9 Bom 151 *Pandit Gocul Chand* v *Kuar Sarat* (1896) 18 All 285

5 *A* sues *B* to recover Rs 5 000 and a decree is passed for him *B* appeals from the decree *Pending* the appeal *A* assigns the decree to *C* *C* may be made a party to the appeal under this rule *Durga Prasad in the matter of* (1900) 22 All 231

6 *A sues B for redemption of a mortgage A preliminary decree for* redemption is passed and a time is fixed within which the mortgage money is to be paid by *A* into Court The money is not paid by *A* within the time fixed by the Court nor is any application made by *F* under O 34 r 8 (4) for a decree for sale 1 then sells the mortgaged property to *C* This amounts to an assignment *pending* the suit so as to entitle *C* to be brought on the record as a party under this rule *Muhammad* v *Jaran* (191J) 37 All 22C 27 I C 771

7 *A* sues *B* for possession of certain land and mesne profits. Pending the suit *B* lets the lands to *C* and delivers possession to him A decree is then passed for *A* for possession and mesne profits After the decree *C* at *B*s request delivers possession of the

( ) *Haj Saj n* v *N C Ma l od* (1908) 3 Bom 3 1 334

( ) *Lak h* v *N k ja Mo i* (1923) C W N 755 80 I C 533 (4) A C 188

(*p*) *Veerar gh a* v *S bba* (19-0) 43 Mad 3 3 I C 4 9

(*q*) *B ppa* v *Bh ma gowda* (19-8) Bom 0 108 I C 17 ('28) A B 65.

land to *A* *A* then applies in execution proceedings to join *C* as a party to the suit so as to compel *C* to account for profits which he had received from the land *C* should not be joined as a party for it cannot be said that *B* s *liability* for mesne profits has *devolved* upon *C* within the meaning of this rule *Manindra* v *Ram Lal* (1922) 49 I A 220 1 Pat 581 65 I C 973 (22) A PC 304

Application under this rule when to be made—This rule only governs an application to *continue* a suit An application by a transferee of the interest of a party made *after the termination* of a suit is not within this rule (r) But where an appeal is preferred from the decree an application under this rule can be made to the appellate Court even though the devolution of interest occurred when the case was pending in the trial Court (s)

Illustration

A sues *B* to establish his right to certain property Pending the suit *B* mortgages the property to *C* A decree is then passed in favour of *A* *B* does not appeal from the decree *C* being desirous of appealing from the decree applies to be made a party to the suit The suit having terminated *C* should not be joined as a party to the suit He may however appeal from the decree under sec 146 as a person claiming under *B* within the meaning of that section *Sitaramaswami* v *Lakshmi* (1918) 41 Mad 510 48 I C 840

Laches—An applicant under this rule is not entitled to leave to be joined as a party as a matter of right The Court has a discretion in the matter and it may refuse leave on the ground of laches or delay (t)

Sub rule 2—*A* obtains a decree against *B* *B* appeals from the decree *Pending* the appeal *C* who holds a decree against *A* attaches the decree obtained by *A* against *B* *C* may be made a party under this rule See O 21 r 53

No new suit—It is clear from the terms of this rule that when a party is brought on the record under this rule there is as regards him no new suit at all He is brought on the record as a party to a suit that has already been instituted and that suit is continued by or against him His substitution as a party does not initiate as regards him a new proceeding (u) See notes below Limitation

Trial Court can bring assignee on record pending appeal—The Court of first instance has jurisdiction to bring on record the assignee of a party to the suit though there may be an appeal pending in the appellate Court from an interlocutory order made by the Court of first instance (v)

Transfer of decree—This rule does not apply to transfers of decrees O 21 r 16 applies to such transfers (w)

Doctrine of lis pendens—In this connection may be noted the provisions of sec 52 of the Transfer of Property Act 1882 which runs as follows During the active prosecution of a contentious suit or proceeding in which any right to any *immovable* property is directly and specifically in question the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court and on such terms as it may impose

(r) *Sitaramaswami* v *Lakshmi* (1918) 41 Mad 510 48 I C 840 *Collector of Muzaffarnagar* v *Hussaini Begam* (1896) 18 All 86 *Srinivasa* v *I atipa* (192) 49 Mad L J 04 91 I C 8 0 (6) A M 44 [application after decree by mortgagee to be joined as a party to secure account in Court in part payment]

(s) *R jan* *I* *J y t* (19) 27 C W N 10 7 I C 2 (24) A C 90

(t) *L l ha* *Ad* *jamoni* (19 3) 27 C W N 7 80 I C 38 (4) A C 188

(u) *Chaman Lal* v *Abdul Ali* (1901) 23 All 331 3

(v) *Bhoglal* v *Darasha* (19 3) 5 Bom L R 308 75 I C 743 (3) A B 303

(w) *Musammat Gulab Kuer* v *Syed Mohamed* (19 1) 6 Pat L J 358 6 I C 30 (1) A 1 180

Limitation—The right to apply under this rule accrues from day to day and is not therefore barred by lapse of time An application therefore to be added or substituted as a party under this rule may be made at any time (x)

Appeal—Under the Code of 1882 an appeal was allowed from an order *giving* leave to be joined as a party but none from an order refusing such leave (y) Under the present Code [O 43 r 1 (l)] an appeal lies from an order *giving* or *refusing* to give leave ( ) The High Court of Madras has held that an order purporting to be passed under this rule is appealable though on the facts the order should not have been passed under this rule (a)

Letters Patent Appeal—An order *refusing* leave to be joined as a party is a judgment within the meaning of cl 15 of the Letters Patent and is appealable as such (b)

11 [S 582, 1st para] In the application of this Order to appeals so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal

Application of Order to appeals

12 [*New*] Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order

Application of Order to proceedings

Execution proceedings—Rules 3 and 4 relate to the *death* of a party pending a suit or appeal Rule 8 relates to the *insolvency* of a plaintiff pending a suit and the *insolvency of an appellant pending an appeal* *The present rule provides that nothing* in rules 3 4 and 8 shall apply to proceedings in execution of a decree It sets at rest the conflict on the question whether the provisions relating to the abatement of suits and appeals apply to proceedings in execution

Illustrations

(1) *A* sues *B* The suit is dismissed After the dismissal *A* dies leaving a will of which *C* is the executor *C* may appeal from the decree without applying under r 3 to be substituted for *A* The reason is that *A* having died *after the termination* of the suit r 3 does not apply see *Ramanada* v *Minatchi* (1881) 3 Mad 236

(2) *A* sues *B* and obtains a decree against him *A* then applies for execution of the decree against *B* *B* dies during the pendency of the execution proceedings Rule 4 does not apply *A* should proceed under sec 50 and O 21 r 22

(3) *A* sues *B* and obtains a decree against him *A* applies for execution of the decree and dies during the pendency of execution proceedings *A*'s legal representative cannot be substituted on the record to continue the proceeding Rule 3 does not apply but the legal representative may under O 21 r 16 make a fresh application for execution *Palaniappa* v *Lalliammai* (19..) 50 Mad 1 99 I C 627 (2.) A M 184 *Akhoy* v *Surendra* (1926) 30 Cal W N 735 96 I C 378 (26) A C 957 *Baijnath* v *Ram Bharos* (1927) 49 All 509 104 I C 116 (2) A A 165 F B *Mirza Mahommed* v *Sujjat Mirza* (1928) 3 Luck 12. 10. I C 611 (28) A O 30

(x) *Kedarnath* v *Harra Chand* (188) 8 Cal 4 0 *Keshub Pow* v *Knight Muller* (1903) 30 Cal 609 *Laj* ... v *I ... ja Jyoti* (1922) 2 C W N 10 5 I C 55 (4) A C 90

(y) *Jam a B bi* v *Sh ikh Jan* (190) .4 All 53.

(z) *Midnapore Zemindary Co Ltd* v *Naresh* (19 7) 54 Cal 716 104 I C 81 (2.) A C 1

(a) *Mutthiah* v *C ... dlose* (19.1) 44 Mad 919 69 I C 337 (1) A M 599 (F B)

(b) *Commercial Bank of India* v *Sabju Saheb* (1901) 4 Mad .5

(4) A sues B and obtains a decree against him A then applies for execution of the decree against B and an order is made in execution proceedings B appeals from the order Pending the appeal B dies The appeal being one from an order *in execution proceedings* r 4 does not apply and there can be no abatement of the appeal *Mir Khan* v *Sharfu* (1923) 5 Lah L J 163 74 I C 577 (23) A L 560

(5) A obtains a decree against B After the decree B is adjudicated an insolvent A then applies for execution of the decree against the Official Assignee A should proceed under O 21 r 2

With reference to illustrations (3) and (4) it should be noted that in an appeal from an order in execution proceedings the legal representatives of a deceased party may be substituted (c)

Mesne profits — A obtains a decree against B for possession and mesne profits B dies pending the inquiry into mesne profits. Under the Code of 1882 an inquiry as to mesne profits was a proceeding in execution and hence there could be no abatement of the proceeding under that Code *Kedarnath* v *Anant Prasad* (1925) 52 I A 188 4 Pat 507 88 I C 482 (25) A PC 117 Under the present Code an inquiry as to mesne profits is an inquiry *pending* the suit hence r 4 applies and B's legal representative should be brought on the record See notes to O 20 r 12 Inquiry as to mesne profits no longer a proceeding in execution

Death of party after preliminary and before final decree—See notes to r 3 above and notes to r 4

ORDER XXIII

Withdrawal and Adjustment of Suits

Withdrawal of suit or abandonment of part of claim

1 [S 73] (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in

(c) *Arjdas* v *Krishnan* (1928) 51 M d 858 110 I C 66 (28) A M 7 2

1 a case however the Court should not act under this rule but return the plaint under O 7 r 10 to the plaintiff to be presented to the proper Court (u) But O 7 r 10 does not apply to Chartered H gh Courts In the case therefore of a Chartered High Court the Court may it seems act under this rule

Other sufficient grounds —Sec 97 of the Code of 1859 ran as follows —

If the plaintiff at any time before final judgment satisfies the Court that there are *sufficient grounds* for permitting him to withdraw from the suit with liberty to br ng a fresh suit for the same matter it shall be competent to the Court to grant such permission on such terms as to costs or otherwise as it may deem proper

It is to be noted that sec 97 of the Code of 1859 did not contain the words some formal defect which occur in the present Code In *Watson* v *Collector of Rajshaye* (v) the plaintiff sued the defendant to set aside an auction sale of a putnee Taluk for arrears of rent A preliminary issue was framed whether the plaintiff was in a position to sue A commission was issued for the examination of witnesses but it was returned unexecuted as the witnesses had not been presented for examination Upon this the Court finding no excuse for the plaintiff s neglect dismissed the suit for want of evidence but with a reservation that the order made was not to be a bar to the plaintiff from proceeding as if the action has not been brought The plaintiff then brought a fresh suit in respect of the same cause of action The High Court of Bengal held that the second suit was barred as *res judicata* under s 2 of the Code of 1859 This decision was affirmed on appeal by the Privy Council In the course of the judgment their Lordships of the Privy Council referring apparently to sec 97 of the Code of 1859 said as follows —

> There is a proceeding in those Courts (Courts of India) called a non suit which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit But that seems to be limited to cases of misjoinder either of parties or matters in contest in the suit to cases in which a material document has been rejected because it has not borne proper stamp and to cases in which there has been an erroneous valuation of the subject of the suit In all those cases the suit fails *by reason of som point of form* but their Lordships are aware of no ca e in which upon an issue joined and the party having failed to produce the evidence which he was bound to produce in support of that issue liberty has been given to him to bring a second suit except in the particular instance that is now bef re them

The passage cited above indicates their Lordships view of the meaning of the words sufficient grounds in sec 9 of the Code of 1859 This decision was followed by the High Court of Bengal in *Madan Ram* v *I rail* (u) where it was held that a plaintiff cannot be permitted to withdraw with liberty to bring a fresh suit after issues have been joined and he has failed to produce the evidence to support his claim *Madan Ram s* case was al o a case under the Code of 1859 The words by reason of some formal defect appeared for the first time in sec 373 of the Code of 1877 The decision in *Watson s* case was al o followed by the High Court of Calcutta in *Kharda Co Ltd* v *Doorga Charan* (z) a case under the present Code The question in that case was whether a plaintiff can be permitted to withdraw from the suit with liberty to bring a fresh suit after he has adduced all his evidence and finds that the evidence is insufficient to establish his case It was contended for the plaintiff that the words other sufficient grounds were wide enough to entitle the Court to allow the plaintiff to withdraw from the suit *under any circumstances that might be deemed sufficient by the Court* but this contention was overruled

( ) (1918) 41 Mad 01 08 46 I C 65 supra
( ) (1869) 13 M I A 160 3 Beng L.R I C 48 supra
(w) (18 4) I W R 91 (Civ Rul)
( ) (1909) 11 Cal L J 45 5 I C 1

and it was held that the Court had no power to allow a plaintiff to withdraw from the suit after evidence had been adduced and the evidence was found to be insufficient to support his case In the course of his judgment Mookerji J after referring to clauses (a) and (b) of sub rule (2) said The intention plainly is that a ground indicated in clause (b) must be *of the same nature as the ground specified in clause* (a) This decision has been followed by the same High Court in subsequent cases (*y*) The High Courts of Patna (*z*) and Lahore (*a*) have followed the Calcutta decisions The Oudh Court also holds that other sufficient grounds must be *ejusdem generis* with a formal defect (*b*) The High Court of Bombay held in some cases that the Court should not allow a suit to be withdrawn after the parties were ready for trial *if such withdrawal might operate to the prejudice of the defendant* (*c*) But this view was dissented from in a later case in which the Court followed the Calcutta decisions (*d*) In a recent case the same High Court held that it is wrong to grant leave to withdraw a suit with liberty to file a fresh suit after the evidence is concluded though the hearing may be adjourned for final arguments (*e*) In Allahabad (*f*) leave to withdraw has been granted where the plaintiff fails to give formal proof of a document which is essential for his success In Madras there is a conflict of opinion whether the words other sufficient grounds mean grounds analogous to a formal defect as held in Calcutta or include grounds which may not be analogous to a formal defect In one case (*g*) the High Court held that the words other sufficient grounds must be *ejusdem generis* with the words some formal defect and that the Court had no power under this rule to give leave to the plaintiff after a substantial portion of his evidence had been heard In a later case (*h*) however Sadashiva Ayyar J said that the words other sufficient grounds were not *ejusdem generis* with the words some formal defect and that they included grounds which might not be analogous to a formal defect and that even if they did not objection to a suit on the ground of jurisdiction or insufficient Court fees were analogous to formal defects It appears therefore that the majority of Judges are in favour of the view that the mere inability of the plaintiff to prove his case is not a sufficient ground within the meaning of this rule for giving him leave to withdraw with liberty to institute a fresh suit

The Calcutta High Court has held that the plaintiff should not be allowed to withdraw his suit with liberty to bring a fresh suit after the suit has been heard and decided on the merits (*i*) Where a plaintiff sought to recover a sum of money upon certain allegations which were found untrue by the first Court and the first Court dismissed the suit and on appeal the District Judge came to the same conclusion but granted leave to the plaintiff to withdraw from the suit with liberty to institute a fresh suit the High Court held that the order should not have been made and set it aside (*j*)

On such terms as it thinks fit —Where leave is granted to a plaintiff to withdraw from a suit with liberty to institute a fresh suit the defendant is

(*y*) *Mabulla v P Hemangini* (1910) 11 Cal L J 51 6 I C 6 9 *Kal I a a v I u cha* (1917) 44 C l 36 33 I C 6 0 *Hiralal v Udoy Chandra* (191) 16 C W N 10 14 I C 33 But see *Hriday Nath v R mcl ndra* (19 1) 48 C l 138 at p 141 9 I C 806 (1) A C 34 (F B) [order of Reference to F ll B nch]

(*z*) *Male d a l v S ng L l* (1918) 3 Pat L J 6 1 48 I C 197 *Uch t v B s u* (1921) 6 I t L J 112 61 I C 639 (1) A P 4

(*a*) *Ishar Das v Lal Singh* (19) Lah L J 290 90 I C 63 (5) A L 43

(*b*) *T ka Clob y v Sheo Dayal* (19 8) 3 Luck 403 10 I C 887 (8) A O 48

(*c*) *Mah p t v Nathu* (1909) 33 B m 7 6 4 I C *B i Lash bai v Sh i p* (1913) 3 B m 68 I C 23 (lea e gr n l aft r th h ari g was finished)

Se also *Na a das v Sh t lal* (19 1) 45 Bom 37 384 38 58 I C 1004 (1) A B 267

(*d*) *Lala Punja I t v Motiram* (19 6) 50 Bom 10 94 I C 777 (6) A B 31

(*e*) *Bhikaji v Anant* (19 9) 31 Bom L R 613 (9) A B 3 0

(*f*) *Jh I L l v B she h Das* (1918) 40 All 61 613 614 46 I C 71 *Cha drika L l v S m ath* (19 8) 50 All 83 115 I C 1 4 (9) A A 133

(*g*) *A ya v Gop n a* (1914) Mad L J 480 26 I C 5

(*h*) *Kannuswami v Jagathambal* (1918) 41 Mad 01 0 46 I C 26

(*i*) *Ra n S ran v P dha* (19 8) 55 Cal 1067 113 I C 84 (9) A C 88

(*j*) *Pal a v G n h Chand a* (1919) 46 Cal 168 45 I C 241

a case however the Court should not act under this rule but return the plaint under O 7 r 10 to the plaintiff to be presented to the proper Court (u) But O 7 r 10 does not apply to Chartered High Courts In the case therefore of a Chartered High Court the Court may it seems act under this rule

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> There is a proceeding in those Courts (Courts of India) called a non suit which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit But that seems to be limited to cases of misjoinder either of parties or matters in contest in the suit to cases in which a material document has been rejected because it has not borne proper stamp and to cases in which there has been an erroneous valuation of the subject of the suit In all those cases the suit fails *by reason of some point of form* but their Lordships are aware of no case in which upon an issue joined and the party having failed to produce the evidence which he was bound to produce in support of that issue liberty has been given to him to bring a second suit except in the particular instance that is now before them

The passage cited above indicates their Lordships view of the meaning of the words sufficient grounds in sec 97 of the Code of 1859 This decision was followed by the High Court of Bengal in *Madan Ram* v *Irsad* (w) where it was held that a plaintiff cannot be permitted to withdraw with liberty to bring a fresh suit after issues have been joined and he has failed to produce the evidence to support his claim *Madan Ram s* case was also a case under the Code of 1859 The words by reason of some formal defect appeared for the first time in sec 373 of the Code of 1877 The decision in *Watson s* case was also followed by the High Court of Calcutta in *Kharda Co Ltd* v *Doorga Charan* (x) a case under the present Code The question in that case was whether a plaintiff can be permitted to withdraw from the suit with liberty to bring a fresh suit after he has adduced all his evidence and finds that the evidence is insufficient to establish his case It was contended for the plaintiff that the words other sufficient grounds were wide enough to entitle the Court to allow the plaintiff to withdraw from the suit *under any circumstances that might be deemed sufficient by the Court* but this contention was overruled

(u) (1918) 41 M 1 01 08 46 I C 65 *supra*
(v) (1869) 13 M I A 160 3 Beng L R 1 C 48 *supra*
(w) (18 4) 21 W R 01 (Civ Rul)
(x) (1909) 11 Cal L J 4 I C 18

and it was held that the Court had no power to allow a plaintiff to withdraw from the suit after evidence had been adduced and the evidence was found to be insufficient to support his case In the course of his judgment Mookerji J after referring to clauses (a) and (b) of sub rule (2) said The intention plainly is that a ground indicated in clause (b) must be *of the same nature as the ground specified in clause* (a) This decision has been followed by the same High Court in subsequent cases (y) The High Courts of Patna (z) and Lahore (a) have followed the Calcutta decisions The Oudh Court also holds that other sufficient grounds must be *ejusdem generis* with a formal defect (b) The High Court of Bombay held in some cases that the Court should not allow a suit to be withdrawn after the parties were ready for trial *if such withdrawal might operate to the prejudice of the defendant* (c) But this view was dissented from in a later case in which the Court followed the Calcutta decisions (d) In a recent case the same High Court held that it is wrong to grant leave to withdraw a suit with liberty to file a fresh suit after the evidence is concluded though the hearing may be adjourned for final arguments (e) In Allahabad (f) leave to withdraw has been granted where the plaintiff fails to give formal proof of a document which is essential for his success In Madras there is a conflict of opinion whether the words other sufficient grounds mean grounds analogous to a formal defect as held in Calcutta or include grounds which may not be analogous to a formal defect In one case (g) the High Court held that the words other sufficient grounds must be *ejusdem generis* with the words some formal defect and that the Court had no power under this rule to give leave to the plaintiff after a substantial portion of his evidence had been heard In a later case (h) however Sadashiva Ayyar J said that the words other sufficient grounds were not *ejusdem generis* with the words some formal defect and that they included grounds which might not be analogous to a formal defect and that even if they did not objection to a suit on the ground of jurisdiction or insufficient Court fees were analogous to formal defects It appears therefore that the majority of Judges are in favour of the view that the mere inability of the plaintiff to prove his case is not a sufficient ground within the meaning of this rule for giving him leave to withdraw with liberty to institute a fresh suit

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On such terms as it thinks fit —Where leave is granted to a plaintiff to withdraw from a suit with liberty to institute a fresh suit the defendant is

(y) *M bulla v Ra Hem g* (1910) 11 Cal L J 51 6 I C 6 0 *h l P a a v P ncha* (191) 44 C 1 36 33 I C 6 0 *Hir lal Udoy Ch dr* (191) 16 C W N 10 14 I C 33 But see *Hrid y Nath I am h dra* (19 1) 48 Cal 138 at p 141 8 I C 806 (1) A C 34 (F B) [ord r of R f ren to Full Bench]

(z) *Mahe d Ram v S g Lal* (1919) 3 Pat L J 6 1 48 I C 19 *U ha t v B sawa* (19 1) 6 P t L J 11 61 I C 639 (1) A P 4

(a) *Ish r D s J I S gh* (19) Lah L J 290 90 I C 63 (2) A L 43

(b) *Tila Ch b y v Sheo D y l* (19 8) 3 Luck 403 107 I C 887 (8) A O 48

(c) *Mal pat v Nathu* (1909) 33 Bom 6 4 I C 5 *B i Kash ba v Sh dapa* (1913) 3 L m 692 1 I C 23 (l a e gran ed aft r the heari g was finished) See also *N i nd s v Sh tilal* (1921) 45 Bom 3 384 38 58 I C 1004 (1) A B 26

(d) *Lala I j shet v Mot ram* (19 6) 50 Bom 19 94 I C 77 (6) A B 315

(e) *Bhik ji v Anant* (19 9) 31 Bom L R 613 (29) A L 3 0

(f) *Jh l Lal v Bisl shar Das* (1918) 40 All 61 613-614 46 I C 71 *Chandrika Lal v Sami th* (19 8) 50 All 83 115 I C 1 4 (9) A A 133

(g) *Ai i v Gopanna* (1914) Mad L J 480 6 I C 5

(h) *Ka n a i v Jag thambal* (1918) 41 Mad 01 0 46 I C 6

(i) *I am Saran v Padha* (19 8) 55 Cal. 1067 113 I C 847 (29) A C 89

(j) *Pad a v G risl Chandra* (1919) 46 Cal 168 45 I C 41

1 ordinarily entitled to the costs of the suit (k) The High Court of Madras has held that where leave is granted to a plaintiff to bring a fresh suit on payment of the defendant's costs *on or before a specified date* and he fails to do so he is precluded from bringing a second suit and if such suit is brought it should be dismissed (l) That Court also held that if leave is granted to bring a fresh suit *on payment of the defendant's costs* (without specifying any date) the plaintiff is precluded from bringing a second suit unless the costs are paid *before* the institution of the second suit The payment of costs after the close of *the trial in the second suit is not a compliance with the condition (m) But the same Court* has held that when it is absolutely impossible for the plaintiff to pay the costs on or before the date fixed by the Court as where the exact amount of costs cannot be ascertained in time the Court has power to extend the time (n)

The High Court of Calcutta has not taken the same strict view of the condition as to the payment of costs as the Madras High Court Thus in *Abdul Aziz* v *Ebrahim* (o) where leave was granted to the plaintiff to bring a fresh suit *on payment of the defendant's costs* it was held that though the payment of costs was a condition precedent to the institution of a second suit non payment of costs before the institution of the second suit did not render the fresh suit bad *ab initio* and further that payment of costs before the trial of the fresh suit cured the irregularity In *Shitlal* v *Gaya* (p) Sir Lawrence Jenkins while agreeing with the result of the ruling in *Abdul Aziz* v *Ebrahim* based his decision on somewhat different ground In that case also permission was granted to the plaintiff to institute a fresh suit on payment of the defendant's costs. The plaintiff did not pay the costs and brought a second suit The suit was dismissed by the Munsif for non payment of costs The plaintiff appealed to the Subordinate Judge Pending the appeal the plaintiff paid the defendant's costs The Subordinate Judge thereupon sent back the case to the Munsif for trial on the merits It was held that inasmuch as the permission to withdraw and bring a fresh suit was made conditional on a certain payment the original suit could not be deemed to be withdrawn until those costs were paid and it must therefore be deemed to be a pending suit which became disposed of as soon as payment was made In the course of the judgment the learned Judge said

When a plaintiff has obtained leave to withdraw upon payment of costs it is his duty to pay the costs at once for until they were paid there is no withdrawal with the permission of the Court In that view when the case came before the Munsif he was not entitled to dismiss it All he could do was to regard sec 10 (of the Code) as a bar to his proceeding with the trial of the suit In so far as he dismissed it he exercised a power that was not vested in him and I think the Subordinate Judge was right when on payment of the costs he set aside the decree of the Munsif and sent back the case in order that the Munsif should proceed with the trial for on the payment of those costs there was the withdrawal complete under O 23 It appears to me important in cases of this kind to have regard to the precise terms of the section and I think it will be well that the Court when giving permission to withdraw with liberty to bring a fresh suit should see that the orders are complete and the proper order in such circumstances is one which limits the time within which the payment should be made and which goes on to direct *that on failure to pay within the time the original suit is dismissed with costs.* The High Court of Patna has followed the Calcutta decisions (q) The High Court of Madras has dissented from the view taken by the Calcutta High Court in *Shitlal* v *Gaya* and

(k) *Khimchand* v *Sobhagchand* (1923) 47 Bom 90 [illegible] 23 A B 406

(l) *F* [illegible] *v* *Nagappa* (1910) 33 Mad [illegible] 8 6 I C 58

(m) *Sethayya* v *Subbayya* (1924) 47 Mad [illegible] 646 [illegible] I C 493 [illegible] A M 87

(n) *Ianna* v *Karappa* (1906) 29 Mad 3 0

(o) (1904) 31 Cal 96

(p) (1914) 19 Cal L J [illegible] I C 10

(q) *Kalidip* v *Akildip* (1918) 3 Pat L J 63 44 I C [illegible] *Muhammad* v *Lachmi* [illegible] (19[illegible]) [illegible] 306 96 I C 94 [illegible] A [illegible] 409

held that the withdrawal operates not when the costs are paid but from the date of the Court s order granting permission to withdraw (*r*)

Where a plaintiff who had brought a suit for redemption against the mortgagee was allowed to withdraw the uit with liberty to bring a fresh suit *within two years* and he brought the fresh suit after two years the High Court of Bombay held that he was entitled to do so The reason given was that a mortgagor has a right to sue for redemption at any time within the period of limitation unless his equity of redemption has in the meantime been extinguished (*s*)

Notice—Though this rule does not specifically require that notice of an application under it mu t be given to the opposite party still it is an elementary rule of universal application that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard Hence if an order is made under this rule granting leave to the plaintiff to withdraw from a suit with liberty to bring a fresh suit without giving notice to the opposite party the order will be set aside under s 115 of the Code on the ground of material irregularity (*t*)

Permission need not be express—The permission mentioned in this section need not be given in express terms It is sufficient if it can be implied from the order read with the application on which the order was made (*u*)

Form of order—Where leave is granted to the plaintiff to withdraw from the suit with liberty to bring a fresh suit the order must not be one *dismissing* the suit with liberty to bring a fresh suit but one *granting permission* to the plaintiff to withdraw from the suit with liberty to bring a fresh suit (*v*) Where leave is refused the Court should simply dismiss the *application* It should not make an order disposing of the suit on the assumption that the plaintiff would withdraw the suit under sub-rule (1) if the application was refused (*w*)

Permission extends to one fresh suit only—The permission granted in the original suit to bring a fresh suit in respect of the same subject matter extends only to the filing of one fresh suit and not more Hence where leave is granted to a plaintiff to bring a fresh suit on payment of the defendant s costs and the plaintiff brings a fresh suit without paying the costs and the suit is dismissed the dismissal is a bar to the institution of a third suit in respect of the same subject matter (*x*)

Dismissal of suit coupled with liberty to bring a fresh suit—There is no power in the Courts of India to *dismiss* a suit *with liberty* to the plaintiff to bring a fresh suit for the same matter (*y*)

Liberty to consolidate withdrawn suit with a pending suit—A Court it seems has no power under this rule to grant permission to a plaintiff to consolidate the claim in the suit which is withdrawn with a claim in another suit pending at the *time* But if *such an order is made it cannot be said to be one made without jurisdiction* and it is not a nullity ( ) But there is nothing to prevent the Court from granting leave to a plaintiff to withdraw from two suits with liberty to bring a fresh suit consolidating the claims in the two suits (*a*)

(*r*) *Seshayya* v *S bayya* (1924) 47 Mad L J 646 8? I C 4?? (4) A M 877

(*s*) *Ramchandra* v *Hanmanta* (19 0) Bom L R 939 8 I C 45

(*t*) *Rajendra* v *At l* (1917) 44 C l 454 39 I C 969

(*u*) *Banw ri Lal* v *Kishen* (19 0) 2 Lah L J 242 67 I C 100 dissenting from *Jita Singh* v *Hari Si gh* (1916) 1 u j Rec no 97 p 294 37 I C 1 8 *Kh di Ra* v *Lalo Rai* (19 6) 5 Pat 23 93 I C 1001 (26) A P 59

(*v*) *Doucett* v *Wise* (1864) 1 W R 322 *Banwari Da* v *Muhammad* (188) 9 All 690

(*w*) *M ha t* v *Pu shotamdas* (1908) 3 Bom 345

(*x*) *Ambubai* v *Shank rsa* (19 5) 7 Bom L R 43 87 I C 807 (2) A B 72

(*y*) *Watson* v *C llector of I aj h ye* (1869) 13 M I A 160 3 Beng L R P C 48 *Banwari Das* v *Mol mal* (1887) 9 All 690 *S kh Lal* v *Bhikhi* (1889) 11 All 187 *Fateh Singh* v *J gan ath Baksh Si gh* (1925) 5 I A 100 10 106 47 All 158 16 163 91 I C 80 (5) A PC 5

(*z*) *Lakshma an* v *Muth ya* (19 1) 40 Mad L J 126 6 I C 833 *Tuljaram* v *Gopala* (1917) 3 Mad L J 434 40 I C 611

(*a*) *Sahib & Co* v *Ad msa* (19?4) 2 Rang 66 81 I C 46 (4) A R 249

1 **Withdrawing with permission Additional relief in fresh suit.**—The effect of withdrawing a suit with the permission of the Court is to leave the parties in the same position as that in which they stood before the suit was brought Therefore the plaintiff may include in the fresh suit a *relief* which he might have included in the first suit but which he had omitted to include in it (*b*)

Withdrawing with permission after suit has abated against some of the defendants—Where a suit has abated against a defendant and it is then withdrawn with liberty to bring a fresh suit such permission does not entitle the plaintiff to join the legal representatives of such defendant as party defendants in the fresh suit (*c*)

Withdrawing without permission Bar of fresh suit—Where a plaintiff withdraws from a suit without the permission of the Court he is precluded from instituting a fresh suit in respect of the same subject matter [sub rule (3)] and against the same defendant The rule is mandatory and when a suit by an idol was withdrawn a second suit by a sebait or manager of the idol was held to be barred (*d*) See notes below Same defendant and Same subject matter

Same defendant—Though the rule does not expressly say so the fresh suit that is barred must be a suit against the same defendant A second suit will not be barred if it is brought against a different person *A* obtains a decree against *B* and in execution of the decree attached certain property alleged to belong to *B* *C* intervenes under O 21 r 58 alleging that the property belongs to him *C*s application is rejected and he brings a regular suit against *A* alone to establish his title to the property *C* then withdraws from the suit without obtaining permission of the Court to bring a second suit for the same subject matter After the suit has been withdrawn the attachment falls through *A* then re attaches the same property in execution of the same decree and the property is sold and purchased by *D* *C* does not appear to contest the second execution proceeding after the withdrawal of his suit He then institutes a suit against *D* to recover possession of the property alleging that the property is his sole and exclusive property The suit is not barred under this rule as *B* the judgment debtor was not a party to the first suit (*e*)

Same subject matter—As already stated if a suit is withdrawn without the permission of the Court the plaintiff is precluded from bringing a fresh suit in respect of *the same subject matter* The expression used in the corresponding s 373 of the Code of 1882 was matter A Calcutta case under the Code of 1882 said that matter did not mean property but that it had reference to the *right* in property which the plaintiff seeks to enforce In that case *A* had instituted a suit to establish his right to sell certain property in satisfaction of a decree against *B* but he withdrew the suit without obtaining leave to bring a fresh suit Subsequently he instituted another suit *to establish his right to sell the same property in satisfaction of another decree against B* It was held that the second suit was not barred The Court said Now though the property in respect of which the present suit is brought is the *same* as that in respect of which the former suit was brought still that would not be sufficient to make the present suit one for *the same matter* as that for which the former suit was brought within the meaning of s 373 for the cause of action in the two suits was different (*f*) In a Madras case under the present Code where the next reversionary heir of a deceased Hindu instituted a suit against the widow of the deceased and an alienee from her of her husband s property for a *declaration* that the alienation was not binding on the estate and on the death of the widow withdrew the suit without obtaining leave to bring a

(*b*) *P* [illegible] *Lal* v *Sr*[illegible] *Bara* (18[illegible]) [illegible] All [illegible]

(*c*) [illegible] v [illegible] (191[illegible]) 38 M[illegible] 643 [illegible] I C 60

(*d*) *Ra*[illegible] v [illegible] (–8) A A 69[illegible]

(*e*) *M* [illegible] v *Ram* [illegible] (188[illegible]) 8 C [illegible]

(*f*) *Kam*[illegible] v *R*[illegible] *Nath* (1894) [illegible] Cal 65 [illegible] *Chandra* v *Purna Ch*[illegible]*dra* (189[illegible]) 4 Cal W N 110 See also [illegible] v [illegible] (1919) Punj Rec no 13[illegible] p 3 at pp 3 4 355 [illegible] I C 4 8

fresh suit it was held that the subsequent suit which he brought *against the alienee* for *possession* of the same property was not barred Wallis C J in delivering the judgment of the Court said The terms subject matter and the same matter which occurred in the corresponding section 373 of the old Code have not been defined and must we think be construed strictly in a penal provision of this character Without attempting an exhaustive definition of all that may be included in the term subject matter we are of opinion that where as in the present case the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit the second suit cannot be considered to have been brought in respect of the same subject matter as the first suit (*g*) The contrary however was held by the Chief Court of the Punjab in a case in which the facts were almost similar to the Madras case (*h*) In a Bombay case (*i*) *A* sued to eject *L* but finding that the notice to quit was defective withdrew the suit without obtaining the leave of the Court Subsequently *A* gave a formal notice to quit and brought a fresh suit for ejectment It was held that the suit was not barred under this rule as the previous suit was not for the *same subject matter* as the second suit Scott C J said We are of opinion that subject matter means to use the words of Order I Rule 1 the series of acts or transactions alleged to exist giving rise to the relief claimed Obviously the first series of acts or transactions which formed the basis of the first suit was incomplete or the plaintiff would have been able to prosecute his suit to decree It was incomplete because there was no notice to quit The second series of act or transactions is complete because the notice to quit has been given and therefore the two suits are not in respect of the same subject matter But the withdrawal of a prior suit for a *declaration* of title to certain war bonds is a bar to a subsequent suit for *consequential relief* in respect of the same bonds [that is for recovery of possession] (*j*) O 2

A suit for partition however stands on a different footing the cause of action in such a suit being a recurring cause of action Hence the withdrawal of a suit for partition of joint property though without permission of the Court is no bar to a second suit for partition of the same property against the same defendants (*k*)

Withdrawing without leave of Court but with consent of defendant—In a case decided under s 97 of the Code of 1859 it was observed by Norman J that where a plaintiff withdraws his suit without the permission of the Court but with the consent of the defendant he is not precluded from instituting a fresh suit in respect of the same subject matter (*l*) The observations of Norman J on this point have been doubted in a recent case (*m*) The doubt seems to be well founded

Withdrawing from suit pending arbitration—When the matters in dispute in a suit are referred to arbitration *by an order of the Court* made under Schedule II para 3 the Court has no power under this rule to grant permission to the plaintiff to withdraw from the suit with liberty to institute a fresh suit The provisions of this rule do not apply to such a case for when once a matter is referred to arbitration the Court is precluded from dealing with it in the same suit save in the manner and to the extent provided in Schedule II. *A* sues *B* for possession of certain property The matters in difference between the parties are referred to arbitration by an order of the Court. The Court has no power either before or after the award is made to grant

(*g*) *Si ga Redd* v *Subba Reddi* (1916) 39 Mad 987 35 I C 185 overruli g *Achutta* v *Achutan* (1898) 21 Mad 3

(*h*) *Jita S ngh* v *Hari S ngh* (1916) Punj Rec no 97 p 34 37 I C 128

(*i*) *Rakhmab i* v *Mahadeo* (1918) 4 Bom 15 43 I C

(*j*) *Maung Mu* v *Maung Kan* (1923) 1 Rang 618 7 I C 393 (4) A R 127

(*k*) *Radhe Lal* v *Mulchand* (19 4) 46 All 8 0 80 I C 933 (24) A A 905 dissenting from *G lk di* v *Mann lal* (1901) 23 All 19

(*l*) *Juggobundo* v *Watson & C* Bourke s Rep P rt VII p 16

(*m*) *Gopala hi d a* v *Pu na Chand a* (1898) 4 Cal W N 110

1 permission to the plaintiff to withdraw from the *suit* with liberty to bring a fresh suit (*n*) But where a reference to arbitration has been made *without the intervention of the Court* (that is not by an order of the Court) and one of the parties to the reference applies to the Court under Schedule II para 20 to file the award the provisions of this rule apply and it is open to the applicant to withdraw the *application* though numbered and registered as a *suit* under that para 20 under sub r (1) of this rule (*o*)

Power of appellate Court to give leave to plaintiff to withdraw from suit—It has been held by the High Courts of Allahabad (*p*) Madras (*q*) and Bombay (*r*) that where a plaintiff s suit is dismissed and he appeals from the decree the *appellate* Court has power to allow the plaintiff appellant to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject matter see s 107 (2) The contrary view seems to be implied in a Calcutta decision (*s*) But an appellate Court has no power to grant such leave *before* the appeal is admitted (*t*)

Erroneous order granting leave to withdraw and jurisdiction—An order for withdrawal of a suit with leave to institute a fresh suit made in circumstances not within the scope of this rule that is made in a case where there is no formal defect or other sufficient ground within the meaning of this rule cannot be treated as an order made without jurisdiction [though it may be challenged in revision on the ground of material irregularity—see notes below Revision] such order is consequently not null and void (*u*) The order not being a nullity a fresh suit instituted upon leave so granted is maintainable it is not barred as *res judicata* Further the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had power to make the order and had properly made it (*v*)

Appeal—An order under this rule granting leave to a plaintiff to withdraw from a suit or to abandon a part of his claim with liberty to institute a fresh suit is not appealable Such an order is not one of the appealable orders mentioned in O 43 r 1 nor is it a decree within the meaning of s 2 (2) (*w*)

Letters Patent appeal—An order of a single Judge of a High Court granting leave to withdraw from a suit with liberty to bring a fresh suit is a judgment within the meaning of cl 15 of the Letters Patent and appealable as such (*x*) Similarly an order of a single Judge of a High Court dismissing an application for the revision of an order giving leave to withdraw a suit with liberty to bring a fresh suit is a judgment within the meaning of that clause and is appealable as such (*y*)

Revision—Though an order granting leave to a plaintiff to withdraw from a suit with liberty to bring a fresh suit is not appealable it is open to revision if it falls within s 115 of the Code An order is open to revision under that section if the Court which

(*n*) *Sheo rite* v *De d t* (188) 9 All 168 *Debi Churn* v *B p a* (190) 7 Cal W N 186
(*o*) *Gauri Sh nkar* v *Maida Koer* (1904) 31 Cal 516
(*p*) *Afzal* v *Akbari* (1915) 37 All 3 6 28 I C 857 *Ganga Ram* v *Akb ri* (1885) 8 All 8
(*q*) *Kamayya* v *Pap yya* (1917) 40 Mad 259 37 I C 414 [F P]
(*r*) *Chhanubh i* v *Dahyabh i* (19 0) 44 Bom 598 7 I C 530 *Shekh Has n* v *Maho m d* (19 1) 45 Bom 06 59 I C 10 (1) A B 2 8
(*s*) *Kali P asanna* v *Panchanan* (1916) 44 Cal 367 33 I C 6 0
(*t*) *Eknath* v *Ranoji* (1911) 35 Bom 261 10 I C 813
(*u*) *Hriday Nath* v *Ram Chand a* (19 1) 48 Cal 138 58 I C 806 (1) A C 34 (F B) ov rruling *Kali P asa na* v *Pun hanan* (1917) 44 Cal 367 33 I C 670 *Rajkum r* v *Ram Khelawan* (19) 1 Pat 90 64 I C 33 (2) A P 44 (F B) *Jhunku L l* v *Bishe har Das* (1918) 40 All 61 46 I C 71 *Sheikh Hass n* v *Mahomed* (19 1) 45 Bom 06 215 16 64 59 I C 210 (21) A B 2 8
(*v*) (19 1) 48 Cal 138 58 I C 806 *supra* (19) 1 Pat 90 64 I C 337 (2) A P 44 *s pra* *Perum l* v *Karupan* (1911) 21 Mad L J 574 8 I C 268 *Chhajjua* v *Khy li Ram* (191) 9 All L J 3 8 14 I C 1 5
(*w*) *Genda Mal* v *Pirbhu Lal* (1895) 17 All 97 *Jog d ndro* v *Sarup Sunduri* (1894) 18 Cal 32 *Abd il Hussein* v *Kasi Sahu* (1900) Cal 36
(*x*) *Na andas* v *Shantilal* (19 1) 45 Bom 377 58 I C 1004 (21) A B 267
(*y*) *A ja* v *Gopanna* (1914) 27 Mad L J 480 26 I C 57 *R ma Aiyar* v *Venkatachella* (1907) 30 Mad 311

made it had *no jurisdiction* to make it as in the undermentioned case ( ) or if the Court acted *illegally or with material irregularity* in making the order

An order granting leave to a plaintiff to withdraw from a suit with liberty to bring a fresh suit in circumstances not within the scope of the present rule that is in a case in which there is no formal defect or other sufficient ground for making it as where the order is made on the ground of the plaintiff s inability to prove his case cannot be treated as an order made without jurisdiction [see notes Erroneous order granting leave to withdraw and juri diction] The High Court therefore has no power to interfere with such an order on the ground that it was made without juri diction (*a*) But it has been held in a series of ca es that the High Court will interfere with such an order on the ground of material irregularity and will set it aside in revision (*b*) Similarly the High Court will interfere and set aside in revision on the ground of material irregularity an order granting leave to a plaintiff to withdraw from a suit with liberty to bring a fresh uit if the order was made *ex parte* (*c*) or if leave was granted without assigning any rea ons (*d*) or if leave was granted on the ground that there was a formal defect or other sufficient ground but no inquiry was made as to whether there was in fact a formal defect or other sufficient ground (*e*) In a Patna case, the High Court held that where the defendant himself alleges a formal defect the Court has jurisdiction to pass any order it plea es under this rule (*f*) But this seems to be an extreme view In a Madras case where the plaintiff deliberately undervalued his suit and paid insufficient court fees and brought the suit in a District Munsif s Court and then applied for leave to withdraw from the suit with liberty to bring a fresh suit and leave was granted, the Court was held to have acted with material irregularity and the order was set aside in revision (*g*) In a Calcutta case the first Court dismissed the plaintiff s suit on a finding that the plaintiff s allegations were untrue On appeal the District Judge came to the same conclusion but granted leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit The High Court held that the order was not properly made and set it aside (*h*)

In Allahabad it has been held that the High Court will interfere in revision if the lower Court has not applied its mind to the circumstances of the case and the provisions of this rule in other words if it has not exercised a judicial discretion (*i*) But if the lower Court has exercised a judicial discretion, the High Court will not interfere in revision merely because the High Court itself might have taken a different view of the matter (*j*)

Effect of reversal of order granting leave to withdraw —Where a fresh suit is filed before the reversal in revision of an order granting leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit the procedure is to declare the fresh

(*z*) *Chowdhury Ram* v *Mahe h* (19) 1 Pat 3 6 I C 12 ( ) A P 5 5

(*a*) *Jhunku L l* v *Bisheshar Das* (1918) 40 All 612 46 I C 71

(*b*) *Jharda Co Ltd* v *Durga Cha an* (1910) 11 C L J 45 5 I C 187 *Mab lla* v *Rani Hemang* (1910) 11 Cal L J 51 6 I C 6 9 *Hira Lal* v *Udoj Chand a* (191) 16 C W N 10 7 14 I C 33 *Hriday Nath* v *Akshay L l* (1917) 5 Cal L.J 454 39 I C 963 *U h t* v *Basau n* (19 1) 6 Pat L J 11 61 I C 639 (21) A P 4? *Bai K shibai* v *Shidapa* (1913) 37 Bom 68 1 I C 3 *Ish r Das* v *Lal Singh* (19 5) Lah L.J 290 90 I C 63 (25) A L 497 *Atja* v *Gopi na* (1914) 7 M d L J 480 26 I C 7

(*c*) *Rajend a* v *At l* (1917) 44 C 1 4 4 39 I C 969

(*d*) *Mul mm d* v *I i j* (1888) 11 M d 3 3 *R hm t Ullah* v *Dla m S ngh* (1922) 20 All L J 90 64 I C 948 (22) A A 185 *Subas ni* v *Ashuto h* (1924) 39 Cal L J 3 1 84 I C 372 (24) A C 751 *Ba jn th* v *Baban* (19 7) 49 All 459 103 I C 3 (27) A A 53 *Kamta Singh* v *Bh gwan Das* (19 8) 50 All 199 106 I C 431 (28) A A 98

(*e*) *Nathuni Ram* v *Mosamriat Sheo Coer* (1918) 3 Pat L J 460 46 I C 179 *Mahendra R m* v *S gi Lal* (1918) 3 Pat L.J 651 48 I C 19

(*f*) *Bisl esha* v *Brijra* (1918) 3 Pat L J 630 44 I C 406

(*g*) *Kan usw mi* v *Jagathambal* (1918) 41 Mad 701 46 I C 265

(*h*) *Padn a* v *Girish Chand a* (1919) 46 Cal 168 45 I C 241 [in s cond appeal]

(*i*) *Radha* v *Tula* (1912) 10 All L J 393 17 I C 647 *Gang* v *Mussam t I sh ni* (19 5) 47 All 319 8 I C 175 (2) A A 466

(*j*) *Jh ku Lal* v *Bisl sh a D s* (1918) 40 All 612 46 I C 71 *Ratan Lal* v *Muh mad* (1921) 19 All L J 47 60 I C 893 (1) A A 6 (the facts of the case are not reported)

suit null and void and to direct the lower Court to proceed with the original suit from the stage which it had reached when the order granting leave was made by that Court (k)

Sub rule (4) Co plaintiffs

Co plaintiffs—By sub r (4) it is enacted that nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent *of the others* This sub rule limits the jurisdiction of the Court to grant permission to withdraw a suit to cases where all the plaintiffs join in the application Where the Court in contravention of this sub rule allows two out of four plaintiffs without the consent of the other two to withdraw from a suit with liberty to bring a fresh suit it acts without jurisdiction and a second suit in respect of the same subject matter is barred But if the suit that was withdrawn was a suit for partition the second suit it has been held will not be barred for a cause of action in a suit for partition is a recurring one and a joint owner has a right to come to Court at any time provided he proves that he has a subsisting joint title and possession in the property within the period of limitation (l)

Rule does not apply

Bengal Rent Act—The provisions of this rule do not apply to suits instituted under the Bengal Rent Act 10 of 1859 which is a complete Code in itself (m)

Probate proceedings—This rule does not apply to probate proceedings the provision in s 55 of the Probate and Administration Act 5 of 1881 [now Indian Succession Act 39 of 1925 s 268] being qualified by the words so far as the circumstances of the case will admit (n)

Execution proceeding—See r 4 below

2 [S 374] In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted

Limitation law not affected by first suit

Limitation—*The fresh suit must be instituted within the period of limitation* It will not lie after the period of limitation even though the suit that was permitted to be withdrawn was within the period of limitation (o) But if the first suit was brought in a Court that had *no jurisdiction* to entertain it that Court would have no power under rule 1 above to give leave to withdraw with liberty to bring a fresh suit If it does give leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit the order is one made without jurisdiction Hence if a second suit is instituted though upon leave so granted the case will be governed not by the provisions of this rule but by those of sec 14 of the Limitation Act 1908 and the time during which the first suit was prosecuted will be excluded in computing the period of limitation for the second suit (p)

3 [S 375] Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement

Compromise of suit

(k) *Nathuni Ram v Sheo Koer* (1918) 3 Pat L J 460 46 I C 1 9

(l) *Mussammat Ram Dei v Mussammat Batu* R (19) 1 Pat 2 8 ( ) A P 489

(m) *C l m Mahomed Sl bendra* (1903) 3 Cal 990

(n) *Banwari Lal v Kishen* (19 0) Lah L J 4 6 I C 100

(o) *Varajl l v Shom shw r* (1905) 29 Bom 219

(p) *Ra deo v Goneshna ain* (1908) 35 Cal 9 4

or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit O 2

Alterations in the rule —This rule differs from the corresponding s 375 of the Code of 1882 in three respects namely —

1 The words where it is proved to the satisfaction of the Court that have been added into the rule to set at rest the conflict of opinion noted below in the commentary under the head Where a compromise set up by one party is denied by the other

2 The words the Court *shall order* such agreement to be recorded have been substituted for the words such agreement shall be recorded The object is to bring out the word order prominently as an appeal is now given from an *order* made under this rule recording or refusing to record an agreement See O 43 r 1 cl (m) and notes below Appeal

3 The words and such decree shall be final so far as it relates to so much of the subject matter of the suit as is dealt with by the agreement compromise or satisfaction which occurred in the old section after the words so far as it relates to the suit have been omitted See notes to s 96 Sub s (3) consent decree not appealable

Scope of the rule —The agreement compromise or satisfaction contemplated by this rule may (1) relate to the whole suit or (2) it may relate only to a *part* thereof or (3) it may also comprise *matters that do not relate to the suit* When the agreement relates to the whole suit the Court must on being invited by the parties record the agreement and pass a decree in accordance with the agreement and the suit stops there Where the agreement relates to a *part only* of the suit the Court must on the application of the parties pass a decree in accordance with the agreement and the suit may be proceeded with as to the rest Where the agreement besides relating to the suit or a part thereof comprises matters that do not relate to the suit the decree must comprise only such terms of the agreement as relate to the suit but not the rest As to the case where a decree comprises matters not relating to the suit see below notes Where the decree comprises matters that do not relate to the suit

Procedure to be followed under this rule —It is important to note that a consent decree under this rule can be passed only after an *order* is made directing the compromise to be recorded This is not a mere matter of form as the aggrieved party has a right of appeal against such order under O 43 r 1 cl (m) (q) See notes below Appeal

Where a compromise set up by one party is denied by the other —If a party to a suit alleges that the suit has been adjusted by a lawful agreement and applies to the Court to record the agreement and to pass a decree in accordance therewith but the opposite party to the suit denies the agreement or wishes to recede from it the question arises whether the Court has power in the one case to decide if the agreement was effected and to pass a decree accordingly and in the other case to pass a decree in spite of the opposite parties reluctance Under the old section both branches of this question were answered in the affirmative by the High Courts of Bombay Madras and

(q) *P ban Sardar* v *Bhup ri a Nath* (1916) 43 Cal 8 33 I C 69 *Sabitri* v *Sati* (1917) 6 Pat 108 10 I C 71 (2) A P 354

Calcutta (*r*), but in the negative by the High Court of Allahabad (*s*). According to the Allahabad decisions the Court had no power under the old section to record an agreement and to pass a decree in accordance therewith unless both the parties consented *before the Court* to have the agreement recorded. Thus even where there was an agreement to adjust the suit the Court could act under that section only if both the parties were in agreement *at the moment of moving the Court* and if they were not then in accord the agreement could only be enforced by a fresh suit for specific performance. The conflict arose from the words "if a suit be adjusted wholly or in part by any lawful agreement or compromise" with which s 375 commenced. The present rule gives effect to the Bombay, Madras and Calcutta decisions. The words "*where it is proved to the satisfaction of the Court that* a suit has been adjusted wholly or in part" clearly show that the Court has power under this rule where an agreement or compromise is denied to decide whether as a fact the alleged agreement or compromise was made and if it is satisfied that it was made to record it (*t*).

Submission and award.—It was held in two Bombay cases under the Code of 1882 that when the matters in difference *in a pending suit* are referred to arbitration *without the intervention of the Court* and an award is made the submission and the award might be treated as an adjustment of the suit by an agreement within the meaning of s 375 of that Code and might be recorded as an adjustment under that section (*u*). In the later of the two cases (*v*) Starling J said that it was open to the plaintiff to proceed under s 525 [now sch II para 20] but that it was not obligatory upon him to do so as there was no express provision in the Code of 1882 that no other course than that prescribed by s 525 should be followed.

The present Code however does contain such a provision for it is enacted by s 89 that "save in so far as is otherwise provided by the Arbitration Act 1899 or by any other law for the time being in force *all* references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder shall be governed by the provisions contained in the second Schedule". In a Bombay case decided under this Code it was held by Davar J that where *in a pending suit* the parties go to arbitration without the intervention of the Court and an award is made the provisions of para 20 of Schedule II do not apply to the award, but that the submission and the award may be recorded as an adjustment under this rule. As to s 89 it was said that the words "any other law for the time being in force" were wide enough to include the provisions of O 23 r 3 (*w*). Four years later Sir Norman Macleod another judge of the same High Court held in *Shavakshaw* v *Tyab Haji Ayub* (*x*) that the words "any other law for the time being in force" in s 89 do not include the present rule and that having regard to the provisions of that section a submission and an award could not be recorded as an adjustment under this rule and that the correct procedure was to apply to the Court to file the award under paragraphs 20 and 21 of Sch. II. The above decisions were reviewed by Sir Norman Macleod in *Manilal* v *Goculdas* (*y*). The learned Judge came to the conclusion that his decision in *Shavakshaw's case* was erroneous and said "They [that is the parties] may make the agreement an order of Court and then paras 1 to 16 of Schedule II apply. If they do not make the agreement an order of Court they cannot ask for the agreement to be filed under para 17; they cannot ask for the award if made to be filed under paras 20

(*r*) *Gokuldas Madhavji Spinning Co* v *Scott* (189) 16 Bom 20; *Sambhai* v *Premji* (1896) 20 Bom 304; *Appasami* v *Varadi* (1896) 19 Mad 419; *Sridharan* v *Purmathan* (1900) 23 Mad 101; *Brojdurlabh* v *Ramanath* (189) 24 Cal 908
(*s*) *Baldhu* v *Shah Muhammad* (189) 14 All 350
(*t*) *Sital* v *Lal Bahadur* (1916) 38 All 80 81, 31 I C 962
(*u*) *Sambhai* v *Premji* (1896) 20 Bom 304; *Pragdas* v *Girdhardas* (190) 26 Bom 6. The correctness of these decisions were doubted in *Rakhanbai* v *Adamji* (1900) 33 Bom 69, 1 I C 6
(*v*) (190) 26 Bom 6 80 *supra*
(*w*) *Hirbai* v *Jamnabai* (1913) 37 Bom 639, 19 I C 86
(*x*) (1916) 40 Bom 386, 37 I C 140
(*y*) (1921) 4 Bom 245, 59 I C 53, (21) A B 310 overruling (1916) 40 Bom 386, 37 I C 140 *supra*

and 21 If an award is made and both parties accept the award they can apply for a consent decree in terms thereof and there is no need to apply for an order recording the terms of the adjustment If the *plaintiff* disputes the award for any reason and proceeds with the suit the defendant may plead the award and have the case set down for hearing on the issue whether the award is binding as an adjustment If the defendant disputes the award, the plaintiff may have the case set down for trial on the issue whether the adjustment could be recorded. Either party may file a suit to enforce the award and apply for a stay of the original suit The ground of the ruling in *Manilal s case* is that a submission and an award properly made in accordance with the submission amounts to an adjustment within the meaning of this rule and as such it may be enforced *under the general law of contract* The result according to that ruling is that where parties to a suit refer their disputes to arbitration without the intervention of the Court and an award is made an application to pass a decree in terms of the award is an application to record a compromise within the meaning of this rule Further if an objection is taken to the award on the ground of misconduct on the part of the arbitrator the Court acting under this rule has jurisdiction under this rule to enquire into the charge of misconduct If the Court does make the inquiry and refuses to record the submission and award the order is not open to revision under s 115 above ( ) The High Court of Calcutta has dissented from the decision in *Manilal s case* and held that the words any other law for the time being in force in s 89 do not include the present rule further that where in a pending suit the parties go to arbitration without an order of the Court the award cannot be enforced under this rule or Schedule II or under the Arbitration Act also that if a submission to arbitration of matters in difference *in a pending suit* is to take place there is no provision for it other than the provisions in Schedule II (*a*) The result according to the Calcutta decisions is that if an award is made under a reference without an order of the Court in a pending suit the Court should not take any notice of the award, and the suit may be proceeded with on the application of either party (*b*) The High Court of Lahore has held that an award made without the intervention of the Court in a pending suit cannot be recorded as an adjustment under this rule unless all parties agree thereto (*c*) A Full Bench of the High Court of Allahabad has dissented from the Calcutta rulings and held that a submission and an award may be recorded as an adjustment under this rule (*d*) And so has a Full Bench of the Madras High Court (*e*) The Bombay High Court has recently reconsidered the matter in a Full Bench without altering its opinion (*f*) but it is submitted with respect that the view taken by the Calcutta High Court is correct In a recent Bombay case (*g*) Rangnekar J expressed his preference for the view taken by the Calcutta High Court If a party does not object to the submission and award being recorded as an adjustment under this rule he is estopped from objecting that the Court had no power to do so under this rule (*h*)

O 2

A *mere agreement to refer* to arbitration matters in difference in a pending suit where the parties have not gone beyond the agreement to refer and no award has been made cannot be treated as an adjustment of the suit within the meaning of this rule (*i*)

(*z*) *Thakersidas* v *Lallubha* (19 3) 5 Bom L R 45 75 I C 10 (23) A B 401

(*a*) *Amarchand* v *Banwari Lall* (19 2) 49 Cal 608 69 I C 808 (22) A C 404

(*b*) *Dikom Tea Co Ltd* v *The India General Steam Navigation Co Ltd* (19 0) 5 C W N 1 7 61 I C 913 *Gurmoni* v *Tarini* (19 7) 55 Cal 5 8 104 I C 360 (7) A C 897

(*c*) *Hari Parshad* v *Soogni* (19 1) 3 Lah L J 162, 67 I C 123, (21) A L 2

(*d*) *Gajendra Singh* v *Durga* (1925) 47 All 637 88 I C 768 (25) A A 503 But see *Baij Nath* v *Narain* (19 7) 50 All 61 10 I C 608 (27) A A 614

(*e*) *Subbaraju* v *Venkatarama raju* (1928) 51 Mad 800 113 I C 63 (8) A M 10 5 *Ayyannamma* v *Ramaswami* (19) 53 Mad L J 444 104 I C 674 (27) A M 11 6

(*f*) *Chenbasappa* v *Baslingappa* (1927) 51 Bom 908 10 I C 05 (7) A B 565 F B

(*g*) *Dinkarrai* v *Yeshwantrai* (19 9) 31 Bom L R 1403 1414

(*h*) *Kondi* v *Chunilal* (19 9) 53 Bom 75 113 I C 229 (9) A B 1

(*i*) *Tincowry* v *Fakir Chand* (1903) 30 Cal 218 *Venkatachala* v *Rangiah* (1913) 36 Mad 353 1 I C 37 *Vyankatesh* v *Ramchandra* (1914) 38 Bom 687 27 I C 46 See also *Khimchand* v *Lhogilal* (192) 48 Bom 854 67 I C 913 (2) A B 486

3 Further a decree obtained upon an award on a reference to the presiding judge and another individual must be regarded as a consent decree and it is not subject to the provisions of Sch. II (j)

Agreement adjusting a suit—Where in the course of a suit the pleaders for both parties agreed that if a certain fact appeared upon a certain document the Court should decree the suit otherwise the suit should be dismissed it was held that the agreement was not one *adjusting* the suit within the meaning of this rule for it was not complete and left something to be done by the Court *viz* to ascertain whether a certain fact appeared upon a certain document (*k*) But an agreement that the parties will consent to a decree being passed in terms to be stated by a person named is an adjustment of the claim (*l*) Where a defendant made an offer to the plaintiff that if a certain witness in the ca e would eat *kachcha* food served by the plaintiff the suit should be decreed and the plaintiff accepted the offer and the witne s ate the food served by the plaintiff it was held that the offer and its acceptance amounted to a contract and that the suit should be decreed It was also held that the present rule did not apply to such a case (*m*)

Agreement to take oath under the Oaths Act—It was agreed in the course of the hearing of a suit between the plaintiff and the defendant that the plaintiff should take a certain oath on a certain date and that if he did so there should be a decree for him but that if he failed to do so his suit should be dismis ed but it was held the agreement does not amount to an adjustment of the suit so as to entitle the defendant to have the suit dismissed on plaintiff's failure to take the oath The Court should not dismiss the suit but should record the refusal and the reasons thereof under s 12 of the Oaths Act 10 of 1873 and proceed with the trial (*n*)

Lawful agreement or compromise.—Where both parties to a suit apply to the Court under this rule to pass a decree in accordance with the compromise arrived at between them the Court has no power to refuse to pass the decree on the ground that it considers the compromi e is too favourable to one of the parties (*o*) An agreement may be lawful although it is voidable for fraud or undue influence (*p*) The rule does not refer to such agreements but if the agreement or compromise is unlawful as where it is opposed to public policy the Court should refuse to pass a decree in accordance with the compromise even if the parties consent (*q*) If a decree is passed under this rule on a compromise which is not lawful the Court should not enforce the decree in execution proceedings Thus a ale of an office attached to a temple is against public policy Hence if in a suit against the holder of such an office a compromise is arrived at whereby the holder of the office consents to the office being sold in satisfaction of the debt due to the plaintiff and a decree is passed on the compromise the Court should notwithstanding the consent decree refuse to sell the office in execution (*r*) It is clear that if the matter had rested in contra t only the Court could not have enforced the sale in a suit brought for that purpose The mere fact that the contract is embodied in a decree does not alter the incidents of the contract By private agreement converted into a decree parties cannot empower themselves to do that which they could not have done by private agreement alone (*s*) Therefore a decree passed on a compromise with a minor (*t*) or with a guardian *ad litem* of a minor after the minor has attained majority (*u*)

(*j*) *Chi a v Ie I ta ami* (1919) 4 Mad 625 6 9 51 I C 8 7
(*k*) *Muhammad v Cheda Lal* (1892) 14 All 141
(*l*) *Himanchal v Jatuar* (1924) 46 All 710 80 I C 16 (24) A A 5 0
(*m*) *Ram S dar v Ja karan* (19) 4 All 456 87 I C 174 (25) A A 71
(*n*) *Etakkott v Etakot* (1909) 31 M d 1 See al o *P rbhu v J n l* (19) 44 All 117 64 I C 646 (2) A A 160 [minor]
(*o*) *Motiram v Yesu* (1898) 2 Bom 238
(*p*) *Qad v Fa al* (19 8) 50 All 48 110 I C 573 (29) A A 494
(*q*) *Sund r mb l v Yogav agurullal* (1915) 38 Mad 850 3 I C 72
(*r*) *Lakshma asw mi v Ra gamma* (1903) 6 Mad 31
(*s*) *Gre t W Ce t al Ry Co v Ch leb* (1899) A C 114
(*t*) *G g d v R meshwar* (19) 6 Pat 388 10 I C 449 (27) A P 1
(*u*) *Sa y si v Yerrannaidu* (19 8) 51 Mad 763 (28) A M 294

is a nullity The principle is that where a decree is based on an agreement of O 23
compromise the Court must be taken to adopt the agreement *with all its incidents* (v) The contract of the parties is not the less a contract and subject to the incidents of a contract because there is superadded the command of a judge (w) On this principle in a case where A sued B on a mortgage and C who was a second mortgagee was joined as a party defendant and A and B entered into a compromise whereby A agreed to pay B more than he was entitled to the Court refused to pass a decree in terms of the agreement on the ground that the compromise was detrimental to the interests of C and that it was not therefore lawful within the meaning of this rule (x) See notes to s 11 above Consent decree and estoppel The following are further illustrations —

(a) B holds certain lands under a lease from A The rent falls into arrears and A sues B for arrears of rent and for possession It is subsequently agreed between the parties that B should continue to hold the lands as A s tenant but upon fresh terms arranged between the parties which include a forfeiture clause that if default should be made in payment of rent on the due dates the lease should be forfeited A decree is passed in terms of the agreement under this rule B commits default in payment of rent A thereupon applies for possession of the land *in execution of the decree* B offers to pay the arrears and applies that he may be relieved against forfeiture It is clear that if the matter had rested in contract only the Court could have granted the relief The mere fact therefore that the agreement has been recorded and a decree passed in accordance therewith does not preclude the Court from granting relief against forfeiture (y)

(b) The facts are the same as in the above illustration except that instead of proceeding in *execution* A institutes a fresh suit against B for possession on default of payment of rent The same principle applies (z) It would seem that the proper procedure in cases where the forfeiture clause is in the form stated in ill (a) is to enforce the forfeiture not by an application to execute the consent decree but by a regular suit (a) The clause does no more than *declare* the right of forfeiture and to that extent the decree is declaratory and it is an elementary principle that a declaratory decree can only be enforced by a suit

Dekkhan Agriculturists Relief Act —A Full Bench of the Bombay High Court has held that a compromise in a suit between parties one of whom is an agriculturist within the meaning of the Dekkhan Agriculturists Relief Act (XVII of 1879) is not rendered illegal by want of compliance with the provisions of sec 15B of that Act (b) and that the compromise may be recorded under this rule But the same High Court has also held that the present rule does not exclude the operation of the special provisions of s 12 of that Act and the Court can under that section go behind the transaction although the whole of the claim is admitted by the agriculturist defendant (c)

Compromise of probate proceedings —Unless a will is proved in some form no grant of probate can be made merely on the consent of parties Hence an agreement or compromise as regards the genuineness and due execution of a will if its effect is to exclude evidence in proof of the will is not lawful within the meaning of this rule and no probate can be granted merely because the caveator consents to the grant Such an agreement is against public policy for its object is to exclude inquiry into the

(v) *Nagappa* v *Venkat Rao* (1901) 24 Mad 265 270

(w) *Wentworth* v *Bullen* (1829) 9 B & C 840 *Lee* v *Gilmore* (1866) L R 1 C 50 See also *Conolan* v *Leyland* (1884) 27 C D 63 638

(x) *Mal h l* v *Os n* (19 3) 38 Cal L J 80 I C 307 (4) A C 1 9

(y) *Nagappa* v *Venkata Rao* (1901) 24 Mad 265 See Transfer of Property Act 188 s 114

(z) *K sh aba* v *Ha Cor d* (1907) 31 Bom 15 overruling *Shirekul* v *Mahablya* (1886) 10 Bom 43

(a) 31 Bom 15 supra

(b) *Shir y g ppa* v *Gov lappa* (1913) 37 Bom 614 0 I C 969

(c) *Got ra i* v *Ba l i* (19) 46 Bom 560 67 I C 953 ( ) A B 331

genuineness of the will which it is the duty of the Probate Court to make (*d*) It is therefore open to the caveator before probate is granted to withdraw from the compromise and to require that the will be proved (*e*) For the same reason if an executor as the result of a compromise withdraws his petition for probate he is not precluded by the provisions of r 1 above from presenting another petition for probate though the first petition was withdrawn without the permission of the Court (*f*)

Form of decree where compromise includes matters which do not relate to the suit—In *Hemant Kumari* v *Midnapore Zamindari Co* (*g*) where a decree comprised lands outside the suit their Lordships of the Privy Council observed as follows —

> A perfectly proper and effectual method of carrying out the terms of this [rule] would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit or it could introduce the agreement in a schedule to the de ree but in either case although the *operative* part of the decree would be properly confined to the actual subject matter of the then existing litigation the decree taken as a whole would include the agreement This in fact is what the decree did in the present case It may be that as a decree it was incapable of being executed outside the lands of the suit but that does not prevent it being received in evidence of its contents

It is clear from this passage that where a suit is adjusted by a lawful agreement between the parties the proper course is to recite the agreement in the decree or to annex it as a schedule to the decree but in either case the *operative* part of the decree should be confined to the actual subject matter of the suit It would be wrong to refuse to incorporate in the decree matters which form part of the compromise because they are extraneous to the suit such matters should be excluded only from the *operative* part of the decree

Where in a testamentary suit consent terms are proposed some of which fall within the testamentary jurisdiction and others do not the decree may properly embody all the terms in a schedule for reference but its *operative* part should be confined to such terms as are within its jurisdiction and the Testamentary Court should leave the parties to take separate proceedings in the ordinary original civil jurisdiction to enforce the remaining terms if neces ary (*h*)

Matters which relate to the suit—As already stated that when a compromise comprises matters *extraneous to the suit* the *operative* part of the decree should be confined to matters *that relate to the suit* But what are matters that relate to the suit? In *Gobinda* v *Dwarka Nath* (*i*) Mitra J said The question whether any particular term relates to the suit must be decided from the frame of the suit the relief claimed and the relief allowed by the decree on adjustment by lawful agreement The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit No hard and fast rule can be laid down each case being governed by its own facts In a later Calcutta case (*j*) Pankin J said In some of the decisions section 375 [now O 23 r 3] has been applied by making a distinction betw en property in

(*d*) *Ghellabha* v *Nandub* (1897) 21 Bom 33 *M nmohin* v *Ranga* (1904) 31 Cal 357

(*e*) *Ja akbat* v *Gaj n nd* (1916) 1 P t L J 3/7 37 I C 1

(*f*) *Jug shw r* v *J g tdTari* (191) 2 P t L J 535 40 I C 345

(*g*) (1919) 46 I A 240 246 47 C l 485 49 53 I C 534 *Giban* v *P mesh* (19 3) 38 C l L J 2 65 I C 47 *U P Nyun* v *M Pan Me* (19 8) 5 Ra g 66 107 I C 163 (28) A R 43

(*h*) *Bai Mo gl ib* v *Ba R mbhai xmi* (19 0) Bom L R 1286 59 I C 344

(*i*) (1908) 35 C l 837 841

(*j*) *Sh shi Bh san* v *Ha Nara n* (19 1) 48 Cal 10 9 10 4 1075 66 I C 0 (1) A C 20

suit and property extraneous to the litigation Where a suit is *merely for the recovery of specific properties* that distinction will be adequate and will be equal to the distinction between matters which relate to the suit and matters which do not In some cases however suits are not for the recovery of property *but to establish particular rights* and I certainly prefer the opinion expressed in the case reported in 35 Cal 837 to the effect that the facts have to be looked at as a whole in order to decide whether matters have been introduced into the suit that do not relate to the suit As to the latter class of case it may be stated that as a general rule all terms which form the *consideration* for the adjustment of the matters in dispute whether they form the subject matter of the suit or not become related to the suit and can be embodied in the decree Thus where A sued B on a promissory note and a compromise was arrived at between the parties whereby B agreed to pay the amount of the note by instalments and the amount was also made a charge on certain immovable property of B it was held that there was nothing in the present rule to preclude the Court from making the amount a charge on B s property even though the relief claimed was for a *money decree* only The *charge* though not claimed as a relief *related to* the suit (k) It formed the *consideration* for the time allowed for payment of the sum decreed by instalments and thus constituted an integral and necessary part of the adjustment of the claim in the suit (l) It has similarly been held that where A and B are joint tenants of certain land and A having paid up the entire rent sues B for contribution and a compromise is arrived at whereby B in consideration of A abandoning his claim gives up his share of the land to A the term as to B giving up his share is a term which relates to the suit (m) Where in execution of a decree obtained by A against B A attaches certain property and C claiming the property as his own brings a suit against A for a declaration of his title to the property and a compromise is arrived at between the parties whereby A admits C s ownership of the property and C agrees to execute a mortgage of the same property in favour of A for the amount of the decree obtained by A against B the term as to the execution of the mortgage is a term which relates to the suit (n) But where A sued B to restrain B from building a projected house in such a way as to interfere with A s enjoyment of light and air and a compromise was arrived at between the parties whereby B undertook not to build his house higher than it originally was and also agreed not to let water into the passage between the houses it was held that the arrangement as to the passage did not relate to the suit and that the operative part of the decree should be confined to the undertaking as to the house (o) But the parties can get over the difficulty by amending the pleadings with the leave of the Court so as to comprise in the pleadings and the decree matters that did not relate to the original suit but are comprised in the compromise (p) In a Patna case where the plaintiff claimed Rs 7 000 with interest at the rate of 9¾ per cent per annum and a consent decree was passed whereby the defendant agreed to pay Rs 2 500 with interest at the rate of 9 per cent per annum if the amount was paid on a specified date but at 24 per cent per annum if it was not paid on or before that date the Court refused execution of the decree with interest at 24 per cent on the ground that that part of the compromise which provided for the payment of interest at the rate of 24 per cent per annum was outside the scope of the suit and allowed execution with interest at

(k) *Joti v Izari* (190) 30 M d 4 8 *R ma sw mi v S bbar ja* (19 5) 49 M d L J 490 494 88 I C 648 (5) A M 1101 *Natesa Ch tt v I gu* (1910) 33 M d 10 3 I C 01 *Bh ra g i v Ma a d g la* (1907) 17 Mad L J 00 *S ba pathy v Ia mah li ja* (191) 38 M d 9 9 23 I C 581 *Ayy g v Koorur* (1914) 27 Mad L J 173 2 I C 58 *Ratnaswami v R t ammal* (1914) 27 M d L J 388 24 I C 135 *Cl a u v Sambhu* (1918) 3 Pat L J 25 268 46 I C 358

(l) *Gobinda Chand a v Dwarka Nath* (1908) 35 Cal 837 *Purna v Nil Madhub* (1901) C W N 485

(m) *Jach v Ch ssa* (1919) 24 C W N 3 8 4 I C 538

(n) *Sa dam n v Bel ry Lal* (19 0) C W N 68 61 I C 535 *Bha t v S n th* (19 1) 5 C W N 806 66 I C 273 (2) A C 3 8

(o) *Ruttonsey v Poo bai* (1883) 7 Bom 304

(p) *Mohibullah v Imami* (1887) 9 All 2 9

3 9 per cent only (*q*) This decision cannot be supported either on principle or on authority so far as the ground on which it is based is concerned See notes below Execution of decree based on a compromise

Parties—If persons other than parties to the suit are parties to the compromise it cannot be recorded unless those persons are brought on the record as parties to the suit This is because the Court has to be satisfied before recording a compromise under this rule that there is a lawful compromise and this is not possible in the absence of those that are not parties to the suit (*r*) In a case where the first defendant transferred his interest in the subject matter of the suit to the second defendant who effected a compromise with the plaintiff the Privy Council held that the fact that the first defendant remained on the record did not give him sufficient interest to entitle him to raise any objection to the compromise or to appeal from the decree (*s*)

Compromise pending arbitration—The Calcutta High Court has held that where the matters in dispute in a suit are referred to arbitration *under an order of reference made by the Court* and pending the reference the parties adjust the suit by an agreement in writing signed by them and the arbitrators the agreement does not amount to an award Nor can it be recorded as an adjustment under this rule unless the arbitration has been superseded by an order of the Court the mere fact that the time for making the award has expired does not amount to a supersession of the arbitration there must be an order of supersession under para 8 of Schedule II (*t*) In a Madras case where the lower Court had under somewhat similar circumstances recorded the adjustment under the present rule it was held that as the time for making the award had expired when the adjustment was recorded the Court must be deemed to have exercised its power to supersede the arbitration under para 8 of Schedule II (*u*)

Execution of decree based on a compromise—This rule requires that where the Court is invited to pass a decree in terms of an agreement or compromise the agreement or compromise should be *lawful* and further that the *operative* part of the decree should be confined to the *actual subject matter of the suit* But what if a decree is passed on an agreement that is not lawful or that the *operative* part of the decree comprises matters that do not relate to the suit Is the Court bound to execute the decree literally according to its terms? The decisions on the subject may be summarized as follows —

First where a consent decree is based on an agreement or compromise that is not lawful—As to this it has been held that so far as the decree embodies unlawful terms of a compromise it is inoperative and will not be enforced (*i*) The subject has already been dealt with above in the notes Unlawful agreement or compromise

Next where a consent decree embraces matters that do not relate to the suit—Where a decree passed on a compromise includes terms that relate to the suit all the terms may be enforced in execution of the decree But where it contains terms that do not relate to the suit there is a conflict of opinion whether those terms can be enforced in execution According to the Allahabad and Madras decisions such terms can be enforced in execution of the decree (*w*) It is not open to the party against whom the decree is sought to be executed to object to the decree on the ground that it contains matters foreign to

(*q*) *Ga rı Dutt v Dol* (1917) 2 Pat L J 6 3 43 I C 459

(*r*) *Dooly Ch d v Mohan Lal* (19 4) 51 C 1 43 83 I C 606 (4) A C 2

(*s*) *Sl I r Bh ıt v \ ra ımha* (19 7) 54 I A 111 51 Bom 44 101 I C 0 (27) A PC 57

(*t*) *Dool j Chand v M h n Lal* (19 4) 51 C 1 43 41 j 440 83 I C 606 (4) A C 2

(*u*) *Alag v Ma ulappa* (1923) 4 Mad L J 76 78 4 I C 609 (3) A M 576

(*v*) *Lak l m naswamı v Ra gamma* (1903) 6 M 1 31

(*w*) *M h b llah v Imamı* (1887) 9 All 9 *Ma ager of Sr Meenak hı Devasta am v 4b l l Kas m* (1907) 30 Ma l 421 *S bapat ı v l a m l l ga* (1915) 38 M d 9 9 23 I C 591 *S e al o G rı D tt v Doh n* (1917) I ıt L J 673 43 I C 459

the suit. Such an objection it has been said by the Madras High Court must be taken by way of appeal from the decree [and now by way of appeal under O 43 r 2 (m) from the *order* recording the compromise] and it cannot be taken in execution of the decree (*x*) On the other hand the High Court of Calcutta has said that such terms cannot be enforced in execution of the decree but they may be enforced as a *contract* by a separate suit (*y*) Such a suit however according to the Allahabad High Court would be barred under s 47 the question in the view taken by that Court being one relating to *execution* ( ) In *Hemanti Kumari* v *Midnapur Zamindari Co* (*a*) where a decree comprised lands outside the suit the Judicial Committee observed A perfectly proper and effectual method of carrying out the terms of [the present rule] would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit or it could introduce the agreement in a schedule to the decree but in either case although the operative part of the decree would be properly confined to the actual subject matter of the then existing litigation the decree taken as a whole would include the agreement This in fact is what the decree did in the present case *It may be that as a decree it was incapable of being executed outside the lands of the district* but that does not prevent it being received in evidence of its contents The correct view it is submitted is that the decree may be executed as to the *operative* part alone which as stated above is to be confined to the actual subject matter of the suit As to the rest it may be enforced as a contract by a separate suit

Appeal —An *order* under this rule recording or refusing to record a compromise is appealable under O 43 r 1 (m) The Court may under this rule either record a compromise or it may refuse to do so If an order is made recording the compromise the Court must pass a decree in accordance with the compromise If an order is made refusing to record the compromise the suit will be proceeded with But in either case as stated above an appeal will lie from the *order* Where an order is made recording the agreement *an appeal may be preferred on any of the following grounds* —

1 That there was no compromise at all or no such compromise as the Court ordered to be recorded (*b*)

2 That the compromise is *not lawful* (*c*)

3 That the compromise recorded by the Court comprises *matters that do not relate to the suit* (*d*)

A compromise entered into by a pleader without the authority of his client is no compromise at all (*e*) and as such it comes under group (1) above

It has been held by the High Courts of Lahore (*f*) and Madras (*g*) that the fact that a *decree* has been passed *in accordance with the compromise does not preclude* an appeal from the *order* recording the compromise On the other hand it has been held by the High Court of Calcutta that an appeal from the *order* is incompetent if the appeal

(*x*) *Manager of Sri Meenakshi Devastanam* v *Abdul Kasim* (190) 30 Mad 4 1 *Palnaswami* v *I t a mal* (1914) 27 M d L J 388 24 I C 13

(*y*) *Jasimuddin* v *Bhuban* (190) 34 Cal 456 463 *Purna Chundra* v *Nil Madhub* (1901) 5 Cal W N 485

(*z*) *Mohibullah* v *Imami* (188) 9 All 9

(*a*) (1919) 46 I A 240 246 47 Cal 48 49 53 I C 534 in app from 19 C W N 347 8 I C 8 9

(*b*) *Goculdas* v *James Scott* (189) 16 Bom 20 21 *T l n and* v *F t h D n* (1918) Punj Rec no 83 p 7 4 I C 230 [where no consent was given at all by some of the parties to the suit]

(*c*) *Goculdas* v *James Scott* (189) 16 Bom 20 21 *Sridharan* v *Puramathan* (1900) 3 Mad 101

(*d*) *Venkatappa* v *Thimma* (189) 18 Mad 410 *Pragdas* v *Girdhardas* (190) 26 Bom 76 9 *Manager of Sri Meenakshi Devastanam* v *Abdul Hasan* (1907) 30 Mad 4 1 4 3 *Mahomed Rashid* v *Rahmat Ullah* (1914) Punj Rec no 96 p 355 24 I C 630

(*e*) *The at* v *S H m l* (1917) 41 Mad 33 41 I C 4 9

(*f*) *Mahomed Rashid* v *Rahmat Ullah* (1914) Punj Rec no 96 p 3 5 24 I C 630 *Megh Raj* v *Tulsi Ram* (19 4) 6 Lah L J 18 80 I C 696 (4) A L 466

(*g*) *Satyanarayana Moorthi* v *Bithayya* (19) 48 Mad L J 24 87 I C 124 (25) A M 606

is filed after the passing of the decree (*h*) See notes to s 96 Sub sec (3) above consent decrees not appealable and notes above under the head Scope of the rule

O 43 r 1 (m) does not apply to an order setting aside an award under a reference made *through the intervention of the Court* Such a case falls within Schedule II of the Code (*i*)

Registration—As to registration of decrees based on a compromise see Mulla s Registration Act p 78 *et seq*

Execution proceedings—See r 4 below

Proceedings in execution of decrees not affected

4 [S 375 A] Nothing in this Order shall apply to any proceedings in execution of a decree or order

Proceedings in execution—One effect of this rule is that the provisions of r 3 hall not apply to execution proceedings The reason is that O 21 r 2 and s 47 taken together provide a complete procedure for recording compromises arrived at in execution proceedings (*j*) This rule also prevents the provisions of r 1 from applying to proceedings in execution Hence where an application for execution of a decree has been made the Court has no power to allow the applicant to withdraw the application under r 1 (2) above with permis ion to make a fresh application (*k*) For the same reason the applicant cannot withdraw his application under r 1 (1) above though he may apply for its dismissal if he does not wish to proceed further with it (*l*) The High Court of Bombay has held that a compromise of a suit for partnership accounts after the passing of a preliminary decree and during the pendency of an enquiry before the Commissioner for taking accounts is not a compromise of a proceeding in execution Such a compromise may therefore be recorded under r 3 above (*m*) In Rangoon it has been held that an agreement between the mortgagor and the mortgagee after the preliminary decree for sale and before the final decree whereby the mortgagee agrees to allow an extension of time to the mortgagor for payment of the decretal amount is within O 21 r 2 and not within r 3 above (*n*) The High Court of Patna has held that an application to set aside a sale under O 21 r 90 is not a proceeding in execution, and that a compromise arrived at between the parties that on the judgment debtor paying a certain sum into Court by a particular date the Court sale should be set aside may therefore be recorded under r 3 above (*o*) But the correctness of this decision is doubtful

ORDER XXIV

Payment into Court

Deposit by d fen lant of amount in sati faction of claim

1 **1** [S 760, R S C O 21, r 1] The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satis faction in full of the claim

(*h*) *Be g l Coal Co* v *Ap r Coll erie* (19 4) 3 C W N 9 8 87 I C 48 (6) A C 41

(*i*) *Munsh* v *G Lar* (19 4) 9 C W N 79 9 I C 773 (25) A C 9

(*j*) *Choudh ry* v *Choudhury* (19 1) 6 Pat L J 3 54 6 I C 608 (1) A P 107

(*k*) *M ta* v *Be i* (1914) 36 All 1 2 I C 961

(*l*) *Chowdhury* v *M hesh* (19) 1 Pat 3 6 I C 1 ( ) A P 5 5

(*m*) *Pr gd s* v *G rdhardas* (190) 6 Bom 6 8

(*n*) *Ahmed* v *A L A R Chetti r F rm* (19 3) 6 Rang 8 110 I C 873 (3) A R. 194

(*o*) (19 1) 6 Pat. L J 3 6 I C 608 (1) A P 107 *supra*

Payment into Court with denial of liability—There is no provision in his rule enabling a defendant to pay money into Court *with a denial of liability* in other word *without prejudice to his contentions* as there is in the corresponding English rule see R S C O 22 rr 1 and 6

Mere willingness to pay—A mere averment of willingness to pay made in the written tatement is not equivalent to payment into Court and it does not stop interest from running (p)

Suit to recover a debt or damages—This order applies only to a suit to recover a debt or damages and not to any other suits Where a suit is instituted against a defendant to recover a debt or damages he may pay into Court such amounts *as he considers* a satisfaction in full of the plaintiff s claim By such payment into Court the defendant may be benefited (1) in respect of interest for which see r 3 and (2) in respect of costs for which see r 4 and illustrations thereto

Suit for injunction—A suit for an injunction to restrain a defendant from building so as to interfere with the plaintiff s light and air but *not including any claim for damages* is not a suit for debt or damages within the meaning of this rule No doubt the Court has in such a suit a discretion under s 19 of the Specific Relief Act I of 1877 to award damages in lieu of injunction but this circumstance does not make the suit one for damages within the meaning of this rule (q) But it has been held by the High Court of Bombay in view of the long established practice of that Court that where a defendant in a suit for an injunction pure and simple pays into Court a sum which he considers a satisfaction in full of the plaintiff s claim though it be with defence denying liability and the Court allows damages only to the plaintiff and that too to the extent of the amount deposited by the defendant the principle underlying r 4 below ought to regulate the discretion of the Court (which it has under s 35) in directing the payment of costs (r)

Suit for accounts—This rule does not apply to suits for accounts (s)

Suit to recover debt or damages together with other relief—This rule applies to suits to recover debt or damages though there may be other reliefs claimed in the suit e g injunction (t)

At any stage of the suit—This means *before decree* as indicated by the words in full of the *claim* and the subsequent rules See notes to r 3 below Execution proceedings

Payment into Court and insolvency of defendant—In England it has been held that when money is paid into Court *admitting* liability the plaintiff in the event of the defendant s bankruptcy is a secured creditor in respect of it and when liability is denied he is a secured creditor to the extent to which his claim is admitted by the trustee in bankruptcy or proved (u)

Notice of deposit

2 [S 377] Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application

Compare R S C O 22 rr 4 and 5

Form—For form of notice see App H form no 3

(p) *H j Abd l R hman* v *H j Noor Mal ; eI* (189) 16 Bom 141 1 0

(q) *Li x mon* v *Moroba* (189) 21 Bom 50

( ) *Luxumon* v *Moroba* (1897) 21 Bom 0

(s) *N hols* v *Evens* (1883) 2 C D 611

(t) See *Moon* v *Dickinson* (1890) 63 L T 371

(u) *I e Gordon* [189] Q B 516

Unless the Court otherwise directs —These words show that the Court has a discretion to refuse to allow monies to be paid out That discretion however should be exerci ed reasonably Where the money sued for and paid into Court is due on a promissory note it would be unreasonable in the absence of special circumstances not to allow the plaintiff to take the money out The fact that the payment into Court is accompanied by a denial of liability on the ground of minority is not such a circum stance (v) Where there are conflicting claims as where the amount deposited in Court is claimed by different parties no party can withdraw the amount without an order of the Court (u)

Interest on deposit not allowed to plaintiff after notice

3 [S 378] No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of *the claim or falls short thereof*

Tender —A plea of tender before action must in order to stop interest be accompanied by a payment into Court after action otherwise the tender is ineffectual (x)

Execution proceedings —The principle of this rule applies to proceedings in execution therefore if money is paid into Court by a judgment debtor no interest should be allowed to the decree holder on the amount so paid although such amount may not in fact be the whole amount due under the decree (y)

Procedure where pl tiff accepts deposit as atisfac tion in part

4 [S 379] (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance, and, if the Court decides that the deposit by the defendant was a full satis faction of the plaintiff's claim the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim

Proced re where h accepts it as satisfaction in full

(2) Where the plaintiff accepts such amount as satis faction in full of his claim, he shall present to the Court a statement to that effect and such statement shall be filed and the Court shall pronounce judgment accordingly, and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation

(v) *Dwark Dass v G rish Chu der* (1899) 6 Cal 66
(w) *Haj Abd l Rahman v Haji Noor M homed* (189) 16 Bom 141
(x) *Haji Abd l Rahman v Haj Noor M homed* (189) 16 Bom 141 *Rakh l Ch ndra v B i K tha* (19 8) 3 C L W N 103 (8) A C 874
(y) *A t l v Muhan mad* (1917) 40 All 1 5 43 I C 5 0

Illustrations

(a) A owes B Rs 100 B sues A for the amount having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage On the plaint being filed A pays the money into Court B accepts it in full satisfaction of his claim but the Court should not allow him any costs the litigation being presumably groundless on his part

(b) B sues A under the circumstances mentioned in illustration (a) On the plaint being filed A disputes the claim Afterwards A pays the money into Court B accepts it in full satisfaction of his claim The Court should also give B his costs of suit A s conduct having shown that the litigation was necessary

(c) A owes B Rs 100 and is willing to pay him that sum without suit B claims Rs. 150 and sues A for that amount On the plaint being filed A pays Rs 100 into Court and disputes only his liability to pay the remaining Rs 50 B accepts the Rs 100 in full satisfaction of his claim The Court should order him to pay A s costs

Compare P S C O 2_ r 6

Apportionment of costs —See notes to r 1 Suit for injunction on p 829 above

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ORDER XXV

Security for Costs

When security for costs may be required from plaintiff

1 [Ss 380, 382] (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiff does possess any sufficient immovable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant

Residence out of British India

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub rule (1)

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is

1 satisfied that such plaintiff does not possess any sufficient immovable property within British India

Object of the rule—The object of the rule is to provide for the protection of defendants in certain cases where in the event of success they may have difficulty in realizing their costs from the plaintiff ( )

Application of the rule—Security for the costs of a defendant *may* be required from a plaintiff in the following two cases —

I (a) Where the plaintiff resides out of British India or where there are two or more plaintiffs *all* the plaintiffs reside out of British India *and*

(b) where none of the plaintiffs has sufficient immovable property within British India other than the property in suit

II (a) Where the plaintiff is a woman

(b) where her suit is for the payment of money *and*

(c) she does not possess sufficient immovable property within British India

Discretion of Court in requiring security for costs from non resident plaintiff—The word may implies discretion In the exercise of this discretion the Court will not order security for costs from a plaintiff residing out of British India in cases in which he cannot be rendered liable for the defendant s costs *e g* an administration suit by the plaintiff as a creditor or a legatee in which the plaintiff s claim is *admitted* or a suit on a mortgage or a promissory note *where there is no defence* In such cases no security for costs will be ordered *even though* the plaintiff resides out of British India and has not sufficient immovable property within British India not even though the plaintiff be a woman (*a*)

Resides—The residence intended in this rule is residence under such circumstances as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided Mere presence in British territory at the time of suit is not residence (*b*) Thus a resident of a Native State staying in Bombay for the sole purpose of taking proceedings to get his wife back cannot be said to reside in Bombay within the meaning of this rule (c) See notes to s 20 above Actually and voluntarily resides

Trading corporations—The residence and domicile of an incorporated trading company are determined by the situation of its principal place of business By the principal place of business is meant the place where the administrative business of the company is conducted This may not be the place where its manufacture or other operations are carried on Dicey s Conflict of Laws 3rd ed p 164

British India—Aden is within British India (*d*) The Kathiawar States are *not within British India* (*e*) *nor is the Cantonment of Wadhwan* (*f*) *nor the* Cantonment of Secunderabad (*g*) nor the Rajkot Civil Station (*h*) See notes to s. 1 British India p 4 above

Immovable property —A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus *income* derived from immovable property cannot

( ) *Premchand* 1 the goods of (1894) 21 Cal 832 at p 836

(*a*) *Premchand* in the goods of (1894) 21 Cal 832 836

(*b*) *Mahomed Shriff* v *Laldin* (18 9) 3 Bom 9

(*c*) *H* *f* v *K lsa* (19) 46 B m 89 64 I C 03 (2) A B 209

(*d*) Aden Laws Regulation 1891 s 2

(*e*) *Hemchand* v *A m S ka lal* (1906) 33 I A 1 8 Bom L R 1 9

(*f*) *Emp or* v *Ch m lal* (1912) 14 Bom L R 8 6 17 I C 534 dl nting from *Treccam* v *B B & C I Ry* (1885) 9 Bom 44

(*g*) *Hoot Al* v *Abd Al* (1914) 1 Cal 1 7

(*h*) *Q Emp ss* v *Abd l* (1886) 10 Bom 186

be said to *possess immovable property* within the meaning of this rule (i) Leasehold property is immovable property within the meaning of this rule (j)

Poverty of plaintiff—Mere poverty is no ground for requiring a plaintiff to give security for the costs of the suit (k) But it is otherwise if he is not the real litigant and issuing on behalf of another who is not a party to the suit (l) In a recent Bombay case a suit was brought by a Parsi father and his minor daughter as plaintiffs for damages for the defendant s breach of his promi e to marry the daughter The father was an undischarged insolvent and it was alleged that the suit was really the father s suit and that he was eeking to make money out of his daughter s engagement The Court upon these grounds ordered the father to furnish security for the costs of the defendant (m) In the last mentioned case the Court relied upon a dictum of Bowen L J in *Cowell* v *Taylor* (n) that in order to prevent abuse if an insolvent sues as nominal plaintiff for the benefit of somebody else he must give security

Inherent power to order security for costs—The case for security for costs from a puppet plaintiff is clearly outside the scope of this rule It can only be brought in under the inherent power of the Court In one case the Calcutta High Court said that it had such power (o) In a later case the same High Court said that the Court had no such power the reason given being that the inherent power of the Court cannot be invoked in matters for which the Code does actually provide (p) See notes above Poverty of plaintiff

Where leave has been granted to plaintiff to sue as a pauper—The Court has no power under this rule to require security for costs from a person to whom leave has been granted under O 33 r 8 to sue *as a pauper* for to do so would be to render the leave nugatory (q) If an order is made requiring a plaintiff to furnish security for the costs of the defendant and leave is subsequently granted to the plaintiff to continue the suit as a pauper the order ceases to operate as regards antecedent costs provided leave is granted before the time limited for giving security has expired (r)

Where the plaintiff is a minor—The power as to requiring security for costs is a discretionary one and except in exceptional cases neither a minor plaintiff nor his or her next friend should be required to give security for costs (s) not even if both the minor and his next friend are residing out of British India and do not own immovable property in British India (t)

Where the plaintiff is a woman—The necessity for the provisions of sub r (3) arises from the provisions of s 56 by which it is enacted that no woman can be arrested or detained in the civil prison in execution of a decree for the payment of money (u) But the Court has a discretion in the matter and in the exercise of its discretion it will not as a general rule require security for costs from a woman plaintiff if the result of such an order will be practically to defeat the suit where it has been instituted *bona fide* (v)

( ) *French nd* in the goods of (1894) 1 Cal 83

(j) *Russicklall* v *Jadubram* (1873) 10 Beng L R App 2

(k) *Ma cl)* v *Goolf* (18 9) 3 Bom 41 *Kh jah A sen Ilajoo* v *Solomon* (1887) 14 Cal 533

(l) *Ram C om r Coondoo* v *Chu der Ca to Mo ker)* (18 7) ? Cal 33 4 I A 23 [a case under the Code of 18 9 whi h did not contain ny provision for sec rity for costs] *Kh j h As oollajoo* v *Solomo* (1887) 14 Cal 33 *Ha th* v *I n K ar* (1913) 18 Cal W N 119 0 I C 703

(m) *Bom ji* v *Nusserwanj* (1903) 27 Bom 100

(n) (1885) 31 Ch D 34 38

(o) *Harinath* v *Ram Kuma* (1913) 18 Cal W N 119 20 I C 703

(p) *Bh irabend a* v *Uda Na a* (19 3) 50 Cal 8 3 864 866 79 I C 98 (-4) A C 51

(q) *Mussamat Hafiza* v *Abd l K rim* (1908) 1- C W N 163 See also *Nusseerood n Biswa* v *Ujj l B was* (18 1) 17 W R 63 [no security for costs from pauper appell nt]

(r) *Bai Laxm* v *Harj van* (1912) 36 Bom 415 1 I C 538

(s) *B i I or ba* v *Devji* (1899) 23 Bom 100 *Man Bai* v *Lodd Gov nd* (1908) 18 Mad L J 155

(t) *Bh sha ker* v *Mulj* (1910) 3 Bom 339 11 I C 5 1

(u) *Prei l nd* in the goods of (1894) 21 Cal 83 838

( ) *Nam b i* v *Daji Govind* (1911) 3 Bom 4 1 8 I C 10 *S naba* v *T ibhowandas* (1908) 3 Bom 60 606

Persons exempted from attending Court—Amongst those so exempted are women who according to the custom and manners of the country ought not to be compelled to appear in public (see s 132) This is a right which no Court has power to refuse (*f*) Such women ought to be examined on commission even though they may have appeared in public before (*g*) and though an allegation of immorality is made against them (*h*) A woman may have entirely abandoned the protection of the *purda* and yet she may be exempted under s 132 from giving evidence in Court if the Court is satisfied having regard to the class and community to which she belongs that she should not be compelled to appear in the witness box (*i*) A religious preceptor is not one of the persons exempted from attending the Court (*j*)

May issue—See notes to r 4 below under the head May issue

Sickness or infirmity—If sickness or infirmity is alleged the character and gravity of that sickness or infirmity must be assessed and the risk consequent upon a refusal to issue a commission must be taken into consideration At the same time the importance of having witnesses present before the Court should not altogether be lost sight of (*k*) The application may be granted even if the defence consists of an equitable counterclaim If it is found that the vendor is unable to attend Court by reason of sickness or infirmity the Court has discretion to grant or refuse the application Such discretion cannot be revised under sec 115 above (*l*)

Evidence taken on commission under this rule—Where evidence is taken on commission under this rule the procedure laid down in r 8 below should be strictly observed (*m*)

Arbitration—It is competent to the Court to issue a commission for the examination of witnesses though the matters in difference in the suit have been referred to arbitration under Schedule II of this Code (*n*)

Appeal—See notes to rule 4 below Appeal

Revision—See notes above Sickness or infirmity

Order for commission

2 [S 384] An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined

Where witness resides within Court's jurisdiction

3 [S 385] A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute

(*f*) *Rahimunnessa* v *Shaik Hakim* (1928) (8) A C 814
(*g*) *Mohesh Chunder* v *M k Lall* (1899) 26 Cal 6 0 *Chan k r* v *Mohesh Chunder* (1899) 6 Cal 651 *Bal leshwari* v *J n na d* (1918) 4 Cal 697 41 I C 610
(*h*) *B od ni* v *Kala Chand* (1901) 5 C 1 W N p cccxxxii
(*i*) *Solomon* v *Jyot a* (1918) 44 C 1 40 44 I C 15
(*j*) *Panachand* v *Manoharlal* (1919) 4 Bom 136 141 14 43 I C 3
(*k*) *Pan hi ri* v *P nch an* (19 4) 39 Cal L J 98 60 84 I C 9 (4) A C 971
(*l*) *Pha nd a* v *Pramatha* (19 8) 55 Cal. 43 106 I C 880 (28) A C 4 1
(*m*) (19 8) 5 Cal 748 106 I C 850 ('28) A C 431
(*n*) *Rab bi* v *Fatimabai* (1905) Bom L R 560

Persons for whose examination commission may issue

4 [S 386] (1) Any Court may in any suit issue a commission for the examination of— O 26

(a) any person resident beyond the local limits of its jurisdiction,

(b) any person who is about to leave such limits before the date on which he is required to be examined in Court, and

(c) any civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court

Form —For form of commission to examine absent witness see App H form No 7

May issue —The Court has a discretion to grant or refuse a commission (*o*) But the discretion must be exercised judicially (*p*) If the Court fails to exercise the discretion judicially such failure is of itself no ground for interfering with the decree in appeal the appellate Court should not interfere unless it is shown if the lower Court has exercised its discretion judicially the decision would have been different from what it was (*q*)

Commission for the examination of witnesses — Ordinarily in the case of a witness not under the control of the party asking for a commission who resides beyond the limit fixed under O 16 r 19 (b) a commission should issue as a matter of right unless the Court is satisfied that the party is merely abusing its authority to issue process It is not for the Court to decide whether the party will be benefited thereby or not that is a matter entirely for the party (*r*)

Plaintiff asking for a commission to examine himself —Suppose a plaintiff residing in Delhi institutes a suit in Bombay and then applies to the Bombay Court for the issue of a commission for his examination in Delhi In such a case the Court will refuse the application unless a very strong case is made out because the Bombay tribunal is that chosen by the plaintiff himself (*s*)

(*o*) *B ey* *Lyre* (1864) 1 Hyde 68 *Coch* v *Allcock* (1888) 21 Q B D 1 9
(*p*) *H rree Dass* v *Me r Mo z m* (1871) 15 W R 447 *M wj* v *Nemcl and* (1893) 23 Bom 6 6 *P cl kari* v *Pa chanan* (19 4) 33 C 1 L J 598 601 60? 84 I C 9 (24) A C 9 1
(*q*) *Ak kv n sa* v *T p Lal* (1898) 5 Cal 807 2 I A 117
(*r*) *Jag atl a* v *Sar thamb l* (19 3) 46 Mad 574 577 71 I C 530 (3) A M 3 1 *Silam a* v *S braya* (1911) 21 M d L J 889 12 I C 74 *A ruth Nat l* v *Dhun pat S gh* (18 3) 0 W R 253 *Hu ee Dass* v *M er Moazzum* (18 1) 15 W R 447
(*s*) *Poss* v *Woodf rd* [1894] 1 Ch 38 4 *New* v *Bur s* [1894] 64 L J Q B 104 *Keeley* v *Wall y* [1893] 9 Times Rep 571 *Nawab Sa yid* v *Herbert* (19 4) 3 Lat 863 84 I C 993 ( ) A 1 1

26, 9 **Reading depositions in evidence** —Evidence taken on commission cannot be used without the consent of the opposite party unless the conditions of clause (a) are fulfilled or the record shews that the discretion under clause (b) has been exercised by the Court (*h*)

According to the practice prevailing on the Original Side of the High Court of Calcutta evidence taken on commission is not treated as evidence in the suit until it has been tendered and read as evidence in the suit by the party on whose behalf it has been taken It follows that evidence taken under a commission at the instance of one party cannot be used by the opposite party until it is tendered and read as evidence by the party on who e behalf it has been taken (*i*) On the other hand the practice in the Courts in the mofussil of Calcutta is to treat the deposition of a witness examined on commission as evidence in the case even though it has not been formally tendered and this practice has been said to be not only perfectly consistent but also in strict accordance with the provisions of rules 7 and 8 (*j*)

Admissibility of documents —Where a document is produced before a Commissioner and no objection is taken to its admissibility no uch objection can be taken before the Court hearing the suit to which the commission is returned (*k*) But if the admissibility of the document is objected to before the Commissioner the party who has objected to the admissibility of the document before the Commissioner on one ground is not precluded from objecting to its admissibility before the Court on any other ground (*l*)

Commission for local investigations

Commi ions to make lo al investigation

9 [S 392] In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court

Provided that, where the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules

Commission when to be issued —The words and the same cannot be conveniently conducted by the judge in person which occurred in the old section after the words net profits have been omitted in this rule The effect of the alteration is that the issue of a commission for local investigation is no longer restricted to ca es where the Judge is unable conveniently to make the investigation himself As the rule now stands a Judge may issue a commission in any case where he deems it fit to do so irrespective of his own convenience (*m*)

(*h*) *Mahim Chand a v Naba Cha d a* (19 7) 44 C L J 98 98 I C 85 ( ) A C 43 *Sat l Ch d a Sat h Ka t* (19 3) 28 Cal W N 3 7 73 I C 391 (3) A PC 73 *Phan ndra v Pramatha* (19 8) 55 Cal 48 106 I C 880 (8) A C 4 1

(*i*) *I v S tja* (1903) 0 C 1 9 *Hema t v Ba l E l ari* (1905) 9 C W N 794

(*j*) *N t la ni do Lall* (1890) 6 Cal 591 *Man Gob nda v Shash dra Ch d a* (1908) 4 C 8 *Dha u l a v M l* (1909) 36 C 1 566 1 I C 366

(*k*) *Stri tlers v Wl le* (18 9) 6 C L R 109

(*l*) *J all v Ga i K m* (1883) 9 C 1 932

(*m*) *S b p th v Peri al* (1921) 44 Mad 640 6 I C 90 (1) A M 3 3

Personal investigation by Judge—A Judge has power to make a local investigation in person in any case in which he sees fit to do so (n) See O 18 r 18

Commission for local investigation—This rule does not authorise a Court to delegate to a Commissioner the trial of any *material issue* which the Court itself is bound to try (o)

Commissioner s report—Where in a suit as to a right of way a commissioner was appointed under this rule to prepare a map of the locality in question it was held that the statements of the village officers made to him with regard to the right of way were inadmissible in evidence (p)

Interference with commissioner s report—Interference with the result of a careful local investigation except upon clearly defined and sufficient grounds is to be deprecated (q)

Amount of profits—The report of a commissioner appointed by a Court of Revenue to ascertain the amount of actual collection in a suit for profits under s 164 of the Agra Tenancy Act is admissible in evidence having regard to this rule and rules 16 17 and 18 (r)

Mesne profits—burden of proof—See notes to O 20 r 12 Burden of proof on p 622 above

Form—For form of commission for local investigation see App H form no 9

Procedure of Commissioner

10 [S 393] (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him shall return such evidence, together with his report in writing signed by him, to the Court

Report and deposition to be evidence in suits

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record, but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation

Commissioner may be examined in person

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit

Alterations in the rule—The words or as to his report in sub rule (2) after the words mentioned in his report are new Sub rule (3) is also new

(n) (19 1) 44 Mad 640 6 I C 790 (21) A M 3 3 *s pra*

(o) *S gh v Mookun* (1893) 16 Mad 350

(p) *Sh taura* v *Bhimappa* (1899) 24 Bom 43

(q) *S t S o d n v Proso o Co m* (18 0) 13 M I A 60 6 Ben L R 677 *Mo I* v *Bh ll der* (1871) 15 W R 423 *R n Amrita* v *Munshi* (1923) 28 C W N 318 80 I C 75 (24) A C 6 0

(r) *B khtawa* v *Sheo Prasad* (1917) 39 All 694 4 I C 7 0 The provisions of O 26 re applicable t suits under the Agra Tenancy Act of 1901

Further evidence after commissioner s report —This rule does not contemplate the tender of further evidence after the Commissioner s report except the examination of the Commissioner himself but it does not forbid it It is consistent with either course and the point must be decid d on general principles according to the facts of each case (s)

Commissions to examine accounts

11 [S 394] In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment

Commission to examine or adjust accounts

Commission to examine accounts —The words of this rule clearly indicat that no order can be made for the appointment of a commissioner unless the examination or adjustment of accounts is considered necessary (t)

The commissioner to whom a suit is referred by a Judge on the original side of the High Court of Bombay is entitled to decide questions of law which may arise while taking accounts (u)

Form —For form of commission to examine accounts see App H form no 9

12 [S 395] (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination

Court to give Commissioner necessary instructions

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit

Proceedings and report to be evidence Court may direct further inquiry

Commissions to make partitions

13 [S 396, 1st para] Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree

Commission to make partition of immovable property

(s) Gri h Cha d r v Shosh Shikhar sw r Roy (1900) 7 Cal 951 966 7 I A 110 Sabapathy v Terum l (19 1) 44 Mad 640 6 I C 90 (21) A M 3 3

(t) Bharat Cha dra v I iran Ch dra (19 5) Cal 66 00 I C 944 (5) A C 1063

(u) Laxmib i v Hu sai bhai (191) 41 Bom 19 36 I C 618 See also Watson v Ag Mehed e (18 4) 1 I A 346

Alteration in the rule —The singular person has been substituted for the plural persons. Under the old section it was held that the use of the plural person showed that the Court could not issue a commission to make partitions to a *single* Commissioner (v) The substitution of the singular person for the plural persons clearly shows that under the present rule the commission may be issued to a single Commissioner

Form —For form of commission to make a partition see App H form no 10

Procedure of Commissioner

14 [S 396 2nd and 3rd paras] (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds Such report or reports shall be annexed to the commission and transmitted to the Court, and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied, but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit

Alteration in the rule —The words shall confirm vary or set aside the same at the end of sub rule (2) and the whole of sub rule (3) have been substituted for the words shall either quash the same and issue a new commission or (where the Commissioners agree in their report) pass a decree in accordance therewith Under the wording of the old section it was held that the Court must either accept the report or reject the report and that it had no power to *vary* it (w) The word vary has been added into sub rule (2) to enable the Court to modify the report in a proper case

Resistance to Commissioner —Where a commission has been issued to make a partition the circumstance that the plaintiff or his agent resists the Commissioner is not sufficient to justify the dismissal of the suit (x)

(v) *M I I nd* v *Muha imad Ali* (1907) 9 All 23

(w) *J nk* v *Gauri* (1906) 28 All

(x) *Masum un n ssah* v *Lal jan* (1910) 3 All 319 5 I C 872

General provisions

Expenses of commission to be paid into Court

15 [S 397] Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued

Powers of Commissioners

16 [S 398] Any Commissioner appointed under this Order, may, unless otherwise directed by the order of appointment,—

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him,

(b) call for and examine documents and other things relevant to the subject of inquiry,

(c) at any reasonable time enter upon or into any land or building mentioned in the order

Attendance and examination of witnesses before Commissioner

17 [S 399] (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the *purposes of this rule the Commissioner shall be deemed to be a Civil Court*

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper

Sub rule (2) —This sub rule is new *It enables the Court within the local* limits of whose jurisdiction a witness resides to issue a summons for his examination on the application of the Commissioner In the absence of any such provision in the old section

it was held that where a witness failed to appear before a Commissioner pursuant to a notice issued by him the only course left open to the Commissioner was to return the commission to the Court from which it was issued and the latter Court would then send the commission to the Court within the local limits of whose jurisdiction the witness to be examined resided (y)

18 [S 400] (1) Where a commission is issued under this Order the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders

Parties to appear before Commissioner

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence

Form —See App H form no 7

ORDER XXVII

Suits by or against the Government or Public Officers in their official capacity

1 [*New*] In any suit by or against the Secretary of State for India in Council, the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case

Suits by or against Government

Suits by or against Government —Suits by or against the Government must be instituted by or against the Secretary of State for India in Council see s 79 above

Notice in suits against Secretary of State or public officer —See s 80 above

2 [S 417] Persons being *ex officio* or otherwise authorized to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government

Persons authorized to act for Government

Recognised Agents —In the Punjab all Government pleaders are authorised to act for Government as their recognised agents without any power of attorney Such pleaders are recognised agents within the meaning of this rule (z)

(y) *M hom d v W nd Al* (1896) 23 Cal 404
(z) *East India Railway Co v P jari Lal* (19 9) 10 Lah 360 112 I C 736 (8) A L 774

3 [S 418] Plaints in suits by or against Government In suits by or against the Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the words "The Secretary of State for India in Council"

4 [S 419] Agent for Government to receive process The Government pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court

5 [S 420] Fixing of day for appearance on behalf of Government The Court, in fixing the day for the Secretary of State for India in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government, and may extend the time at its discretion

6 [S 421] Attendance of person able to answer questions relating to suit against Government The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State for India in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person

7 [S 423] Extension of time to enable public officer to make reference to Government (1) Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary

8 [Ss 426, 427] (1) Where the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits O 2

Procedure in suits against public officer

(2) Where no application under sub rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree

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ORDER XXVIII

Suits by or against Military Men or Airmen

1 [S 466] (1) Where any officer, soldier or airman actually serving the Government in a military or air-force capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead O 28

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them

(2) The authority shall be in writing and shall be signed by the officer soldier or airman in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer, soldier or airman is serving in military or air force staff employment, the head or other superior officer of the office in which he is employed Such commanding or other officer shall countersign the authority which shall be filed in Court

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer, soldier or airman by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person

Explanation—In this Order the expression "commanding officer" means the officer in actual command for the time being of any regiment, corps detachment or depot to which the officer, soldier or airman belongs

Changes in the rule—The words or airman have been added in the heading of this Order and in this rule after the word *soldier* by the *Repealing and Amending* Act 1927 The words or air force in this rule were inserted after the word military by the same Act

2 [S 465] Person so authorized may act personally or appoint pleader

Any person authorized by an officer, soldier or airman to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, soldier or airman could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, soldier or airman

Changes in the rule—See note to r 1 Changes in the rule

3 [S 467] Service on person so authorized or on his pleader to be good service

Processes served upon any person authorized by an officer, soldier or airman under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person

Changes in the rule—See note to r 1 Changes in the rule

ORDER XXIX

Suits by or against Corporations

r 1 **1** [S 435] Subscription and verification of pleading

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case

Companies authorized to sue and be sued in the name of an officer or trustee—All reference has been omitted in this and the next following rule to companies authorised to sue and be sued in the name of an officer or of a trustee as such companies if any there be are very rare

Foreign corporation—The procedure prescribed by this rule applies to foreign corporations also A foreign corporation can claim the benefit of this rule although not registered under the Indian Companies Act or under an Act of Parliament (a) Thus a plaint in a suit by the Singer Manufacturing Company which is a company incorporated

(a) Singer Manufacturing Co v Baijnath (1903) 30 Cal 103

in the United States may be verified by an agent holding a general power of attorney from the company as a principal officer of the company within the meaning of this rule (b) The fact that the Agent also acts for another foreign firm is not material (c)

Suit by an unregistered or unincorporated society—A suit by an unregistered or unincorporated society must be brought in the names of all the members of the society (d) Where there are numerous members the suit may be instituted by one or more of them with the permission of the Court on behalf of all [O 1 r 8]

Suit by or against a registered company—A suit by or against a registered company must be instituted in the name of the company A suit against two companies described as the India General S N and R Co Ltd and the Rivers S N Co Ltd *by their joint Agent A E Rogers* is substantially a suit against Rogers and it is in contravention of the provisions of this rule The words by their joint agent A E Rogers should be omitted (e) But if the relief is really sought against the Company and the error is one of misdescription a suit nominally against the Agent may be treated as a suit against the Company (f)

Other principal officer of the corporation—The manager at Lucknow of the local branch of the Delhi and London Bank was *authorised by a power of attorney* to manage the affairs of the Bank and to substitute any person for himself In pursuance of this power he gave a *power of attorney* to the accountant of the Bank to manage the affairs of the Bank but the power omitted words giving authority to sue It was held that the accountant was under the circumstances the principal officer of the Bank and that he could as such sign and verify the plaint in a suit filed by the bank (g)

Principal Officer able to depose to the facts of the case—The Calcutta High Court has held that as regards every pleading on behalf of a company or corporation the fitness to verify of the person purporting to verify it must be proved by affidavit (h) Note the difference in punctuation between this rule and r 3 below

Dismissal of suit—Where in the case of a suit by a corporation the plaint is signed and verified by an officer *other* than a principal officer of the corporation the suit should be *dismissed* (i) Similarly the suit should be *dismissed* if in the case of an unregistered or unincorporated society the suit is brought in the names of some only of the members of the society (j) See notes above

2 [S 436] Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

Service on corporation

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) *Singer Manufacturing Co v Yar Muhammad* (191) Punj Rec no 8 p 33 10 I C 141

(c) *Schantz Corporation Ltd v Chemische Fabrik Von Heyden Aktiengesellschaft* [1911] 2 K B 516 See also *Actieselskabet Dampskib Hercules v Grand Trunk Pacific R Ilway* [191] 1 K B 2 2

(d) *Pa hauti v Gauri Kuar* (1898) 20 All 167 *Hriday Nath Roy v Akhil Chandra Roy* (1929) 49 C L J 3 7 (29) A C 445

(e) *India Gen e l S N & R Co Ld v Lal Moha* (1916) 43 Cal 441 31 I C 3

(f) *R dh Lal v East I d a R ilway* (19 6) 3 Pat 1 8 90 I C 680 (6) A I 40

(g) *Delhi a d Lond n Ba k v Oldh m* (1894) 21 Cal 60 20 I A 139 *Allen B th v Ar n Mal* (19 5) 7 Lah L J 66 68 88 I C 46 ( ) A L 338

(h) *Int rn t onal C nt nental Caoutchou Compagn e v Mehta & Co* (19 7) 31 C W N 1030 10 I C 568 (7) A C 80 *Sreenath v East Indian Railw y Coy* (189) 2 C 1 268

(i) *Yus f Beg v The Board of Foreign Miss o s of th Presbyt r an Chu ch* (1894) 16 All 4 0

(j) *Pancha ti v Gauri Kuar* (1898) 20 All 167

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business

Service by post.—The language of the old section has been enlarged so as to allow of service by post on corporation and by this means the rule is brought into line with the provisions of s 148 of the Indian Companies Act " of 1913

Power to require personal attendance of officer of corporation

3 [S 436, last para] The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit

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ORDER XXX

Suits by or against Firms and Persons carrying on business in names other than their own

Suing of partners in name of firm

1 1 [*New* R S C O 48A, r 1] (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct

(2) Where persons sue or are sued as partners in the name of their firm under sub rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons

Suits by or against firms—The whole of this Order is new It is a reproduction almost *verbatim* of the principal rules comprised in O 48A of the English rules The rules as to the *attachment* of partnership property and the execution of decree against firms will be found in O 21 rr 49 and 50 above

In applying English decisions under the corresponding rules in England it must be remembered that there is a distinction between the English and the Indian law as to the liability of partners. According to the English law the liability is joint according to the Indian law it is joint and several. See Indian Contract Act 1872 ss. 42 to 45

Under sec 45 of the Contract Act one of two joint promisees cannot sue alone This order modifies that section and if the promisees are partners enables one to sue alone but only if he sues in the name of the partnership (k)

This Order deals with the mode of suing firms Rule 1 provides that two or more persons claiming or being liable as partners may sue or be sued in the firm name Rule 3 provides that where a suit is instituted by partners in the name of their firm the plaintiffs shall on demand in writing by the defendant declare in writing the names and places of residence of the partners If the plaintiffs fail to comply with the demand the Court may stay further proceedings If the demand is complied with the suit will proceed as if all the partners had been named as plaintiffs in the plaint As regards *signature and verification* where a suit is brought in a firm name it is provided by r 1 sub r (2) that it will suffice if the pleading or any other document required to be signed or verified is signed or verified by *any one* of the partners it is not necessary that all the partners should sign or verify it As regards *appearance* in a suit brought against a firm it is to be noted that a firm cannot appear as a firm and the partners should therefore appear individually in their own names but all subsequent proceedings should continue in the name of the firm (r 6) Where a suit is brought against a firm no partner can put in a personal defence (l) He can only file a written statement *for and in the name of the firm* The decree also must be in the name of the firm (m) though all the partners may not have appeared (n)

Firm —As to the definition of a firm it is laid down in sec 239 of the Indian Contract Act 1872 that persons who have entered into partnership with one another are called collectively a firm The Calcutta High Court has held that a partnership firm is not a person but merely a collective name of the individuals who are members of the partnership and as such cannot be a partner in another firm (o) If so a firm consisting of individuals and minor firms or of minor firms exclusively cannot be a firm within the meaning of this rule

Minor —In England an infant s contract is voidable and he may be a partner He is not however personally liable for the debts of the firm but a creditor who has obtained judgment against the firm in the proper form that is a judgment against the defendant firm other than A B an infant partner may levy execution against the partnership property (p) If the action is not brought against the firm in the firm name but is brought against the partners as nominee the infant partner ought not to be joined as a party (q) In India a minor s contract is void and a minor cannot be a partner He may however be admitted to the benefits of partnership in which case his *share* in the property of the firm is liable for the obligations of the firm but he is not personally liable see Indian Contract Act 1872 s 247 The share referred to in s 247 is the right of the minor to participate in the property of the firm after its obligations are satisfied (r) When a minor has been admitted to the benefits of partnership a reference by the firm to arbitration will bind the minor to the extent of his share in the property of the firm (s) See O 21 r 50

Suit against manager and owner of a firm —In a Bombay case (t) the plaintiff filed a suit against C K manager and owner of the shop of M C It turned out that C K had died before the suit was filed and the plaintiff applied to bring the heirs of

(k) *H n S gh v F n K Cl d* (19 8) 8 Lal 1 100 I C 7 1 ( ) A I 115
(l) *Fll s v W d n* [18] 1 Q B 714
(m) *Harris v I avel n p B thers* [1893] Q B 34 3
( ) *Ly agl t Ltd v Cl rk & Co* [1891] Q B 55
(o) *Seodoyal v J h rm ll* (19 3) 0 Cal 549 557 5 8 5 I C 81 (24) A C 4
(p) *Lovell v Beauch mp* [1894] A C 607
(q) *Chandlen v Pa kes* (1800) 3 Esp 6
(r) *S y s Cha n v Krishnadhan* (19) 49 I A 108 116 49 C l 560 569 67 I C 1 4 ( ) A PC 37
(s) *Bisl mbe v Ga ga* (19 3) 5 Lah L J 5 71 I C 34 (3) A L 21
(t) *M t l l v Ch nd nal* (19 3) 25 Bom L R 1091 77 I C 19 (4) A B 15 Distin g i h *R mp tab v Gavrisl lar* (19 3) 5 Bom L R 7 8 I C 464 (24) A B 103

r 1 C K on the record The period of limitation had by that time expired and so the lower Court dismissed the suit as time barred *The High Court* reversed the decree on the ground that the suit was in substance a suit against the firm

At the time of the accruing of the cause of action '—These words show that a suit may be brought by or against a firm in the firm name though *the firm* may have been dissolved before the date of the suit provided the cause of action arose before dissolution (u)

Carrying on business in British India —This rule applies to all partnerships carrying on business in British India Therefore a firm which carries on business in *British India* may be sued in the firm name under this rule although it be a foreign firm the members of which are resident out of the jurisdiction (v) The only question to be *considered* in order to see whether the case comes within the rule is whether the firm carries on business [in British India] (w) If it does the partners may be sued in the firm name If it does not the partners cannot sue (x) or be sued (y) in the firm name *The* expre sion carry on business has no spec al legal significance It must be interpreted in the ordinary business sense (z) A firm in England cannot be said to carry on business in Bombay merely because it has employed an agent in Bombay to collect orders for the firm *the agent having no authority to accept or reject the orders* (a) it does not make any difference that the name of the firm is affixed to the agent s office (b) See notes to s 20 Carries on business

Suit by firm on promissory note passed to a member —A firm may sue on a promissory note passed to one of its members though the note has been passed to him in his name (c)

Firm as agriculturist —The definition of agriculturist in sec. 2 of the Dekkhan Agriculturists Relief Act 1879 can only apply to a firm sued under the provisions of O 30 r 1 if that firm by itself or by its servants or by tenants earns its *livelihood* wholly or principally by agriculture carried on within the limits of a district to which the Act extends The mere fact that one or all the members of a firm earn their livelihood principally from agricultural income does not make the firm itself an agriculturist within the meaning of that Act (d)

Statement of names and addresses —Rule 2 enables a *defendant* to obtain disclosure of the names of the partners in a *plaintiff firm* by a statement in writing by the plaintiffs or their pleader Under r 1 *any party* to the suit *may apply to the Court* for a statement of the names of the partners in the *plaintiff or defendant firm* to be furnished *and verified* in such manner as the Court may direct (e) It is perhaps not altogether easy to reconcile the two rules but r 2 is applicable to the case only of plaintiff whereas r 1 applies generally (f) Where an affidavit has been filed under r 1 or a declaration made under r 2 the Court has no power to require the deponent or declarant to attend to be cross examined on the affidavit or declaration nor has the Court any power to direct the separate trial of an issue as to whether a person whose name has been disclosed in the affidavit or declaration was a partner in the firm at the time the cause of action accrued (g) But the statement of names disclosed in

(u) *D & So s v Morris* (1883) 10 Q B D 463 *Pul n v Malendr* (19 1) 34 Cal I J 40 6 I C 10 (-1) A C 7-- *H rj a das v Bhagwa das* (19) 49 (al 394 96 I C 38 ( ) A C 390

(v) *W r e t r C ty & Cou ty Ba k g Co v F ba k I a l g & Co* [1894] 1 Q B 84

(w) *Ib p* 68

(x) *I y k l sh Oil Mill v Velmahomed* (19-8) 30 Bom L R 117 109 I C 99 (-8) A B 191

(y) *Von H lf ld v Re h t-er* [1914] 1 Ch 748

(z) *G t v Anders n & C* [18] 1 Q B 108 11 *per* Lord Esh r M R

(a) *Gr nt v A der on & Co* [189] 1 Q B 108

(b) *B ill v G odw n & Co* (1896) 33 C D 604

(c) *Br jol l v B dh Nath* (19 8) 55 Cal 5 1 105 I C 549 (8) A C 148

(d) *Dh amsey v Balkrish a* (19 9) 53 Bom 87 (-9) A B 3 8

(e) *B dg s & Co v Shama D & Co* (1916) I uj Rec no 8 p 6 47 I C 4--

(f) *Abrahams & Co v Du lop Pneumatic Tyre Co* [190] 1 K B 46 -0

(g) *Abrah m & Co v D l p Pneumatic Tyre Co* [190] 1 K B 46

the affidavit or declaration will be treated as embodied in the plaint and will be a necessary part of the cause of action and if the plaintiffs fail in establishing it, the suit will fail (h)

Suit by or against individual partners—See Indian Contract Act 18—, ss. 43 and 45

2 [New R S C, O 48 A, r 2] (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted

Disclosure of partners' names

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct

(3) Where the names of the partners are declared in the manner referred to in sub rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint

Provided that all the proceedings shall nevertheless continue in the name of the firm

Disclosure of partners names—See notes to r 1 above ... names and addresses If the plaintiff firm has not made a full disclosure of partners the proper procedure is not to dismiss the suit but to allow the firm ... a further declaration making a full disclosure and thus to remedy the defect

Proceedings to continue in name of firm—See notes to r 1 above ... against firms on p 850 and r 6 below Subsequent proceedings ... of firm.

3 [New R S C O 48 A r 3] Where persons ... as partners in the name of ... summons shall be served either—

Service

(a) upon any one or more of the partners, or

(b) at the principal place at which ... business is carried on within British India ... any person having, at the time of ... control or management of ... business there

(h) Ib p 51
(i) Imperial Press ... Co v B ... h Cr ... [illegible]

as the Court may direct, and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable

Service of summons—This rule is to be read with r 1 above and with O 21 r 50 It applies only to suits against partners *in the name of their firm* It provides a special mode of service upon firms *carrying on business in British India* whether the partners reside within or without British India (j) One mode of service authorized by the rule is service upon anyone or more of the partners the other is service as the principal place of business of the partnership within British India upon the manager of the business If the summons is not served in either of these ways the service is irregular (k) If it is served in either of these ways the service is good service *upon the firm* whether all or any of the partners are within or without British India The service being good service *upon the firm* any decree that may be passed in the suit against the firm may be executed against the property *of the firm* When the firm has been dissolved the only method of service is under clause (a) on a partner (l) and if service by registered post has been ordered the registered letter should be addressed to a partner and not to the firm name at the place where the *business used to be carried on* (m)

If the service is effected in the first mode prescribed by the rule that is if the service is *upon a partner* it is good service *upon the firm as well as upon that partner personally* but it is not service upon *any other member* of the firm so as to make such member a person who has been *individually* served as a partner etc within the meaning of O 21 r 50 sub r (1) cl (c) If the service is effected in the second mode prescribed by the rule that is *upon a manager* at the place of partnership business and the manager is not a partner the service is good service upon the firm but it is not service upon any member of the firm so as to make such member a person who has been *individually* served as a partner etc within the meaning of O 21 r 50 sub r (1) cl (c) (n) This distinction is important for the purposes of execution for under O 21 r 50 where a decree has been passed against a firm execution can at once issue without leave of Court against the property of the firm and also against the separate property of any individual partner who was served with the writ But execution cannot be issued without leave of Court against the separate property of any partner who was not served with the writ and did not appear (o)

Dissolution of partnership before institution of suit.—Where there has been dissolution to the knowledge of the plaintiff he cannot make an outgoing partner liable unless he served the writ of summons upon him *A* sues the firm of *B & Co* upon a promissory note passed to him by the firm When the note was given the firm consisted of three partners X Y and Z but Z had retired from the firm before the institution of the suit and A knew before he instituted the suit that Z had so retired Z resides in British India but he is not individually served as required by the proviso to this rule

(j) *Gast v Ind son & Co* [189] 1 Q B 108
(k) See *Worcester City and County Banking Co v Firbank Pauling & Co* (1894) 1 Q B 84 88 790
(l) *Hrjmu d s v Bhagwa d* (19) 49 C l 394 69 I C 36 ( ) A C 3 0
(m) (19) 49 Cal 394 69 I C 36 ('22) A C 390 *supra*
( ) *In re Ide* (1896) 17 Q B D 5
(o) *Baunab v Bank of Bengal* (1914) 19 C W N 1008 101 26 I C 800

Z does not appear *A* obtains a decree against the firm The decree cannot be executed against the personal property of *Z* Nor can *A* apply under O 21 r 50 sub r (2) for leave to execute the decree against the personal property of *Z* So also on the death of a partner his personal estate cannot be made liable unless his legal representative is joined (*p*) This is because the present rule overrides O 21 r 50 and the latter rule only applies where there has been no dissolution to the knowledge of the plaintiff (*q*) The above ruling would not apply to the case of a partner who had left the firm before the institution of the suit *without* the knowledge of the plaintiff If the plaintiff was not aware of the dissolution when he filed his suit the decree binds all the partners in the firm whether they have been served individually or not (*r*)

Service on manager, subsequent service on partner—Where a summons is served upon a manager and subsequently upon a partner it is the date of the latter service from which time is to be counted for the appearance of the defendant firm (*s*)

Principal place at which the partnership business is carried on—See notes to r 1 above Carrying on business in British India

As the Court may direct—These words do not occur in the corresponding English rule According to the English rule the summons may be served upon a partner or upon the manager at the plaintiff s option Under the present rule it would seem that the plaintiff has no such option and that he should obtain the directions of the Court as to the mode of service If the method of service prescribed by the Court is followed then *prima facie* there has been service on the firm (*t*) It is conceived however that omission to obtain such directions would not vitiate the service but would constitute at the most an irregularity within the meaning of s 99 above

Notice to be given to the person served as to the capacity in which he is served—See r 5 below and notes thereto

Right of suit on death of partner

4 [*New*] (1) *Notwithstanding anything contained in* section 45 of the Indian Contract Act 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit

(2) *Nothing in sub rule (1) shall limit or otherwise affect* any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors

Joinder of legal representative—*A* passes a promissory note for Rs 5 000 to a firm consisting of three partners *B* *C* and *D* If *B* dies *C* and *D* alone cannot sue

(*p*) *Mathuradas* v *Ebrahim* (19 7) 51 Bom 986 10 I C 871 (7) A B 581
(*q*) *Wigram* v *Cox Sons Buckley & Co* [1894] 1 Q B 9
(*r*) *Gordhandas* v *Gautmeland* (19) 7 Bom L R 541 87 I C 1051 (5) A B 331
(*s*) *Alden* v *Beckley* (1890) 25 Q B D 543
(*t*) *International Colonial Co* v *Mehta* (19) 54 C I 10 7 105 I C 356 ( ) A C 58

30, to recover the amount of the note. The suit must under s. 45 of the Contract Act, be
5 bought by *C* and *D* along with *B* s legal representative. The effect of the present rule is that where the suit is brought *in the firm name* it is not necessary to join *B* s legal representative as a party plaintiff (*u*) But the legal representative may apply to be made a party plaintiff The mere fact that he does not apply will not affect his right to claim the benefit of any decree that may be passed in favour of *C* and *D* If the suit is against the firm and one of the partners dies before or during the suit the decree can be enforced against the share of the deceased in the partnership property But if the legal representatives are not joined it cannot be enforced against the personal estate of the deceased partner (*v*)

Notice in what capacity served

5 [*New* R S C, O 48A, r 4] Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner

Notice in what capacity served—Where a suit is brought against a firm *in the firm name* the summons will be issued against *the firm* Such summons may be served either upon any one or more of the partners or upon the person in control of the business [r 3] The present rule provides that the person served should be informed by notice in writing given at the time of service whether he is served as a partner or as a person in management of the business or in both characters. *In default of notice* the person served will be *deemed*—not merely *presumed*—to be served as a *partner* If he contends that he is not a partner the proper course for him to adopt is to appear under protest under r 8 below denying that he is a partner If he does not do so he will be deemed to have been served *personally* as a partner within the meaning of O 21 r 50 sub-r 1 cl. (c) and execution may be granted against him personally (*w*)

Service on manager—If service is effected on the person in control of the business and no notice is served as provided by this rule the service is not effective and cannot be made so [Annual Practice notes to O 48A r 4].

Appearance under protest.—Where a summons is served upon a person as a partner but such person appears under protest denying that he is a partner the plaintiff may disregard the appearance altogether and proceed as if the summons had not been served that is, he may have service subsequently effected upon a partner or partners or upon any persom having the control of the business as provided by r The mere fact that the person served as a partner denies that he is a under protest does not preclude the plaintiff from firm (r 8 below)

Where a summons is served upon a person appears with denial of partner management of the bu iness the p service is then one under r

(*u*) *H* (S
(*v*) M (

Forms of notice — Take notice that the summons served herewith is served on you—

(i) as a partner in the defendant firm of *AB & Co*

(ii) or as the person having the control or management of the partnership business of *AB & Co*

(iii) or as a partner in the defendant firm of *AB & Co* and also as the person having the control or management of the partnership business of *AB & Co*

6 [*New* R S C, O 48A r 5] Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm

Appearance of partners

Appearance of partners —Though all proceedings in a suit instituted against a firm in the firm name must be conducted *in the firm name* the partners should so far as appearance is concerned appear individually *in their own names* The reason of the rule is that a firm cannot appear as a firm Where a suit is brought against a firm in the firm name the appearance of one partner is the appearance of the firm (*x*)

The only person entitled to appear in a suit against a firm are—

(i) persons who allege they are partners of the firm sued or were partners at the time the cause of action arose and

(ii) persons who are served as partners but deny that they are partners of the firm sued or were partners of the firm at the time the cause of action accrued Such persons may appear under protest See rr 7 and 8 below

A person served as a manager of the partnership business need not appear unless he is a member of the firm sued (r 7 below) A managing partner of a business firm has an implied authority in the ordinary course of business to appoint solicitors to defend a suit brought against the firm in the firm name and to instruct them to enter an appearance for the other partners as well No suit will therefore lie against the solicitors at the instance of the other partners for entering an appearance in their name without their express authority (*y*)

The expression individually is not synonymous with in person hence no partner can be forced under this rule to appear in person (*z*)

All subsequent proceedings shall continue in the name of the firm — Where persons are sued as partners *in the firm name* the plaint (*a*) and every subsequent proceeding must be headed with the firm name as defendants The proceedings in a suit so brought continue in the name of the firm even though the names of the partners are disclosed (*b*) The written statement must be headed in the firm name and the decree also must be against the firm in the firm name The Court cannot in such a suit pass any *personal* decree against a partner unless he is sued *personally* along with the firm (*c*)

Defence —Where a suit is brought against a firm *in the firm name* on a claim against the partnership the partners ought if they can agree to put in one written statement But if they cannot agree on one defence each partner is entitled to put in a separate

(*x*) *Lysaght Ltd v Clark & Co* [1891] 1 Q B 55 5 6

(*y*) *Tomlinson v Broadsmith* [1896] 1 Q B 386

(*z*) *Bridges & Co v Sham Din & Co* (1918) Punj Rec no 8 p 6 47 I C 4

(*a*) *Ajit ng v Grunn ng* (19 5) 7 Bom L R 998 94 I C 969 ( ) A B 494

(*b*) *Pulin v Mahe d a* (19 1) 34 Cal L J 405 67 I C 10 (1) A C

(*c*) *Taylor v Collier* (188) 30 W R (Eng) 01

to recover the amount of the note. The suit must, under s. 45 of the Contract Act, be bought by *C* and *D* along with *B* s legal representative. The effect of the present rule is that where the suit is brought *in the firm name* it is not necessary to join *B* s legal representative as a party plaintiff (*u*) But the legal representative may apply to be made a party plaintiff The mere fact that he does not apply will not affect his right to claim the benefit of any decree that may be passed in favour of *C* and *D* If the suit is against the firm and one of the partners dies before or during the suit the decree can be enforced against the share of the deceased in the partnership property But if the legal representatives are not joined it cannot be enforced against the personal estate of the deceased partner (*v*)

Notice in what capacity served

5 [*New* R S C, O 48A, r 4] Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner

Notice in what capacity served—Where a suit is brought against a firm *in the firm name* the summons will be issued against *the firm* Such summons may be served either upon any one or more of the partners or upon the person in control of the business [r 3] The present rule provides that the person served should be informed by notice in writing given at the time of service whether he is served as a partner or as a person in management of the business or in both characters *In default of notice* the person served will be *deemed*—not merely *presumed*—to be served as a *partner* If he contends that he is not a partner the proper course for him to adopt is to appear under protest under r 8 below denying that he is a partner If he does not do so he will be deemed to have been served *personally* as a partner within the meaning of O 21 r 50 sub r 1 cl (c) and execution may be granted against him personally (*w*)

Service on manager—If service is effected on the person in control of the business and no notice is served as provided by this rule the service is not effective and cannot be made so [Annual Practice notes to O 48A r 4]

Appearance under protest—Where a summons is served upon a person as a partner but such person appears under protest denying that he is a partner the plaintiff may disregard the appearance altogether and proceed as if the summons had not been served that is he may have service subsequently effected upon a partner or partners or upon any persom having the control of the business as provided by r 3 above The mere fact that the person served as a partner denies that he is a partner and appears under protest does not preclude the plaintiff from *otherwise* serving the summons on the firm (r 8 below)

Where a summons is served upon a person both as a partner and manager and such person appears with denial of partnership but does not deny that he is the person in management of the business the plaintiff is entitled to a decree against the firm for the service is then one under r 3 cl. (b) and such service is good service upon the firm

(*u*) *Hari S gh* v *Karam Cha d* (19°) 8 Lah 1 100 I C. 1 (2) A L. 115
(*v*) *M thurad* v *Ebrah m* (19 7) 1 Bom 98
103 I C 871 (7) A B 581
(*w*) *Baw ab* v *B k of B gal* (1914) 19 C W N 1008 6 I C 866

Forms of notice — Take notice that the summons served herewith is served on you—

(i) as a partner in the defendant firm of *AB & Co*

(ii) or as the person having the control or management of the partnership business of *AB & Co*

(iii) or as a partner in the defendant firm of *AB & Co* and also as the person having the control or management of the partnership business of *AB & Co*

6 [*New* R S C O 48A r 5] Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm

Appearance of partners

Appearance of partners —Though all proceedings in a suit instituted against a firm in the firm name must be conducted *in the firm name* the partners should, so far as appearance is concerned appear individually *in their own names* The reason of the rule is that a firm cannot appear as a firm Where a suit is brought against a firm in the firm name the appearance of one partner is the appearance of the firm (*x*)

The only person entitled to appear in a suit against a firm are—

(i) persons who allege they are partners of the firm sued or were partners at the time the cause of action arose and

(ii) persons who are served as partners but deny that they are partners of the firm sued or were partners of the firm at the time the cause of action accrued Such persons may appear under protest See rr 7 and 8 below

A person served as a manager of the partnership business need not appear unless he is a member of the firm sued (r 7 below) A managing partner of a business firm has an implied authority in the ordinary course of business to appoint solicitors to defend a suit brought against the firm in the firm name and to instruct them to enter an appearance for the other partners as well No suit will therefore lie against the solicitors at the instance of the other partners for entering an appearance in their name without their express authority (*y*)

The expression individually is not synonymous with in person hence no partner can be forced under this rule to appear in person (*z*)

All subsequent proceedings shall continue in the name of the firm — Where persons are sued as partners *in the firm name* the plaint (*a*) and every subsequent proceeding must be headed with the firm name as defendants The proceedings in a suit so brought continue in the name of the firm even though the names of the partners are disclosed (*b*) The written statement must be headed in the firm name and the decree also must be against the firm in the firm name The Court cannot in such a suit pass any *personal* decree against a partner unless he is sued *personally* along with the firm (*c*)

Defence —Where a suit is brought against a firm *in the firm name* on a claim against the partnership the partners ought if they can agree to put in one written statement But if they cannot agree on one defence each partner is entitled to put in a separate

(*x*) *Lysaght Ltd* v *Clark & Co* [1891] 1 Q B 5 5 6

(*y*) *Tomlinson* v *Broadsmith* [1896] 1 Q B 386

(*z*) *Brady & Co* v *Shamas Din & Co* (1918) Punj Rec no 8 p 96 47 I C 4

(*a*) *Ajit ng* v *Grunn g* (19) 7 Bom L R 938 94 I C 969 ( ) A B 494

(*b*) *I l n* v *Mahend a* (19 1) 34 Cal L J 40 67 I C 10 (1) A C

(*c*) *Taylor* v *Collier* (188) 30 W R (Eng) 01

written statement In any case the written statement should be a written statement *of the firm* but where the partners cannot agree on one defence and a partner puts in a separate defence the proper form would be written statement of the defendant firm of *AB & Co* by *XY* one of the partners appearing in the suit It may be asked what is the plaintiff to do if he finds a series of inconsistent defences put in by the different partners? The answer is that to entitle him to judgment against the partnership he must to use a homely phrase beat all the defences—that is to say he must show and satisfy the judge at the trial that not one of the defences prevents a judgment being entered against the partnership (*d*) What would happen if some of the partners did not appear at all? In case say one partner alone chooses to appear he would be entitled and would be bound to put in a written statement for the firm He might if he choose add by so and so one of the partners served and appearing *but his defence would be the defence of the firm* and the suit would be tried upon that defence and in that case judgment could be obtained *against the firm* Of course if the partner chose to put in an improper defence and so rendered the partnership liable in a case where it ought not to be made liable he might thereby as between himself and his co partners be committing a breach of duty for which he would be liable to them but so far as the plaintiff is concerned the plaintiff would be able to obtain judgment against the firm A partner is not entitled in a suit against a firm in the firm name to put in a personal defence he can only put in a defence for and in the name of the firm (*e*) But where a partner is sued *personally* along with the firm he may put in a *personal* defence besides defence for the firm (*f*)

Decree —Where a suit is brought against a firm in the firm name the decree must be against the firm in the firm name (*g*) From this it follows that if one of the partners fails to appear no decree can be passed against him separately for want of appearance (*h*) and if any one partner does appear no decree can be passed against the firm for want of appearance (*i*) the appearance of one partner being the appearance of the firm (*j*) It can never be said that a decree against a firm is *ex parte* against one of the partners because he has not appeared As soon as a decree is passed against a firm the *assets of* the firm are liable to satisfy it (*k*) The firm name is only a compendious way of describing in the writ the partners who compose the firm and a plaintiff who sues a firm sues the partners (*l*) But though the decree against the firm makes them all liable as to the partnership property it can only be decided in execution proceedings whether a particular partner is personally liable to satisfy the decree (*m*) See O 21 r 50 and notes to r 8 below As to minor partner see notes to r 1 Minor

No appearance except by partners

7 [*New* R S C, O 48A r 6] Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued

See notes to r 6 above Appearance of Partners

(*d*) *Per* Romer L J *Ellis* v *Wadeson* (1899) 1 Q B 714 71

(*e*) *Ellis* v *Wadeson* [1899] 1 Q B 714 *Inter* ... (19 7) 54 Cal 10 105 I C 3 6 ( ) A C 58

(*f*) *Taylor* v *Collier* (188) 30 W R (Eng) 01

(*g*) *Jackson* v *Litchfield* (188) 8 Q B D 4 4

(*h*) *Jackson* v *Litchfield* (188) 8 Q B D 4 4 4 8

(*i*) *Adam* v *Townend* (1884) 14 Q B D 103

(*j*) *Lysaght Ltd* v *Clark & Co* [1891] 1 Q B 55 5 6

(*k*) *Ad ppa* v *Pragj* (19 4) 6 Bom L R 388 80 I C 713 (4) A B 366

(*l*) *Ram Prasad* v *Ba adji* (19) 49 Cal 4 69 I C 88 ( ) A C 408

(*m*) (19 4) 6 Bom L R 388 80 I C 3 (4) A B 366 *supra*

8 [*New* R S C O 48A r 7] Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared

Appearance under protest

Appearance under protest —Where a person served with a summons as a partner denies that he is a partner he may enter appearance under protest under this rule Where an appearance is entered under protest its effect is to nullify the service altogether as regards the defendant firm (*n*) In such a case the plaintiff may disregard the appearance under protest altogether and have the summons served upon one who is admittedly a partner or one who has the control or management of the defendant firm as provided by r 3 above and having obtained a decree against the firm he may apply for leave to execute it against such person under O 21 r 50 But the plaintiff is not bound to adopt this course He may take out a chamber summons and contend that the party who appeared under protest is a partner or was a partner at the time the cause of action accrued and apply on that basis to strike out of such appearance the denial of partnership See Annual Practice notes to O 48 A rr 4 and 7 In a case where the plaintiff did not take out a summons to decide whether the party appearing under protest was a partner he was allowed an adjournment to serve the firm But as it was not equitable that the claim should be left hanging over the protesting party pending proceedings under O 21 r 50 the Court directed that the issue whether or not he was a partner should be tried in the suit (*o*)

Party appearing under protest not entitled to file written statement on his own behalf —A party appearing under protest under this rule is not entitled to file a written statement on his own behalf even one denying that he is a partner (*p*)

Party appearing under protest not entitled to dispute liability of firm —In England a party appearing under protest is not allowed to plead in the alternative that if he is a partner the firm he is not liable (*q*)

Defence to party appearing under protest in proceeding under O 21 r 50 — A party appearing under protest is entitled to take any defence in a proceeding against him under O 21 r 50 in addition to the defence that he was not a partner of the defendant firm, unless to do so will be to negative the provisions of a rule of procedure (*r*)

9 [*New* R S C O 48 A, r 10] This order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common, but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and enquiries may be directed to be taken and made and directions given as may be just

Suits between co partners

(*n*) *International Colonial Cotton Co* v *Melta* (19 7) 34 Cal 10 7 10 I C 3 6 ( ) A C 7 8 *Charry* v *Iolloom I* (19 6) 50 Bom 66 99 I C 49 (26) A B 58

(*o*) *Ithalda* v *Hansraj* (19 1) 3 I m L R 1 49 64 I C 688 (1) A B 48

(*p*) *International Continental Caoutchoue Compagnie* v *Melta & Co* (19) Cal 10 7 10 I C 356 (27) A C

(*q*) *Weir & Co* v *McVicar & Co* 1

(*r*) *Chhattoo Lal Misser & Co* v (19) 56 Cal 0 (20) A C

Scope of the rule —This rule provides that suits between a firm and one of its members or between two firms with a common member may be instituted in the firm name provided the firms carry on business in British India (r 1) But no execution can be issued in such a suit *except by leave of the Court*

10 [*New* R S C, O 48 A, r 11] Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name, and, so far as the nature of the case will permit, all rules under this Order shall apply

Suit against person carrying on business in name other than his own

Scope of the rule —A person trading by himself as a firm or in an assumed or trading name may *be sued* in his trade name but he cannot *sue* in that name (s) The words as if it were a firm and so far as the nature of the case will permit shew that the case is not identical for one man cannot constitute a firm (t) If a sole proprietor dies a suit after his death must be brought against his legal representatives (u) It cannot *after* his death be brought against him in his trade name If the suit is brought against him in his trade name the suit is one against a dead man and a nullity (v) If he dies *pending the suit* the suit will abate unless his legal representative is brought on the record within 90 days from the date of his death (w) This rule does not enable a plaintiff to sue the proprietor of a newspaper *in the name of the newspaper* (x)

Non resident foreigner —As to the corresponding English rule it has been held that it does not apply where the person carrying on business in a name other than his own is a foreign subject resident out of the jurisdiction though he may carry on business through an agent within the jurisdiction The decision proceeded upon the broad ground that an English Court has no jurisdiction over foreigners residing abroad merely because they carry on business within the jurisdiction and that the words any person though large enough to include a foreigner refer only to an English subject (y) The question as to whether the Courts of this country have jurisdiction over foreigners residing abroad merely because they carry on business here through an agent arose in the recent Privy Council case of *Annamalai* v *Murugasa* ( ) but the point was not decided by their Lordships In both Courts in India it was assumed that the Court had jurisdiction but their Lordships said This assumption appears to their Lordships to require more attention than it had received

Application of foregoing rules —By the latter part of this rule all the foregoing rules of this Order relating to proceedings against firms are to apply to a person *trading* in a name other than his own *so far as the nature of the case will permit* By virtue of r 1 this rule does not apply unless the business is carried on in British India. By virtue of rr 1 and 2 the person sued in his trade name may be required to disclose his real name and private address By virtue of r 3 the summons may be served upon the person *sued or upon any person having the control or management of the business* but in the latter case execution cannot be issued against the personal property of the persons sued except by leave of the Court [O 21 r 50] As regards appearance the person sued must appear in his own name (r 6)

(s) *Mason* v *Mogridge* (18) 8 Times R p 80
(t) *Emperor* v *G rusha* ... (19 3) 2 Bom L R 7 85 I C 464 ( ) A B 103
( ) *H b b Bax* v *Sam l Fu & Co* (19) 23 All L J 961 89 I C 2 (26) A A 161
(v) ... Bom L R 7 85 I C 464 (24) A B 109 *supra*
(w) *P m I* ... *d* v ... *& Co* (19) 49 Cal 5 4 63 I C 84 ( ) A C 404
(x) *D Bern l* v *New York Herald* (1893) Q B 97 (foot note)
(y) *St Goba Cha* ... *d C* ... *Co* v *Hoyermann Agency* (1893) Q B 96
(z) (1903) 26 Mad 544 30 I A 0

ORDER XXXI

Suits by or against Trustees, Executors and Administrators

1 [S 437] *Representation of beneficiaries in suits concerning property vested in trustees etc.* In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit But the Court may, if it thinks fit, order them or any of them to be made parties

Scope of the rule.—This rule applies only where the contention is between the beneficiaries and a third person It does not apply where the contention is between beneficiaries and trustees or between the beneficiaries *inter se*. In suit between beneficiaries and a third person the trustees sufficiently represent the beneficiaries (*a*) though the beneficiaries are an unascertained and unascertainable class (*b*) or persons (*c*) As to declaratory decrees it is provided by s 43 of the Specific Relief Act 1877 that a declaration made under s 42 of that Act is binding where any of the parties are trustees on the persons for whom if in existence at the date of the declaration such parties would be trustees Compare R S C 16 r 8

When beneficiaries may be added as parties—Beneficiaries should alway be made parties when the executors are wholly uninterested in the case as where they have fully administered the estate (*d*) or where they have an interest adverse to that of the beneficiaries (*e*) Where a suit was brought by an executor and the names of the beneficiaries who took possession of the estate pending the suit were substituted as plaintiffs it was held that it did not amount to a substitution of new plaintiffs within the meaning of s 22 of the Limitation Act (*f*)

A purchases certain property at an execution sale in the name of *B* If the judgment debtor seeks to set aside the sale *A* is by virtue of this rule not a necessary party to the proceeding (*g*)

2 [S 438] *Joinder of trustees executors and administrators* Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties

Trustees—The word trustees has been newly added in this rule

(*a*) See as to beneficiaries unde a will *Ardesir* v *Hir b* (1884) 8 Bom 4 4

(*b*) *Fuss ll* v *D d g* (1884) 7 Ch D 37 *Re Sl llo* (1888) 3J Ch D 50

(*c*) *Ca d j* v *Cur n Howe* [1901] Ch 479

(*d*) *Clegg* v *Rowland* (1866) L R 3 Eq 368 3 3

(*e*) *B f rd* v *Ra a bba* (1890) 13 Mad 19

(*f*) *Jahr ab* v *Brojo* (1903) C W N 81

(*g*) *B roda* v *Chu der* (190) 9 Cal 68

Several trustees executors or administrators—This rule applies only to suits against and not to suits by trustees executors or administrators It provides that all executors who have proved the will should be made parties to the suit. The Court may however entertain an application as for a receiver even though all proving executors are not made parties to the suit (h) An executor who has neither proved nor intermeddled *with the estate cannot be sued as representing the estate* (i) *See Indian* Succession Act 39 of 1925 sec 311

Outside British India —These words have been substituted for the words beyond the local limits of the jurisdiction of the Court (j)

Administration decree—A decree for general administration cannot be passed without a general administrator (k)

3 [S 439] Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her

Husband of married executrix not to join

ORDER XXXII

Suits by or against Minors and Persons of Unsound Mind

1 [S 440 1st para] Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor

Minor to sue by next friend

Minor—Every person domiciled in British India who has not completed the age of 18 years is a minor In the case however of a minor of whose person or property a guardian has been appointed by a Court of Justice or whose property is under the superintendence of a Court of Wards the age of majority is deemed to have been attained on the minor completing his age of 21 years see Indian Majority Act IX of 1875 s 3

Object of having next friend or guardian ad litem—As a minor is deemed incapable of prosecuting or defending a suit himself it is necessary that his interests in the suit should be watched by an adult person Such person is in the case of a minor plaintiff called his next friend and in the case of a minor defendant his guardian ad litem or guardian for the suit But neither the next friend nor the guardian ad litem is a *party* to the suit (l) The next friend or guardian ad litem may choose his own attorneys or change them (m) As to liability of next friend for costs see notes below

Title of suit—Where a suit is brought on behalf of a minor the title of the suit should run thus *A B* a minor by his next friend *C D* v *X Y* Where a suit is brought against a minor the title of the suit should be *F G* v *A B* a minor by his guardian ad litem *C D* Where the title of a suit in a case was *A B* for self and his minor daughter *C D* instead of *A B and C D* a minor by her next friend *A B* and the objection was raised for the first time in appeal it was held that the error did

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(h) *Hafizabai* v *Kazi Abd l* (189) 19 Bom 83 8
(i) *M hamid* v *I t hle* (1894) A C 437
(j) See *K mar S ad nd* v *Dhi dra* (1905) C L J 454
(k) See *R Tol m* (189) 1 C 866
(l) *R p Chn I* v *Dasodha* (1908) 30 All 55 56
(m) *Di endra* v *H lson* (1901) 28 Cal 64

not affect the merits of the case and that it was not therefore fatal to the suit (n) [s 99] See notes to r 3 below under the head Where a minor defendant is substantially represented by a guardian ad litem

Objection to authority of next friend—Where a minor plaintiff has a cause of action no objection to the *authority to sue* of the next friend through whom the suit is brought will be entertained in appeal (o)

When minor may sue without next friend—A minor may sue in a Presidency Small Cause Court without a next friend when the amount claimed does not exceed Rs 500 and is due to him for wages or for work done as a servant Presidency Small Cause Court Act 15 of 1882 s 32

Liability of next friend for costs—Where a suit brought by a minor by his next friend is dismissed and the Court finds that the suit was not for the benefit of the minor the Court may direct the next friend *personally* to pay the costs (p) But if the Court finds that there were reasonable grounds for instituting the suit and the next friend has acted *bona fide* the Court will not mulct the next friend in costs and will direct the costs to come out of the property of the minor (q)

There is nothing in the Code to authorise a Court to decree costs against a guardian ad litem except in the case referred to in r 11 below (r)

Suit on behalf of an alleged minor who in fact is not a minor—A suit i instituted on behalf of a person alleged to be a minor by his next friend. It is found that the plaintiff was not in fact a minor at the date of the institution of the suit In such a case the suit should, according to Allahabad decisions be dismissed (s) according to Calcutta (t) Madras (u) and Lahore (v) decisions the plaint should be returned for amendment. The latter seems to be the better opinion.

Adult sued as minor—Where an adult is sued as a minor by his guardian ad litem and a decree is passed against him he is estopped from disputing the validity of the decree if he knew of the suit before the decree was passed If his property is sold in execution of the decree he is estopped from impeaching the same if he knew of the suit or of the proceedings in execution before the sale (w)

Minor suing as adult.—Where a suit is brought by a minor without a next friend, and the defendant is aware of the plaintiff s minority but does not object and the plaintiff attains majority before the decree is passed the decree is binding upon the parties (x)

Estoppel—A minor who representing himself to be a major collects rents and gives receipts therefor is estopped from again recovering the rents once paid to him by instituting a suit through a next friend (y) Similarly a minor who representing himself to be of full age sells certain property and executes a deed of sale is estopped from suing to set aside the sale on the ground that he was a minor at the date of sale (z) But if the purchaser knew that the vendor was a minor the purchaser could not be said to have been misled by the false representation as to the vendor s age and the suit to set aside the sale would not then be barred (a) A Court of Equity will deprive a fraudulent

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(n) *Alim* v *Jh lo* (1886) 1 Cal 48

(o) *H d R der I k l* (1884) 10 Cal 6 6 11 I A 6

(p) *Gee eballa* v *Ch nde K t* (188) 11 Cal 13

(q) *D el b i* v *Jefferson* (1886) 10 Bom 48

(r) *Naras nha* v *Lakshmipat* (1881) 3 Mad 63 *S t Ahmad* v *Am na* (19 8) 50 All 33 113 I C 434 (29) A A 18

(s) *Sh o i* v *Bh t S gh* (1898) 0 All 90 *R h t Amin* v *Sl ka Lal* (19 3) 4 All 01 77 I C 30 (4) A A 54

(t) *Taqui J n* v *Obaidulla* (1894) 1 Cal 866

(u) *Sh m ga* v *Nar jana* (1917) 40 Mad 743 41 I C 510

( ) *Amrit r a* v *Gamun* (19 6) 89 I C 363 (6) A L 8

(w) *Sesh giri* v *H mantha* (1915) 39 Mad 1031 3 I C 391 *Ramachari* v *Durai s mi* (1899) 21 Mad 167

(x) *F l Bibi* v *Khokai* (19 8) 5 Cal. 71 111 I C 349 (8) A C 573

(y) *I a F t* v *Shew Nandan* (190) 29 Cal 1 6

(z) *Ga sh* v *Bapu* (189) 21 Bom 198

(a) *Mohori* v *Dh rmoda* (1903) 30 Cal 39 30 I A 114

minor of the benefit of the plea of infancy but he who invokes the aid of the Court must establish not only that a fraud was practised on him by the minor but that he was deceived into action by the fraud (b) It is clear that if the purchaser *knew* that the vendor was a minor he could not be said to have been deceived into action by the minor s misrepresentation as to his age

Where question of minority is in dispute—Where a person is sued as a major but he claims to be a minor the Court should frame an issue for the determination of the question of minority and for that purpose appoint a guardian for the alleged minor (c)

Attorney s Costs—An attorney is entitled to recover from the infant s estate the costs of a proper suit or defence of a suit in which the estate was involved. He is also entitled to have a charge declared on the estate for the amount of his costs (d)

2 [S 442] (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented

Where suit is instituted without next friend plaint to be taken off the file

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit

Taking the plaint off the file—This rule contemplates the case where a suit is instituted without a next friend by a person who is alleged by the defendant to be a minor In such a case the defendant may apply under this rule to have the plaint taken off the file To bring his case within the rule the defendant must show that the plaintiff is a minor and that the suit was instituted without a next friend Now the fact of minority—

(i) may either be apparent on the face of the plaint or

(ii) it may be ascertained upon objection by the defendant and enquiry by the Court

In case (i) the practice is to take the plaint off the file (e)

In case (ii) i e where the fact of minority is established after evidence has been taken on the point it may be found—

(a) that the plaintiff instituted the suit with the knowledge of the fact of minority and with the intention of deceiving the Court and evading the payment of costs in the event of failure or

(b) that the plaintiff had no such knowledge or intention

In case (a) the practice according to the Bombay decisions is to make an order under this rule directing the plaint to be taken off the file (f) According to the Calcutta decisions the Court should pass a decree dismissing the suit The Calcutta High Court holds that the procedure prescribed by this rule namely taking the plaint off the file applies only to those cases where the fact of minority is apparent on the face of the plaint that is to say in case (i) and that it does not apply where the fact of minority is established on enquiry held by the Court upon that point (g) The difference between

(b) *Brohmo D tt v Dh rmod s* (1899) 6 C l 381
(c) *Na sey T ker y & Co v Sachi dranath* (19 9) 31 Bom L R 100
(d) *W k v Dhu oo B boo* (1881) 7 C l 140 *Sh m Cha an v Chowdhry Deby S ngh* (1894) 21 Cal 8 *A ma Krish v Hari S ra n* (1916) 43 Cal 6 6 33 I C 1 *Nccalso l so v Appasam* (1 4) 17 M d 3
(e) *B l a Bh tt v Ram Lal* (1886) 13 C l 189 *R tt bai v Chabildas* (1889) 13 Bom
(f) *R tt nbai v Chabil las* (1889) 13 Bom
(g) *Be i Ram Bhutt v Ram Lal* (1886) 13 Cal 1 9

the practice of the two Courts is important in this way that while an appeal lies from a decree dismissing a suit no appeal lies from an order directing a plaint to be taken off the file

In case (b) the practice is to stay proceedings and to allow sufficient time to enable the minor plaintiff to be represented by a next friend (*h*)

The Court should take notice of the irregularity and refuse to proceed even if the suit is *ex parte* (*i*) If the defendant appears and does not object the Court should not reject the plaint but should allow the plaintiff time to get himself properly represented (*j*) When a next friend is appointed the objection that the suit was originally instituted without a next friend can no longer be urged (*k*) If the plaintiff attains majority before the Court has decided that he is a minor there is no necessity to appoint a next friend (*l*)

Costs—When a suit is instituted by a minor without a next friend the pleader or any other person presenting the plaint is liable for costs and the Court should not render the property of the minor liable for costs (*m*)

Decree for a minor in a suit instituted by him without a next friend—*Where a suit is instituted by a minor without a next friend and the defendant* does not object to it he will be deemed to have waived his objection The defendant cannot in such a case after a decree has been passed against him object to the execution of the decree on the ground that the suit was instituted by the minor without a next friend. The absence of a next friend does *not* make the suit *a nullity* The institution of a suit by a minor without a next friend is *merely an irregularity* which can be waived by the conduct of the defendant (*n*)

Guardian for the suit to *be appointed by Court for* minor defendant

3 [S 446, 1st para S 456] (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice

(*h*) *Be i Ram Bh tt v Ra J l* (1886) 13 Cal 189 *Ratt b i v Ch i ll* (1889) 13 Bom 7 *Rarucha v Man kk l* (19 3) 44 Mad L J 1 4 I C 309 (23) A M 3

(*i*) *M j S v M g Nyi* (19) 3 Rang 39 89 I C 8 0 (2) A R 3

(*j*) *Al ilm d v S d M an* (19 3) 4 Lah 300 5 I C 10 8 (4) A L 18

(*k*) *Sa k r v D l* (19 3) 43 M d L J 57 3 I C 491 ( ) A M 2 9

(*l*) *Parichan v M kkal* (19 3) 44 Mad L J 515 74 I C 309 (3) A M 5 3

(*m*) *A ich nd v Collector of Sholapu* (1889) 13 Bom 234

(*n*) *K malaksh v Ramasami* (1896) 19 Mad 1 7

minor of the benefit of the plea of infancy but he who invokes the aid of the Court must establish not only that a fraud was practised on him by the minor but that he was deceived into action by the fraud (*b*) It is clear that if the purchaser *knew* that the vendor was a minor he could not be said to have been deceived into action by the minor s misrepresentation as to his age

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In case (ii) i e where the fact of minority is established after evidence has been taken on the point it may be found—

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In case (a) the practice according to the Bombay decisions is to make an order under this rule directing the plaint to be taken off the file (*f*) According to the Calcutta decisions the Court should pass a decree dismissing the suit The Calcutta High Court holds that the procedure prescribed by this rule namely taking the plain off the file applies only to those cases where the fact of minority is apparent on the face of the plaint that is to say in case (i) and that it does not apply where the fact of minority is established on enquiry held by the Court upon that point (*g*) The difference between

(*b*) *Brohmo Dutt* v *Dharmodas* (1899) 6 Cal 381

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(*d*) *W tk s* v *Dh a oo B boo* (1881) 7 Cal 140 *Sham Cha* v *Chowdhry Debya Si gh* (1894) 21 Cal 8 *K mar Krish a* *H ri N ra n* (1916) 43 Cal 6 6 33 I C 04 *Nocal B* v *Appasam* (1 94) 1 M d 5

(*e*) *B i I Bh ll v P m Lal* (18 6) 13 Cal 1 0 *hall bai* v *Chabildas* (1853) 13 B m

(*f*) *J tto ba* v *Chabild s* (1889) 13 Bom

(*g*) *B i P m Bhull* v *I m Lal* (1886) 13 Cal 1 9

the practice of the two Courts is important in this way that while an appeal lies from a decree dismissing a suit no appeal lies from an order directing a plaint to be taken off the file O rr

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The Court should take notice of the irregularity and refuse to proceed even if the suit is *ex parte* (*i*) If the defendant appears and does not object the Court should not reject the plaint but should allow the plaintiff time to get himself properly represented (*j*) When a next friend is appointed the objection that the suit was originally instituted without a next friend can no longer be urged (*k*) If the plaintiff attains majority before the Court has decided that he is a minor there is no necessity to appoint a next friend (*l*)

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Guardian for the suit to be appointed by Court for minor defendant.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice

(*h*) *De . . P . . Eh . . v Ram Lal* (18 6) 13 Cal 1 9 *Faronba v Chal . .* (18 9) 13 . . . *P . . cha v Manakk l* (1923) 44 Mad L J 515 4 I C 309 (23) A M 5 3

(*i*) *M . . g S . . v Ma ng Ny* (192) 3 Rang 239 89 I C 8 0 (. .) A R 3

(*j*) *Al Ahmad v S d Mian* (19 3) 4 Lah 390 5 I C 10 . . (4) A L 1 8

(*k*) *Sa kara v Derak* (1923) 43 Mad L J 5 2, 3 I C 491 (22) A M 25

(*l*) *P . . chan v Man kkal* (1923) 44 Mad L J 515 4 I C 309 (23) A M 5 3

(*m*) *Amichand v Collector of Shol pur* (1 9) 13 Bom 234

(*n*) *Kamalaksh v P . . maram* (1 96) 19 Mad, 1

3 to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule

Sub-rule (4) is new

Guardian ad litem—Where a guardian ad litem has once been appointed, his appointment endures for the whole of the litigation including proceedings in execution and appeal (*o*) The Calcutta High Court has held that a guardian ad litem appointed in the original suit does not continue as such in execution proceedings without fresh appointment (*p*) But it is submitted that this is erroneous for execution proceedings are a continuation of the suit

A guardian ad litem is *not a party* to a suit or appeal Therefore a suit or an appeal is not time barred merely because the order appointing a guardian ad litem is not made until after the expiration of the period of limitation prescribed for the suit or appeal (*q*)

Proper person to be appointed guardian ad litem—It is the duty of the judge himself to decide who is the proper person to be appointed as guardian ad litem (*r*)

Plea of minority—*A* sues *B* *B* alleges that he is a minor In such a case the Court should frame a preliminary issue on the question of minority and appoint a guardian for the purpose of the enquiry on the question of minority If the defendant is found to be a minor a guardian ad litem should be appointed for him but if he is found to be a major the guardian appointed for the inquiry should cease to act and the defendant may conduct his own case (*s*) So also if a dispute arises as to whether a minor is the legal representative of a deceased party the Court should appoint a guardian ad litem and decide the matter (*t*)

Non representation—The provisions of this rule as to the appointment of a guardian ad litem for a minor defendant are imperative Hence if a minor is sued without a guardian ad litem and a decree is passed against him the decree is a nullity and it cannot be enforced against him (*u*) For the same reason it cannot operate as *res judicata* (*v*)

The Allahabad High Court has held that a minor against whom a decree has been passed without the appointment of a proper guardian ad litem may if the facts of the case justify, in that very suit (1) appeal from the decree or (2) apply for a review of judgment or (3) apply for an order under r 5 (2) below according as the circumstances of the case may permit or he may bring a regular suit to set aside the decree and the sale (if any) in execution of the decree (*w*) A minor however cannot resist *execution* of the

(*o*) *Jwala* v *I rbhu* (180) 14 All 55 [illegible] v *Alakarajamba* (1833) M 1 18 *Muz ff All Kh n* v *I rbatti* (190) 9 All 640 *Rajkishor* v *Ram Ch l m* (19 1) 6 Pat L J 1 1 [illegible] I C 3 (22) A 1 2 6 *Sh mbh* v *Kanhaya* (1922) 44 All 619 I C 4 7 (22) A A 33 *Bh gel* v *Dharma* (19 3) 45 All 6 3 5 I C 609 (4) A A 9

(*p*) *Salal dd* v *Af a Begum* (1923) 28 C W N 963 84 I C 63 (5) A C 23

(*q*) *Khem Karan* v *H Dayal* (188) 4 All 3 *I p Chand* v *I asodha* (190) 30 All 55

(*r*) *Ramchand a Das* v *Jot pras d* (190) 29 All 6 5 6 8

(*s*) *K Das* v *Kasim Sait* (1893) 16 Mad 344

(*t*) *P kma i* v *I e as mi* (19 4) 47 Mad L J 3 0 80 I C 94 (4) A M 813

(*u*) *D k h r* v *I cet* (189) 4 Cal 5 *Bh re M l* v *H r Kish Da* (190) 4 All 393 *Ha uman M hamm d* (1906) 9 All 3 *D j* v *Dh j m* (1888) 1 Bom 18 *I hd-u Nisa* v *M h mmed* (1909) 36 I A 168 31 All 5 3 I C 864 *I art b S gh* v *Bh b ta Singh* (1913) 40 I A 18 3 All 4 7 21 I C 2 9 *Pu h d* v *R poy* (1913) 17 C W N 549 18 I C 8 9 *N rendra Jog d a* (1914) 19 C W N 53 2 I C 13 *S r d a* v *Aghore* (1920) 5 C W N 6 I C 464, *Umapati* v *Sheikh M u lla* (19 3) 3 Cal L J 496 I C 4 (3) A C 6

(*v*) *Dam* v *I akrya* (19 0) 44 Bom 6 6 I C 4

(*w*) *Bh gw* v *Ia m S kh Da* (191) 39 All 8 10 11 36 I C 368 *Sh m Lal* v *Ghas ta* (1901) 3 All 459 (FB)

decree on the ground that the decree is a nullity for a minor not represented by a proper guardian ad litem as where the guardian ad litem is a person whose interest is adverse to that of the minor [r 4] cannot be said to be a party to the suit within the meaning of s 47 above (*x*) O 3

The Allahabad High Court has held that where a decree in a suit against a minor is set aside in a subsequent suit by the minor on the sole ground that he was not represented by a proper guardian ad litem the Court whose decree is set aside has inherent power to restore the suit and to proceed with the appointment of a fit and proper person as guardian ad litem for the minor defendant (*y*) But the Madras High Court has held that there is no such inherent jurisdiction (*z*) Again the Allahabad High Court has held that where an ex parte decree has been passed against a minor not properly represented the minor may apply to have the decree set aside under O 9 r 13 (*a*) The Madras High Court has held that no such application is competent the reason given being that a minor not properly represented in a suit cannot be regarded as a party to a suit and an application under O 9 r 13 can only be made by a party to the suit (*b*)

Substantial representation—When a minor defendant is not represented at all as in the cases referred in the preceding paragraph he is not a party to the suit and the decree as against him is a nullity That must be distinguished from another class of cases where the Court has recognised a guardian ad litem but has made no formal appointment or has made an appointment which is open to objection owing to some defect of procedure The rule in this latter class of cases is different for the decree will bind the minor unless it is shewn that the defect of procedure has prejudiced him In this class of cases the leading case is that of *Walian* v *Banke Behari* (*c*) That was a suit brought against a minor but no order was applied for and none was made for the appointment of a guardian ad litem In the plaint however which was admitted by the Court the mother of the minor was described as his guardian. Further the mother appeared throughout the proceedings in the suit as the minor s guardian A decree was passed against the minor and in the decree and the execution proceedings the mother was described as the minor s guardian In a suit brought by the minor on attaining majority to set aside the decree passed against him on the ground that no guardian ad litem had been appointed as required by the present rule it was held by their Lordships of the Privy Council overruling the decision of the Calcutta High Court that the Court in which the former suit was instituted had *by its action* given sanction to the appearance of the mother as a guardian ad litem and that the absence of a *formal* order of appointment was not fatal to the suit unless it was shewn that the defect in procedure prejudiced the minor Their Lordships observed that there was nothing in the proceedings of that suit to suggest that the interests of the minor were not duly protected by the mother or that the defect in procedure had prejudiced the minor and they accordingly held that the decree was binding upon the minor The particular defects of procedure that have been condoned on the ground of no prejudice to the minor are—omission to make a formal order of appointment (*d*) an appointment made without the affidavit required by r 3 (3)

(*x*) *I al poda* v *Har* (191) 44 C 1 6 7 35 I C 6 [l natic defendant] *Rashid un Nissa* v *M l mmad* (1909) 31 All 572 36 I A 168 3 I C 864

(*y*) *Bh gw n* v *I a am Sukh Das* (1917) 39 All 8 6 I C 366

(*z*) *P ja* v *Ja g I* (1919) 37 Mad L J 3 3 I C 184 *Arumuga* v *I er a e jiapp* (19 4) 46 Mad L J 348 8 I C 6 (4) A M 48

(*a*) (191) 39 All 8 36 I C 366 *supra*

(*b*) (1919) 37 Mad L J 99 53 I C 184 *supra*

(*c*) (1903) 30 Cal 10 1 30 I A 18

(*d*) *Kedar* v *Protab* (1893) 0 Cal 11 *Har* v *Bhubaneshwari* (1888) 15 I.A 195 16 Cal 40 *S resh Ch nd* v *J gat Chund* (1887) 14 Cal 04 *S jad Ami* v *Sheikh Masl ndi* (1916) 40 Bom 541 37 I C 186 *Le haw sl rind a* v *R m D bend a* (1919) 4 Pat L J 213 48 I C 245 *N ra n Das* v *I all* (1915) Punj Rec no 61 p 2 0 31 I C 4 7 *Phull* v *D bi P shad* (19 4) 5 Lah 39 5 I C 449 (23) A.L 575

being filed (*e*) or without notice to the minor under r 3 (4) (*f*) appointment of a Court guardian without notice to the person in whose care the minor is (*g*) But such irregularities will vitiate the decree if there is prejudice to the minor as in *Sadashir* v *Trimbuk* (*h*) and *Shaik Abdul Karim* v *Thakurdas* (*i*) where no formal appointment was made and the minor s interest were not protected or in *Bhagwan* v *Param* (*j*) where a Nazir was appointed guardian without notice to the mother with whom the minor lived and he for want of funds took no steps to defend the suit The rule is well stated by Wallace J in *Tirumalacharyulu* v *Ammisetti* (*k*) as follows No irregularity by way of omission to send notice as required by O 32 r 3 shall operate to render void the presumed representation of the minor in a suit unless such omission has in fact prejudiced their defence and such prejudice is not a matter of assumption or presumption but of proof

Notice—Notice should be served both on the proposed guardian and on the minor and the wishes of the minor should be considered (*l*) But if there is no fraud or collusion failure to give notice to the minor is an irregularity which does not justify the Court in setting aside the decree (*m*)

Service of summons—There is no express provision in the Code for service on minors Hence where the defendant is a minor he should be served with the summons in the way provided for service upon adults (*n*) But where a guardian ad litem has been appointed by the Court service of summons or of notice of hearing in the case of an appeal on such guardian is sufficient (*o*) As to service in suits brought against wards of Courts of Wards see Bengal Court of Wards Act 1879 s 54 and Bombay Court of Wards Act 1905 s. 34

Fraud of next friend or guardian ad litem—A decree passed against a minor properly represented is binding upon him as much as a decree passed against an adult but it is open to the minor to impeach the decree *by a suit* in cases where the next friend or guardian for the suit has been guilty of fraud or collusion in allowing the decree to be passed against him (*q*) or of culpable negligence which has brought prejudice to the minor (*q*)

Probate proceedings—Until a contest arises section 141 of the Code is not applicable to a probate proceeding so as to attract the applicability of this Order But where a will of which probate is sought affects the interests of a minor it may be expedient as a rule of practice to appoint a guardian ad litem (*r*)

(*e*) *M nu Lal* *Ch I* *Abba* (1910) 3 I A 3 All 8 6 I C 88 *Ima* *D* v *Pi a I d* (19 0) 1 Lal 55 I C 833

(*f*) *Ph ll* v *D l I i Lal* (19 4) Lah 38 1 C 449 (3) A I 5

(*g*) *Mari tham I* v *P lin* (1918) 37 Mad 3 16 I C 18 , *I man* v *Dora swami* (19 3) 44 M 1 L J 99 3 I C 409 (3) A M 46 *Lal hm I nt a* v *Jag ath raj* (1 4) 46 Mal I J 1 77 I C 461 (4) A M 41 *T rum la haryul* v *Amm tt* (19 4) 46 M 1 L J 363 80 I C 41 (4) A M 63

(*h*) (19 0) 44 Bom 0 6 I C 399

(*i*) (19 5) 55 Cal 1 41 (3) A C 84

(*j*) (191) 3 All 1 9 I C 6 7

(*k*) (1924) 46 Mad L J 363 80 I C 541 (4) A M 63 See also *Sulta* v *Hard ya* (19) 84 I C 94 (5) A A 549

(*l*) *R jendra* v *Prabodh* (19 1) 6 I L J 8 63 I C 936 (1) A I 5

(*m*) *Sukha* v *Lachmi* (1928) 6 All L J 834 (8) A A 6 1

(*n*) *J l d a* v *S ath* (18) 6 C 1 6 1 2 *Ab l l* v *F ll* (1908) 3 C 1 1 184 See *In the goods f Am da Lal* (1900) 27 C 1 3 0 and *J l lls* v *J bells* (1) C W N 100 [but case of ser ice of citation] See also Trevelyan on Minors 4th ed p 79

(*o*) *F k* v *K m Jyotish* (19 6) 30 C W N 949 dissenting from *h* C *der J gat Ch n t r* (1886) 14 C 1 04 13 See al *Col d I m* v *M h mmad* (191) Punj Rec no 3 p 115 11 I C 31

(*p*) *Cur d s* v *Ladk rah* (189) 19 Bom 1 *Lalla* v *I m nd n* (18) C 1 8 *I agh rbar* v *Bh k n* (18 6) 12 C 1 6 *Be Pr ad* v *Lajja Ram* (1916) 34 All 4 3 I C 63

(*q*) *Brij Pal* v *Ram Sarup* (1926) 48 All 44 89 I C 1018 (6) A A 33 *Amrita* v *A dutkrao* (19) 9 Bom L R 133 10 I C 3 ( ) A B 613

(*r*) *Radha hyam Dass* v *P s adari* (1920) 4 C W N 41 5 I C 664 *Sarkwyn* v *H ro omy* (1920) 4 C W N 53 5 I C 43

Execution proceedings—The provisions of this order do not directly apply to execution proceedings The non representation of a minor by a guardian ad litem in execution proceedings is not in itself sufficient to set aside an execution sale (s)

4 [Ss 445, 457, ss 440 443 s 456, and R S C, O 65 r 13]

Who may act as next friend or be appointed guardian for the suit

(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor s welfare that another person be permitted to act or be appointed, as the case may be

(3) No person shall without his consent be appointed guardian for the suit

(4) Where there is no other person fit and willing to act as guardian for the suit the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require

Code of 1882—Sub r (1) corresponds to ss 445 and 457 of the Code of 1882 sub r (2) to ss 440 and 443 2nd paragraph and sub r (4) to s 456 2nd paragraph and P S C O 65 r 13 Sub r (3) is new It is in accordance with a Bombay ruling in the undermentioned case (t)

Married woman as guardian ad litem—Under the Code of 1882 though a married woman could be appointed next friend of a minor plaintiff she could not be appointed guardian ad litem of a minor defendant Under this Code she may also be appointed guardian ad litem

Sub rule (1) adverse interest.—This rule provides that a person whose interest is adverse to that of a minor should not be appointed guardian ad litem This has given rise to the question whether if a minor is represented by a guardian ad litem whose

(s) F [illegible] Su end a (19) 31 Cal L J 91 64 I C 25 Man R [illegible] Abd l Said (19 6) 30 Cal W N 86 89 I C 65 (7) A C 103 Ba [illegible] Di ar v Mahammad Suleman (19 6) 8 L h L J 464 97 I C 181 (6) A L 490

(t) Jadow v Ch gan (1881) 5 Bom 306

3 being filed (*e*) or without notice to the minor under r 3 (4) (*f*) appointment of a Court guardian without notice to the person in whose care the minor is (*g*) But such irregularities will vitiate the decree if there is prejudice to the minor as in *Sadashiv* v *Trimbak* (*h*) and *Shaik Abdul Karim* v *Thakurdas* (*i*) where no formal appointment was made and the minor's interest were not protected or in *Bhagwan* v *Param* (*j*) where a Nazir was appointed guardian without notice to the mother with whom the minor lived *and* he for want of funds took no steps to defend the suit The rule is well stated by Wallace J in *Tirumalacharyulu* v *Ammisetti* (*k*) as follows No irregularity by way of omission to send notice as required by O 32 r 3 shall operate to render void the presumed representation of the minor in a suit unless such omission has in fact prejudiced their defence and such prejudice is not a matter of assumption or presumption but of proof

Notice—Notice should be served both on the proposed guardian and on the minor and the wishes of the minor should be considered (*l*) But if there is no fraud or collusion failure to give notice to the minor is an irregularity which does not justify the Court in setting aside the decree (*m*)

Service of summons—There is no express provision in the Code for service on minors Hence where the defendant is a minor he should be served with the summons in the way provided for service upon adults (*n*) But where a guardian ad litem has been appointed by the Court service of summons or of notice of hearing in the case of an appeal on such guardian is sufficient (*o*) As to service in suits brought against wards of Courts of Wards see Bengal Court of Wards Act 1879 s 51 and Bombay Court of Wards Act 1905 s. 34

Fraud of next friend or guardian ad litem—A decree passed against a minor properly represented is binding upon him as much as a decree passed against an adult but it is open to the minor to impeach the decree *by a suit* in cases where the next friend or guardian for the suit has been guilty of fraud or collusion in allowing the decree to be passed against him (*p*) or of culpable negligence which has brought prejudice to the minor (*q*)

Probate proceedings—Until a contest arises section 141 of the Code is not applicable to a probate proceeding so as to attract the applicability of this Order But where a will of which probate is sought affects the interests of a minor it may be expedient as a rule of practice to appoint a guardian ad litem (*r*)

(*e*) *M n Lal* v *Ch l bba* (1910) 3 I A 3 All 8 6 I C 88 *I am D n* v *P l d* (19 0) 1 Lah 5 I C 833

(*f*) *I h R D l Farsl a l* (19 4) 5 Lah 38 I C 443 (3) A I 5

(*g*) *M ruth l* v *P la* (1918) 3 Mal 3 16 I C 18 *I ma wam* v *Do swam* (19 3) 44 M l L J 3 I C 409 (3) A M 45 *Lak hm k nt a* v *J g th r j* (19 4) 46 M d L J 1 7 I C 461 (4) A M 31 *T rumal harya l* v *Amm sett* (19 4) 46 M l L J 363 80 I C 41 (4) A M 63

(*h*) (19 0) 44 Bom 0 6 I C 399

(*i*) (19 9) 55 Cal 1 41 (29) A C 84

(*j*) (191) 3 All 1 9 I C 6 3

(*k*) (19 4) 46 Mal L J 363 80 I C 41 (4) A M 63 See also *ult* v *H rd y* (19) 84 I C 94 (2) A A 545

(*l*) *Rajendra* v *Prabodh* (19 1) 6 Pat L J 8 59 I C 936 (21) A P 25

(*m*) *S kha* v *Lachmi* (1923) 6 All L J 634 (5) A A 6 1

(*n*) *Jut l a* v *S ath* (1908) 6 C l 6 I *Ibl l* v *F jy r* (1908) 3 Cal 1 184 8 *In th good f l r la Lal* (1900) 7 C l 350 and *l l lis* v *Isabella* (18) C W N 100 [In the cases of service of citation] See also Trevelyan on Minors 4th ed p

(*o*) *Ras k* v *K mar Jyot h* (19 6) 30 C W N 949 dissenting from *S r h Ch nder* v *J gat Ch l* (1886) 14 Cal 04 15 See also *Gob l I m* v *M hammad Al* (191) Punj I c n 35 p. 115 11 I C 31

(*p*) *Cur las* v *Ladk raha* (1 9) 19 Bom 1 *Lalla* v *I am l* (1 9) C I 8 *I agh be Bh l a* (18 6) 1 Cal 6 *He Prasad Lajj I am* (1916) 38 All 4 35 I C 63

(*q*) *Brij Pa* v *I am Sarup* (1926) 48 All 44 80 I C 1018 (6) A A 35 *Amru Audubhrao* (19) Bom I 135 103 I C 3 ( ) A B 613

(*r*) *Padh hyam D* v *P g S nd ri* (19 0) C W N 541 9 I C 664 *achury* v *H ronomy* (19 0) C W N 53 53 I C 43

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(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be

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(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require

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(t) *Jadow v Chhagan* (1881) 5 Bom 306

4 interest is adverse to that of the minor the decree passed in the suit is a nullity The leading case on the subject is *Rashid un-nissa* v *Muhammad* (u) In that case a suit was brought by a minor for a declaration that two decrees and three sales in execution affecting her share in her father s estate were invalid as against her as she was represented in the suit by her uncle whose interest was obviously adverse The Subordinate Judge decreed the suit but the High Court set aside the decree holding that the suit was barred by sec 244 of the Code of 1882 (now sec 47) and that the proper course for the plaintiff if she had any objection to make to the execution of the decree was to raise it in execution proceedings The judgment of the High Cout however was reversed in appeal to the Privy Council In the course of the judgment their Lordships said With all respect to the learned judges of the High Court their Lordships are unable to agree with this conclusion Sec 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed that is to say between parties who have been properly made parties in accordance with the provisions of the Code Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term Her sister Ulfat un nisa was a married woman and therefore disqualified under sec 45 of the Code from being appointed guardian for the suit *and Maulada r's [uncle s] interest was obviously adverse to that of the minor* This decision has been followed by the High Court of Madras and it has been held that where the interest of a guardian ad litem is obviously adverse the decree is a nullity (v) A similar view has been taken by the High Court of Allahabad (w) The same point was raised in another Madras case but the learned judges said that they were not prepared on the facts of the case to hold that the guardian ad litem was so wholly disqualified that her representation must be treated as no representation at all (x) In a recent Calcutta case Rankin C J doubted whether *Rashid-un nissa* v *Muhammad* went so far as to hold that the appointment of a guardian ad litem whose interest was adverse rendered the decree a nullity in every case (y)

The question whether a guardian ad litem appointed by the Court has an interest adverse to that of the minor is one of fact Where a mortgage or other transaction has been entered into by a person on behalf of a minor and a suit is brought against the minor to enforce the transaction the question arises whether such person can be appointed the guardian of the minor for the suit It has been held by a Full Bench of the Madras High Court that there is nothing either in the Code of Civil Procedure or in any of the authorities to lay down not merely that such a person should not as a rule be appointed but cannot in any circumstances be validly appointed ( )

Sub rule (2) guardian appointed by competent authority—A guardian of his minor son appointed by a Hindu father under his will is not a guardian appointed by competent authority within the meaning of this rule (a)

Sub r (2) provides that where a minor has a guardian appointed by competent authority no person other than such guardian should be appointed his guardian ad litem The Allahabad High Court has held that where the Court in ignorance of the fact that the minor has a guardian appointed by competent authority appoints another person guardian for the suit such appointment is not an illegality but a mere irregularity and it does not of itself vitiate either the decree passed in the suit or a sale consequent upon such decree (b) But the Madras High Court has held that this is an illegality

(u) (1909) 36 I A 168 31 All [illegible] 3 I C 864
(v) S Lappa Gou d a v Mana Na ken (19[illegible]) 47 Mad 9 6 I C 1018 ('21) A M [illegible]
(w) Ch[illegible] Lal v [illegible] (19[illegible]4) 46 All 6 0 9 I C 5[illegible]6 ([illegible]4) A A 1
(x) K[illegible]ppuswamy v Kamalammal (19[illegible]0) 43 Mad 84 9 I C 66
(y) [illegible] Abd l Karim v Thakurd [illegible] (1928) 55 Cal 1 [illegible] ([illegible]8) A C 84
(z) [illegible] Lal [illegible] swami (19[illegible]) [illegible] Mad [illegible] 113 I C [illegible] ([illegible]) A M 213
(a) B[illegible] v More [illegible] (190) 31 Bom 413
(b) Dem[illegible] S[illegible]gh v Prabh[illegible] S[illegible]gh (190) 2[illegible] All [illegible]90

which vitiates the decree (c) The permission to appoint another person as next friend or as guardian ad litem need not be express (d) Failure to record reasons as required by sub r (2) is an irregularity which does not of itself vitiate the appointment (e) O 3

Sub rule (3) consent of guardian ad litem—This sub rule controls both sub rule (1) and sub rule (2) and places a material restriction on the power of the Court *No person competent under either of these sub rules can be appointed guardian ad litem* without his consent (f) A guardian who has not consented to act as such is no guardian at all and the decree is invalid irrespective of any question of prejudice because the minor has not been represented in the suit (g) Das J seems to take a different view in *Pande Saldeo* v *Ramayan* (h) but that is erroneous as pointed out by Venkatasubba Rao J in *Sriramulu* v *Lakshminarayana* (i) and by Rankin C J in *Satis Chandra* v *Hashem Ali* (j) The Allahabad High Court has said that in certain circumstances consent may be presumed when the proposed guardian remains silent and absent (l) But it is submitted that this is incorrect and the proper procedure in such case is in default of any other person fit and willing to act to appoint an officer of the Court (l) But under the Code of 188- which did not contain any proviso similar to r 4 (3) when a guardian under the Guardian and Ward Act made no response consent was presumed (m) In an Allahabad case where a father and his minor son were sued the Court appointed the mother guardian ad litem in spite of her refusal. The father filed a written statement for the son and defended the suit on his behalf It is clear that the minor was not represented by his mother but the High Court held that there was substantial representation by the father and there was no prejudice to the minor (n) The consent need not be expressed in writing Some cases use the phrase express consent but the word express is not in the rule Consent is a question of fact and the evidence of it may be indirect and circumstantial (o) or it may be proved by conduct (p)

Sub rule (4) Officer of Court as guardian ad litem—In cases under the previous Codes it was held that if an officer of Court was appointed guardian ad litem he should not be paid for his trouble (q) also that if he had no funds to conduct adequately the d fence of the minor the Court could relieve him of his po ition as guardian (r) But under the present code the Court may provide for the costs to be incurred by him in order that he may obtain legal assistance and this is so even when the guardian ad litem is himself a pleader (s) The appointment of an officer of the Court as guardian ad litem on a fals affidavit that there is no other person fit and willing is vitiated by fraud and is of no legal effect A decree so obtained is not binding on the minor (t) But the mere fact that no inquiry has been made

(c) *Bh maji* v *Hus in Saheb* (19 0) 43 Mad 808 59 I C 84
(d) *Sridhar Rao* v *Ram Lal* (1909) 31 All 7 1 I C 5 3
(e) *Rar han* v *Manakkal* (1923) 44 Mad L J 515 4 I C 309 (3) A M 5 3
(f) *A ala Up d a* (19 1) 26 C W N 81 6 I C 18 (-1) A C 600
(g) *N s gh* v *Sle k J hi* (191) 1 C I L J 3 13 I C 414 *Na nd a* v *Jogendra* (1914) 19 C W N 537 -7 I C 139 *Su d a* v *Agl ra* (19 1) - C W N 5 6 I C 464 (1) A C 534 *Annada* v *Upe dra* (1021) -6 C W N 81 65 I C 18 (21) A C 600 *Umapati* v *Sh kh Masiulla* (19 3) 37 Cal L J 496 7 I C 472 (3) A C 6 *Shaikh Sujj d* v *Salai Ra* (19 3) 2 Pat 7 I C 637 ( ) A P 448 *Jagadise* v *Harih* (19 4) 40 Cal L J 39 78 I C 219 (24) A C 104 488
(h) (19 3) Pat 335 1 I C 05 (3) A P 24
(i) (19 4) 4 Mad 783 83 I C 312 (2) A M 30
(j) (1927) 54 Cal 4 0 103 I C 1 4 (27) A C
(k) *Chatter S ngh* v *Tej Singh* (1920) 43 All 104 59 I C 671 dis ent d from in *Shaik Sajjad* v *S l i Rai* (19 3) - Pat 7, 72 I C 637 ( ) A P 448 but followed in *Mallayya* v *Pu na m* (19 4) 47 Mad 4 6 77 I C 6 8 (24) A M 608
(l) *D aba dhu* v *Ma h d* (1912) 16 Cal L J 318 17 I C 263
(m) *Taje lwar Dutk* v *Lakhan P ashad* (19 3) 2 Pat 206 83 I C 290 (3) A P 31 *Sa a Chand a* v *B bhat* (19 1) 34 Cal L J 30 66 I C 433 (1) A C 84
(n) *Kuber* v *Ramakar* (19) 47 All 3 7 86 I C 86 (25) A A 3 1
(o) *S i mulu* v *Lak h n ray na* (19 4) 4 Mad 83 83 I C 31 (2) A M 30 F.B
(p) *J wahar S ngh* *Saw S gh* (1923) - La I J 497 9 I C 5 (24) A L
(q) *Ke koose* v *Serle* (1844) 3 M I A 3-2
( ) *G pilal* v *Aga si gji* (1904) 28 Bom
(s) *M l l i G ga Pra ad* (19 3) 45 All 7 71 I C 9 5 (23) A A 98
(t) *Pa icl n* v *M nakkal* (19 3) 44 Mad L J 515 74 I C 309 (3) A M

by the Court into the question whether there was any other person fit and willing to act as guardian ad litem does not make the decree a nullity the case is merely one of irregularity (u) The Deputy Registrar who has been appointed guardian of minor respondents in a High Court appeal may also be appointed to represent them in proceedings for obtaining leave to appeal to Privy Council but upon the final admission of the appeal he ceases to represent them (v) The High Court cannot provide for the costs of a guardian ad litem in an appeal to Privy Council (v) As to irregularities in the appointment of a Court guardian see notes under rule 3 above

Representation of minor by next friend or guardian for the suit

5 [Ss 441, 442] (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub rule (2), shall be made by his next friend or by his guardian for the suit

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader

Receipt by next friend or guardian for the suit of property under decree for minor

6 [S 461] (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable poperty on behalf of a minor either—

(a) by way of compromise before decree or order, or

(b) under a decree or order in favour of the minor

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other movable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will in its opinion, sufficiently protect the property from waste and ensure its proper application

Joint Mitakshara family —The Calcutta High Court had held that this rule did not apply when the next friend was the manager of a Mitakshara joint family of which the minor was a member and that qua manager he could receive monies

(u) *Hu ndra v S ... (19..)* 8 P ... 8 115 I C 896 (..) A ... 360

(v) *Maharaja Bir Kishor v Ali Ahmad* (19..) 55 C ... 34 106 I ... 86 (..) A C ... 4

due on a decree in favour of himself and the minor (w) But this conflicts with the Privy Council ruling in *Ganesh Rao* v *Tuljaram* (x) that a manager of a joint family if he is a next friend or guardian is subject to the control of the Court and that he cannot do in his capacity of manager acts that he is debarred from doing as next friend or guardian without the leave of the Court Accordingly when payment under a decree in favour of a minor and of the manager of a joint Hindu family was certified to the Court by the manager alone who was the next friend of the minor the Court refused to record it as the leave of the Court had not been obtained and for the same reason the Court refused to recognize the payment as a valid discharge and granted an execution application for the recovery of the whole amount (y)

Security for protection of minor s property—A bond passed by a surety under sub r (2) cannot be enforced by summary process under s 145 ( )

7 [S 462] (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian

Agreement or compromise by next friend or guardian for the suit

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor

Alterations in the rule—The words expressly recorded in the proceedings in sub r (1) and the words so recorded in sub r (2) are new They give effect to the practice established under the old section. See notes below Compromise decree when binding on a minor

Scope of the rule—This rule contemplates the following steps to be taken in order before a compromise decree is passed in a suit to which a minor is a party namely (1) an application by the next friend or guardian ad litem for leave to compromise the suit (2) the granting of leave by the Court if the Court thinks the case is a fit one for leave and (3) the consent of the next friend or guardian ad litem to the proposed compromise *after* the Court has granted the leave (a) If the leave is granted and the next friend or guardian ad litem assents to the compromise the parties may apply to the Court under O 23 r 3 for a consent decree in terms of the compromise and if the compromise is lawful it is the duty of the Court under that rule to pass the decree applied for If the next friend of a minor plaintiff agrees to compromise a suit on behalf of the minor subject to the leave of the Court *and then withdraws from the compromise before the leave of the Court is applied for* the Court will not enforce the compromise at the instance of the defendant even though the terms of the compromise might appear beneficial to the minor The reason is that such compromise is not binding unless it is sanctioned by the Court (b) The Court cannot force a compromise upon a minor against the opinion of the guardian ad litem or next friend (c) But if the guardian or next friend is acting improperly in refusing to consent to a beneficial arrangement the Court may take steps to remove him and substitute some other person (c)

(w) *Har lar Persl ad* v *Mat ra Lal* (1908) 35 C 1 61
(x) (1913) 40 I A 13 36 Mad 295 19 I C 51
(y) *Pu lakkutt ja* v *Dor n awmi* (19 4) 47 Mad L J 408 8 I C 88 (5) A M 30
(z) *K rugod ppa* v *Soogamma* (1918) 41 Mad 40 39 I C 9 8
(a) *Aman S gh* v *Nara n* (1898) 20 All 98
(b) *R nga* v *R jagopala* (1899) 2 Mad 3 9 *G lab Dei* v *I a h M t Co* (19 5) 47 All 8 88 I C 4 9 (2) A A 570
(c) *Hem g ni* v *Bhagw ti* (19 3) 7 C W 79 7 I C 68 (3) A C 685

Compromise decree when binding on minor—The provision contained in this rule making it necessary to obtain the leave of the Court is of great importance for the protection of minor s interests (*d*) and it has been extended to a compromise by a natural guardian who has put herself in the place of a guardian ad litem by applying to the Court to sanction a compromise (*e*) To render a decree passed in pursuance of a com promise binding on a minor the following conditions must be complied with —

(a) The next friend or guardian ad litem must *apply to the Court* for leave to enter into the proposed compromise (*f*) stating specifically that the com promise is sought to be made on behalf of the minor (*g*) and also setting forth the terms of the proposed compromise (*h*)

(b) On such an application being made to the Court the Court must exercise a judicial discretion as to the propriety in the interests of the minor of the proposed compromise (*i*) It is not possible to lay down any hard and fast rule as to what materials a Judge may call for before he is satisfied with the compromise and that is a matter which must be left to his discretion (*j*) And if the Court sees reason to grant leave it should *record an order* showing that an application has been made to it that the terms of the proposed agreement or compromise have been considered by it and that having regard to the interests of the minor it has granted leave to make the agreement or compromise (*k*) It is not sufficient that the terms of a compromise are before the Court There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on petition or in some way not open to doubt that the leave of the Court was obtained (*l*) A compromise will be deemed to be beneficial to the interests of a minor if it secures to the minor some demonstrable advan tage or averts some obvious mischief (*m*) A certificate of counsel for the minor that the compromise is for his benefit is according to ordinary practice sufficient (*n*)

In Bombay it has been held that in sanctioning a compromise as for the benefit of a minor the Court should have before it an affidavit by the next friend or guardian of the minor to that effect and in heavy ca es there should be an opinion of counsel or else a statement by counsel at the bar that in his opinion the compromise is for the benefit of the minor It has also been held that the Court is not bound to pass a decree in the exact form of the terms of the compromise agreed to by the parties and that it may make such alterations as it deems expedient (*o*)

(c) The leave must be *express* not implied It must in the language of this rule be *expressly recorded* in the proceedings From the mere fact that the Court has passed a decree in accordance with a compromise it cannot be inferred that any of the steps preliminary and necessary to the making of the decree have been taken by the Court The Court by passing a decree in

(*d*) *Subram n n* v *Paj I jesw ra* (1916) 39 M d 115 1 7 3 I C 2 8 [I C]

(*e*) *G rmallappa* v *Mallappa* (19 0) 44 Bom 574 5 I C 41

(*f*) *Kala ti* v *Chedulal* (180) 17 All 531

(*g*) *Ma oh r Lal* v *Jad ath Singh* (1906) 8 All 585 33 I A 1-8

(*h*) *I rup kshappa* v *Sh dappa* (190?) -6 Bom 109

(*i*) *Kalavati* v *Chedulal* (189) 17 All 31

(*j*) *Dha ryas gh* v *hu l* (19 3) 9 Bom I R 36? 94 I C 104 (-6) A B 291

(*k*) *Ma ohar L l* v *Jad th S gh* (1906) 8 All 585 33 I A 1-8 *Kal ti* v *Chedulal* (189) 17 All 531 *G r das m* v *Al girusami* (1906) 9 Mad 104 *Bhura* v *Devcl a d* (1911) 35 Bom 3 10 I C 909 *Seth ram* v *I asa t* (1911) 34 Mad 314 12 I C 409 *Badri Prasad* v *Gopal* (1919) 41 All 3 -0 I C 75

(*l*) 28 All -8 589 33 I A 1 8 131 *supra* *Ishan Chandra* v *Nurat n* (19-3) 1st 638 7? I C 1049 (3) A I 184

(*m*) *Dharm ji* v *G rrav* (1873) 10 B H C 311

(*n*) *Sakinbai* v *Shir nibai* (19 0) 47 I A 89 ?? Bom L R 5 63 I C 943

(*o*) *Cha dulal* v *Nagindas* (19?9) 31 Bom L. I 6 1 (?9) A B 3-0

> pursuance of a compromi e does not *ipso facto* sanction the compromise (*p*) The provisions of this rule are complied with if the leave of the Court is expressly recorded it is not necessary that the order granting leave should state that the Court had considered the terms of the compromise and regarded them to be beneficial to the minor (*q*)

But the non observance of the above conditions does not render the compromise decree *void* or affect the jurisdiction of the Court to record it (*r*) The decree is only *voidable* and that too at the option of the minor No other party to the suit can call the decree in question the minor alone is entitled to call it in question and this he may do either on attaining majority or before then through a next friend (*s*)

Procedure to set aside compromise decree—A compromise decree may be set aside either in a regular suit or upon an application for review to the Court that passed the decree (*t*) But it cannot be called in question by way of objection to any proceeding taken in execution of it (*u*)

It was doubtful whether under the Code of 188_ a compromise decree can be set aside by an *appeal* from the decree Where an appeal was preferred from a compromise decree on the ground that the lower Court did not consider the question as to whether the compromi e was a proper one in the interests of the minor the High Court of Allahabad entertained the appeal (*v*) in a similar case the High Court of Calcutta refused to entertain the appeal (*w*) Under the present Code no appeal lies from a consent decree [s 96 sub-s (3)]

Compromise under misapprehension of a material fact—Where a compromise is entered into under a mi apprehension of a material fact it will be set aside even though it may have been sanctioned by the Court under this rule (*x*) See Indian Contract Act 1872 s 20 Something in the nature of fraud must be shewn before a compromise sanctioned by the Court is set aside (*y*)

Minor attaining majority pending suit—If the minor attains majority while the suit is still pending a compromise entered into by his guardian is not binding on him even though it has been sanctioned by the Court ( )

Compromise of execution proceedings—Execution proceedings are a continuation of the suit and a next friend or guardian cannot after decree enter into a compromise or an adjustment of the decree without the sanction of the Court (*a*) See O 21 r 2 And this is so even though the guardian ad litem had power as natural guardian to sell the minor s property (*b*) But the rule is confined to an agreement or compromise in the course of the suit A transfer by a guardian ad litem of a decree

(*p*) *M ohar Lal* v *Jadan th Singh* (1906) 8 All 385 I A 1 8 *Paresh S ngl* v *Bhabuti S ngh* (1913) 35 All 48 40 I A 18 1 I C 88 *Virup k happa* v *Shidappa* (190) 6 Bom 103 *Lal ati* v *Ch dilal* (1895) 17 All 531 *Arunachalam* v *Mejj pp* (1898) 21 M d 91 *Sha t Chu d r* v *K rt k Ch der* (1883) 9 Cal 810 *Ram G l m* v *D rga P h d* (19 1) 6 Pat L J 190 60 I C 980 (1) A P 14

(*q*) *Janki* v *Na i thal* (191) Punj Rec no 36 p 146 30 I C 3

(*r*) *P m Gulam* v *Sl m S hai* (19 0) 5 P t L J 379 6 I C 34

(*s*) *Vi pak h pp* v *Sh dapp* (190) 6 Bom 103 *Jita S gh* v *Mans gh* (19 1) 2 Lah 164 6 I C 94 ( ) A L 166 *Ishan Ch nd a* v *Nil at* (19 3) P t 538 I C 1043 (3) A P 194 *Ph lwa ti Kunw* v *Ja e hwara* (19 4) 46 All 57 83 I C 8 (4) A A 6 *Tarubal* v *Sou e dra* (19) 9 C W N 597 88 I C 369 (25) A C 866

(*t*) *Mirali* v *Rehmoobhoy* (1891) 15 Bom 594 *Su e dra* v *Hema gini* (190) 34 Cal 83

(*u*) *Arunachall m* v *Murugappa* (1889) 1 Mad 503 *Virupakshappa* v *Shidappa* (1899) 3 Bom 6 0

(*v*) *Kalavati* v *Ch dilal* (189) 17 All 531

(*w*) *Pakhal* v *Adwyta* (1903) 30 Cal 613

(*x*) *Bi e Solomon* v *Abdool A eez* (1881) 6 Cal 68 *Jhanda S gh* v *Lachn* (19 0) 1 Lah 344 56 I C 8 8

(*y*) *Bha udas* v *Krishnaba* (19 6) 50 Bom 716 99 I C 307 ( ) A B 11

( ) *Sa y si* v *Verr n Naidu* (19 8) 51 Mad 63 (8) A M 294

(*a*) *Virupakshappa* v *Shidappa* (190) 26 Bom 103 *Aru achalam* v *R manandhan* (1906) 29 M d 309 *D rud* v *Paramasami* (1916) 31 Mad L J 07 3 I C 70 followed in *Kanaka ya* v *Mulp ru* (19 1) 41 Mad L J 5 64 I C 85 ('21) A M 587 and *Kanakaiy* v *Venkata amayya* (19) 49 Mad L J 443 90 I C 1049 (2) A M 1 87

(*b*) *G mallappa* v *Mallappa* (19 0) 44 Bom 4 5 I C 417

in favour of a minor made not with reference to the suit or execution proceeding does not require the sanction of the Court (c)

Agreement to be bound by oath under Indian Oaths Act 1873 s 9 not within this rule —An agreement by the next friend (d) or guardian (e) of a minor that an issue in the suit should be determined by the oath of the defendant does not come within the purview of this rule and the sanction of the Court is not necessary In such a case the minor is bound by the agreement provided there is no fraud or gross negligence on the part of the next friend

Abandonment of issue does not amount to a compromise —A next friend or guardian ad litem may abandon an issue in the course of the trial of the suit and the sanction of the Court is not requisite for that purpose for the abandonment of an issue does not amount to a compromise within the meaning of this rule The abandonment is binding on the minor provided there is no fraud or gross negligence on the part of the next friend or guardian ad litem (f)

Agreement to refer to arbitration —It has been held by the High Courts of Madras (g) and Bombay (h) and by the Chief Court of the Punjab (i) that an agreement by a next friend or guardian ad litem to refer any matter in controversy in a suit to arbitration is an agreement within the meaning of this rule and that the sanction of the Court is therefore necessary According to the Allahabad High Court such an agreement is not within this rule and the sanction of the Court is not necessary (j) See schedule II r 1

The decisions cited above relate to cases where the agreement to refer was made during the pendency of a suit But cases also occur in which no suit is pending and an agreement to refer is made to which a minor is a party by his guardian In such cases the application of the rule depends upon whether —

(1) *that there should be a pending suit as indicated by the words* no next friend or guardian for the suit and

(2) that there should be an agreement to refer

If either of these conditions is wanting the present rule does not apply and no leave of the Court is necessary *A* and *B* carry on business in partnership *A* dies leaving a minor son and a widow Disputes arise between the parties as to accounts and an agreement is made between the minor through his mother and *B* to refer the disputes to arbitration The arbitrators make their award and the minor by his mother applies to file the award under para 20 of Sch II The application is registered as a suit between the minor applicant as plaintiff and *B* as defendant [see the 2nd clause of para 20] Notice is then given as required by the 3rd clause of para 20 to *B* and no objection to the award having been made by *B* the award is filed and a decree passed in terms of the award as provided by para 21 of Sch II Does the agreement to refer require the sanction of the Court under this rule ? No because it was not made during the pendency of a suit and the first of the two conditions mentioned above is wanting (k) Does the decree on the award require the sanction of the Court ? No because the application to file the award being made by the minor as plaintiff it cannot be said

(c) G da jul v Ra ga l ao (19 1) 40 M d L J 124 6 I C 2 (-1) A M 113
(d) Cheng l v l enk ta (1880) 1 M d 443 Sheo Nath v S kh Lal (1900) (1 9
(e) Deor j v Abh iraj (19 7) 42 All 84 10 I C 38 ( ) A A 84
(f) Ve k t v Bha h k l (1899) Ma l 538 See also Sar m ao v Coll ct r f Dh rea (1893) 17 Bom 233 and L k m sw v Darth gha Mu icipality (1891) 18 Cal 99 17 I A 90 [as to w t er]
(g) Lak hm na v Ch th mb (1901) Mad 3 6 Vij ya v l enkatasubba (1916) 39 Mad 8 3 3 I C 881
(h) Atm a v Bh la (1913) 15 Bom L R 993 19 I C 4 4
( ) G ne la v M lcha d (191) Punj R c 1 0 9 p 330 15 I C 161 [F B] M h m d Ibrahim v Allah Bakh h (1919) P nj Rec no 145 p 3 1 5 I C 3
(j) Ha d v (Sh k (1906) All 5 L t wan v Lachya (1914) 36 All 69 1 I C 999 [F B]
(k) l dhal l Datt r m (190) 6 Bom

that there was an *agreement* on behalf of the minor not to object to the award and to allow a decree to be pas ed on the award in this case the second of the two conditions mentioned above is wanting (*l*) Again if the application to file the award was made by *B* in which case the application would be registered as a *suit* between *B* as plaintiff and the minor as *defendant* would the decree on the award require the sanction of the Court ? Ye if the minor s guardian *agreed* not to object to the award and to allow a decree to be passed on the award in this case both the conditions mentioned above are pre-ent namely that there is an *agreement* on behalf of the minor and the agreement is made in the course of a *suit* started by the application to file the award (*m*)

Withdrawal of suit by next friend —If the next friend of a minor plaintiff withdraws from the suit and such withdrawal is *in pursuance of an agreement or compromise* entered into with the defendant the withdrawal must be with the sanction of the Court under this rule if the sanction of the Court is not obtained the order of withdrawal may be set aside at the instance of the minor (*n*) If an appeal is with drawn on terms and there are parties concerned who are not *sui juris* the leave of the Court mu t be obtained (*o*) But if the withdrawal is not in pursuance of an agreement or compromise entered into with the defendant the sanction of the Court is not necessary and the withdrawal is binding on the minor plaintiff provided there is no fraud or gro s negligence on the part of the next fri nd (*p*)

Where the minor is a member of a joint Hindu family —In a suit brought by some of the members of a joint Hindu family one of whom was a minor a compromise decree was passed after the compromi e had been sanctioned by the Court The minor had no separate interest the adult members of the family had taken part in the compromise and assented to it and the Court declared that it was for the benefit of the minor In a suit brought on behalf of the minor to set aside the compromise decree on the ground that the proper materials which were essential to make the compromi e and decree binding upon him were not placed before the Court previous to obtaining its sanction it was held that the decree was under the circum stances binding on the minor (*q*)

When the father of a minor a member of a joint Hindu family of wh ch the father is the managing member is appointed his *guardian* ad litem his powers as managing member so far as they relate to the minor s interest are controlled by the provisions of the present rule and he cannot without the leave of the Court enter into any agree ment or compromi e on behalf of the minor with ref rence to the suit Such an agreement is not binding on the minor even if it was a *bona fide* settlement of a disputed claim (*r*)

Minor in charge of Court of Wards —The sanction of the Civil Court required by this rule is not nece ary having regard to the provisions of ss 18 and 21 of the Court of Ward Act (Beng Act 9 of 1879) to validate a compromise entered into under the authority and by the direction of the Court of Wards on behalf of a minor under its charge (*s*)

Joint bond by a minor and an adult —In a compromise of a suit two defendants of whom one is a minor enter into a bond by which they jointly agree to pay a certain sum of money to the plaintiff at a future date The leave of the Court is not obtained on behalf of the minor as required by this rule The bond is not enforceable against the minor but it is enforceable to the full amount against the adult promisor (*t*)

(*l*) *H nlr m v Sl j* (1919) 43 Bm ? 8 48 I C 238 [F B]

(*m*) *Mal l v v I ln b* (1 96) 1 rinte l Judg me t [Bomb y] 609

( ) *K n l v R h ll y* (1889) 13 B m 13 *D ra wa v Tl g s n* (1904) 7 M d 377

(*o*) *Sak nb v Sh* (19 0) 4 1 A 88 ? Bom L R I C 943

(*p*) *Ram S n p v Sl h L tafat* (190) 9 Cal 35 *Rajad v Ghulla* (1919) Punj Rec no 9 p 148 47 I C 503

(*q*) *I a neswa I r h d v Ram Bahadu S ngh* (1907) 34 Cal ?0

( ) *G h I w v Zul r m Row* (1913) 36 M d 29 40 I A 13 19 I C 515

(*s*) *Nak w v I en ba* (1917) 44 Cal 8 9 37 I C 9 1

(*t*) *Jam a Ba v V sant Rao* (1916) 43 I A 99 39 M d 409 34 I C ?13

8 [S 447] (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred

Retirement of next friend

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor

Retirement of next friend —A suit is brought by *A* and *B* both minors by their mother as their next friend. The mother is also appointed guardian of the person and property of the minors under the Guardian and Wards Act 1890 Subsequently on the application of the mother *A* who has then attained majority is appointed guardian of the person and property of *B* in her place This is not tantamount to *A* being appointed next friend of *B* for the suit The mother therefore cannot retire without first procuring a fit person to be put in her place and giving security for the costs already incurred (*u*)

9 [S 446] (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal, and the Court if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit

Removal of next friend

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit

(*u*) *Banarsi Prasad* v *Ram Narain* (1908) 30 All 105

Alterations in the rule—The words and make such other order as to costs as it thinks fit in sub-r (1) are new The words and shall thereupon appoint etc at the end of sub r (2) are also new

Where the next friend does not do his duty—Where a Court finds that a next friend does not do his duty in relation to a suit it is its duty not to permit him to prejudice the interests of the minor but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and for the appointment of a new next friend or that the minor plaintiff himself may on coming of age elect to proceed with the suit or withdraw from it (v) So also if he is acting improperly in refusing to consent to a beneficial compromise (w)

Appeal after expiry of limitation period—In a suit brought against a minor by his guardian a decree is passed against the minor The interest of the minor requires an appeal but certain events happen after the passing of the decree which render it to the interest of the guardian ad litem that the decree against the minor should stand and hence no appeal is preferred by him from the decree In such a case leave will be granted to the minor on his attaining majority to appeal from the decree though the period of limitation for the appeal may have expired (x)

Non appearance of next friend—When the next friend does not appear the suit should not be dismissed for default even though a reservation is made that such dismissal is without prejudice to the minor The proper course is to stay further proceedings pending the appointment of another next friend (y)

Stay of proceeding on removal etc of next friend

10 [Ss 448 449] (1) On the retirement removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit

Retirement removal or death of guardian for the suit

11 [Ss 458 459] (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place

The words may permit such guardian to retire in sub-r (1) are new The guardian does not cease to be a guardian merely because he expresses a desire to retire.

(v) *Do asc m v Thu gasuram* (1904) 27 Mad 377

(w) *Hem gi i v Bhagw ti* (1923) C W N 79 I C 68 (3) A C 685

(x) *C sandas v Ladl vahoo* (1896) 0 Bom 104

(y) *Kir t v Cha hal* (19 1) 6 Pat L J 317 63 I C 716 (1) A P 103

Until he is removed by the Court he represents the minor (z) The High Court of Patna has held that it is not necessary to give notice under rule 3 (4) before appointing a new guardian under this rule (a)

12 [Ss 450, 453] (1) A minor plaintiff or a minor not a party to a suit on whose behalf, an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application

Course to be followed by minor plaintiff or applicant on attaining majority

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus —

"*A B*, late a minor, by *C D*, his next friend, but now having attained majority "

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend

(5) Any application under this rule may be made ex parte but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend

When title to be corrected —The provisions of this rule which require the title of a suit to be corrected apply to a *pending* suit and not to a suit in which a final decree has been passed and in which it only remains to proceed in execution (b)

13 [S 454] (1) Where a minor co plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co plaintiff, and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit

Where minor co plaintiff attaining majority desires to repudiate suit

(2) Notice of the application shall be served on the next friend, on any co plaintiff and on the defendant

(z) *Kuppuswami* v *Baraswami* (19) 0 Mad 3 101 I C 339 (27) A M 538

(a) *Radha Krishna Gopal* v *Lakshmi* ay (19 3) 2 I t 3 1 I C 341 (3) A I 38

(b) *Doorg Mohun Das* v *Tahir Ally* (18) 2 Cal. 2 0

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit shall be paid by such persons as the Court directs

(4) Where the applicant is a necessary party to the suit the Court may direct him to be made a defendant

Sub r (4) is new

14 [S 455] (1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by a next friend be dismissed on the ground that it was unreasonable or improper

Unreasonable or improper suit

(2) Notice of the application shall be served on all the parties concerned, and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the cost of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit

15 [S 456] The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued

Application of rules to persons of unsound mind

Persons of unsound mind —The present rule makes the provisions of rule 1 to 14 applicable to persons of unsound mind. The result is that where a person of unsound mind is a plaintiff a suit on his behalf must be brought by a next friend and where he is a defendant the suit must be defended by a guardian ad litem Where a manager has been appointed of the property of a lunatic under the Lunacy Act no person other than such manager should act as the next friend of the lunatic in a suit in respect of the lunatic s property (c) See r 4 sub r (2) above

Persons adjudged to be of unsound mind —A person may be adjudged to be of unsound mind under the Lunacy Act 4 of 1912

Persons of unsound mind not adjudged to be so —The old section did not contain any provision as to persons of unsound mind not adjudged to be so But it was held that the same procedure applied where a party to a suit was of unsound mind though not adjudged to be so For the title of suits see App A pleadings, Title of Suits.

Decree against a lunatic —A decree passed against a lunatic not properly represented in the suit cannot be challenged in execution proceedings The reason is that a lunatic not properly represented is not a party to the suit within the meaning of s 47 above (d)

(c) See *B* . *D* . *I* v *H* . *alal* (1899) 3 Bom 403

(d) *Kalipada* v *Hari* (1917) 44 Cal 6 7 35 I C 8 6

Revision.—When an application for an inquiry as to whether a party is of unsound mind was dismissed without an inquiry the order was set aside in revision (*e*). Where during the pendency of a suit in the Court of a Subordinate Judge the defendant's pleader informed the Court that lunacy proceedings were pending in the Court of the District Judge with reference to the mental condition of the defendant and he applied for a stay of the suit until the determination of the question by the District Judge and the application was refused it was held that although no revision lay the case was a fit one for the exercise of the inherent powers of the Court and a stay was granted (*f*)

16 [S 464] *Saving for Princes and Chiefs* Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State or being sued by direction of the Governor General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind

A ruling chief sued in his personal capacity if not domiciled in British India is not subject to the Majority Act If he has attained majority according to his personal law no guardian ad litem need be appointed (*g*)

ORDER XXXIII

Suits by Paupers

1 **1** [S 401] *Suit may be instituted in forma pauperis* Subject to the following provisions, any suit may be instituted by a pauper

Explanation—A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject matter of the suit

Scope and object of the order—A plaintiff suing in a civil Court must pay the Court fee prescribed by law for the plaint and subsequent proceedings in the suit. These fees are prescribed by the Court Fees Act VII of 1870 But a person may be too poor to pay the Court fee and the object of this Order is to enable such person to bring and prosecute suits without payment of Court fees (*h*) There are however certain fees from which even a pauper is not exempted namely fees for service of process, and such fees must be paid by him (r 8) If the pauper succeeds in the suit the Government have a first charge on the subject matter of the suit for the amount of the Court fee which would have been paid by him if he had not been permitted to sue as a pauper

(*e*) *Chaturbhuj v Harnand* (19 9) 0 All 333 108 I C 141 (1928) A A 108
(*f*) *Harnand Lal v Chaturbhuj* (1926) 48 All 356 93 I C 8 (1926) A B 21
(*g*) *Rameshchand a v Maharaja B rendra* (1923) 0 C W N 297 80 I C 100 ( ) A C 513
(*h*) *Jotindro v Dwarka* (1893) 0 Cal 111 115

(r 10) If the pauper fails in the suit the Court should order him to pay the Court fees due by him (r 11) An order directing a pauper plaintiff to pay the defendant in cash the costs occasioned by an amendment of the plaint and dismissing the suit in default of such payment was held to be wholly improper (i) But the Rangoon High Court has held that a pauper may be ordered to pay costs as a condition of an adjournment (j)

Is not possessed of —These words refer to property over which the petitioner has actual control They do not apply to a dower debt due by the petitioner s husband (k)

Subject matter of the suit. —In determining whether a person claiming to sue as a pauper is worth Rs 100 neither the value of his necessary wearing apparel nor the value of the property claimed by him in the suit should be taken into consideration The ground for excluding the subject matter of the suit under this rule is that such property is presumably out of the pauper s reach and cannot be made use of by him to carry on his litigation (l)

A applies for leave to sue as a pauper for the recovery of certain ornaments worth Rs. 2 000 from *B* Pending the investigation into pauperism *B* deposits in Court a portion of the ornaments claimed by *A* of the value of Rs 100 as ornaments belonging to *A* The ornaments deposited in Court being entirely at *A* s disposal are no longer part of the subject-matter of the suit. From the moment of the deposit *A* becomes entitled to property worth Rs. 100 and hence he is not entitled to sue as a pauper for the rest of the ornaments (m) Macleod J however expressed the opinion that *A* could not be said in such a case to be entitled to property worth Rs. 100 for otherwise every application for leave to sue as a pauper may be defeated by the respondent paying into Court Rs. 100 out of the amount claimed (n) and has recently given effect to this view in *Bai Balagarri* v *Motilal* (o) the reason given being that the property does not cease to be the subject matter of the suit because of defendant s admission or payment

In a Madras case the petitioner had obtained a decree for maintenance and sought to appeal in forma pauperis for higher maintenance but the defendant paid Rs. 571 arrears of maintenance into Court to her credit and the petition was dismissed on the ground that she had sufficient means to pay the Court fee on the memorandum of appeal (p)

A who has mortgaged his property to *B* sues *B* for redemption *A* s equity of redemption is no part of the subject-matter of the suit Its value therefore should be taken into consideration in determining whether *A* is a pauper (q)

Sons sued as paupers to set aside an alienation of joint family property by the father but when it was found that there was a share of the property that had not been alienated they were not allowed to continue the suit as paupers (r)

Other than his necessary wearing apparel and the subject matter of the suit —These words do not qualify that part of the Explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law but only the conditions that the applicant is not entitled to property worth Rs. 100 (s) Ornaments which a woman ordinarily wears are of the same class as her wearing apparel (t)

(i) *Ambaji* v *Hanmantr o* (19) 47 Bom 104 69 I C 707 ( ) A.B 385

(j) *Lim F n Sun* v *E g Wan Ho k* (19 8) 6 Rang 61 (28) A R 306

(k) *Mab a* v *Sh ikh S tkari* (19 7) 45 C l L.J 68 100 I C 264 (27) A C 309

(l) *M hammad* v *4j dh a* (1888) 10 All 467

(m) *Dwa kanath* v *Madhavrav* (1886) 10 Bom 07

(n) *Fatmabai* v *Dossabh y* (1910) 34 Bom 638 5 I C 688

(o) (19 3) 47 Bom 5 3 7 I C 2 4 (3) A B 47

(p) *Mal lakshm i re* (19 6) 50 Mad L J 114 94 I C 33 (6) A M 56

(q) *Kapil Deo* v *Ram Rikha* (1911) 33 All 23 8 I C 494

(r) *Ram Pr sad* v *Jagtamba* (19 5) 47 All 872 88 I C 4 0 ( ) A A 54

(s) *Krishnaba* v *Manoh r* (1906) 30 Bom 593

(t) *Mahia* v *Sh ikh Satka i* (19) 45 Cal L J 68 100 I C 64 ( ) A C 309

Prosecution of suit as pauper—A plaintiff may be allowed to *continue* as a pauper a suit instituted by him in the ordinary way (u)

Minor Plaintiff—A minor pauper may sue through a next friend although the latter is not a pauper (v) In England when a minor applies to sue as a pauper it must be proved that the minor *as well as the next friend* are paupers But this rule of English practice does not apply in India and it is enough if it is proved that the minor is a pauper it is not nece sary to prove that the next friend also is a pauper (w)

Pauper defendant—It has been held by the High Court of Calcutta that although the Civil Procedure Code provides only for suits to be brought by a pauper plaintiff the Court has inherent power to allow a *defendant* to defend in forma pauperis (x)

Legal representative of pauper—The legal representative of a deceased person may be allowed to *institute* a suit in forma pauperis if the deceased him elf had been allowed to sue as a pauper if the proceedings had been instituted in his lifetime provided the legal repre entative is also himself a pauper (y) Similarly on the death of a pauper plaintiff his legal repre entative may be allowed *to continue* the suit in forma pauperis provided the legal repre entative is also himself a pauper (z) But in *Sivagamme Sivagami v Gopalaswami* (a) it was said that it was immaterial that the legal representative has means in his private capacity and that he can continue the suit as a pauper if he has not come into posse sion of sufficient means out of the estate This conflicts directly with *In re Radakrishna Iyer* (b) decided a few months earlier by the same Court but they are both de isions of a single judge In England an executor or administrator is not allowed to sue or defend as a pauper (c) unless he is also a beneficiary (d)

Suit in a representative capacity—If plaintiff sues in a representative capacity as trustee or sebait and has not in his possession sufficient property of the trust he may be allowed to sue as a pauper although he has sufficient personal property of his own (e)

Official liquidator—The word per on in this rule includes a company [see General Clauses Act 10 of 1897 s 3 (39)] An official liquidator therefore of a company is competent to apply for leave to sue in forma pauperis on behalf of the company if the company is a pauper within the meaning of this rule The fact that the liquidator in his personal capacity is not a pauper does not affect the question (f)

Married woman—The mere fact that the applicant s husband has property is not sufficient reason for di allowing her application for leave to sue in forma pauperis (g)

Pauper appeals—As to pauper appeals see Order 44 below

2 [S 403] Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits a schedule of any movable or immovable property belonging to the applicant, with the estimated value

Content of application

(u) *F j v S Kh m* (1884) 8 I m 615 *Thomp n Calcutt Tran w y Co* (1893) 20 C I 319
(v) *Gola pm mee v Pro je* (19 3) 11 B I R 3 3 *Va l la v Jam* (19 3) 3 C I L J 3.4 0 I C 919 (3) A C 6.6
(w) I *k ta ra yi v tcl n a* (1881) 3 M d 3 *V m la d v K l h t* (19 4) 6 I m L R 3 0 80 I C 4 (4) A B 410
(x) *Dur ga Ch rn v Nut l ll* (18 0 Cal 819
(y) *B ll v r* (1884) M I 3 0
(z) *M j v Kh d o* (191) 36 Bom 9 11 I C 4 I *D wu llh* (1894) 18 Bom 37 *Lal t M h M d I v N Ch d Da* (1906) 33 Cal 1163 *In re* *I d ikr h a Iy* (19) 88 I C 91 ( ) A M 819 whi h xplains *Bh ghat v B d n* (186) 3 W R Mis 0
(a) (19) 48 M d L J 3.0 87 I C 8 ( ) A M 6
(b) (19) 84 I C 91 ( ) A M 819
(c) *I a f e v Sh pp rd* (1 4) 1 Dl k 136 *Oldfi ld v Cobbett* (1845) 1 H R 613
(d) Willi n on E ecitors 10th e l p 1 41 Di 1 I Ch I r pp 87 88
(e) *M l a v Sh Kh h tkars* (19 7) 45 Cal L J 68 100 I C 964 ( ) A C 309
(f) *J erum l v Th rum la ayap ram Nidhi Ld* (191) 41 M d 6 4 4 I C 164
(g) *Sha f a v Va. i* (1919) 3 I t L J 1 8 44 I C 23

thereof, shall be annexed thereto, and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings

Procedure —Rules 2 to 8 prescribe the procedure to be followed when a suit is proposed to be instituted in forma pauperis

Death of applicant —Where an *application* for leave to sue in forma pauperis has been made but the applicant dies pending the hearing of the application the application cannot be continued by the legal representative of the deceased applicant The reason is that the right to apply for leave to sue as a pauper is a *personal* right and it does not survive to the representative of the deceased applicant But the legal representative may present a *fresh application* for leave to sue in forma pauperis if he himself is a pauper (*h*)

3 [S 404] Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person

Presentation of application.

Presented to the Court —Presentation need not be to the Court itself Presentation to the proper officer of the Court is sufficient (*i*)

Purda nashin woman —A purda nashin woman exempted from appearing in Court under s 132 above may present the application for leave to sue as a pauper by a duly authorized agent (*j*)

Pauper appeals —The provisions of this rule apply also to applications for leave *to appeal* as a pauper See O 44 r 1

4 [S 406] (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant

Examination of applicant

(2) Where the application is presented by an agent, the Court may, if it thinks fit order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken

If presented by agent Court may order applicant to be examined by commission

Examination —This Order contemplates examination of two kinds namely (1) the examination of the applicant which may as indicated in this rule be regarding (a)

(*h*) *Lalit Mohan v Satish Chandra* (1906) 33 Cal 1163 *Karim v Basuria* (1928) 51 Mad 697 110 I C 318 ('28) A M 2 8

(*i*) *Chidambara v Vadar Mohideen* (19 4) 48 Mad 8 84 I C 968 (4) A M 901

(*j*) *Wazir unnissa v Ilahi Baksh* (190) 4 All 17

the merits of the claim and (b) pauperism and (2) the examination of persons other than the applicant which should be confined to pauperism only as indicated by the provisions of rr 6 and 7 below Persons other than the applicant cannot be examined on the merits of the applicant s claim (*k*)

Rejection of application

5 [Ss 405, 407] The Court shall reject an application for permission to sue as a pauper—

(a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or

(b) where the applicant is not a pauper, or

(c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or

(d) where his allegations do not show a cause of action, or

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter

Alteration in the rule—The expression cause of action in cl. (d) has been substituted for the words right to sue in such Court. See notes below under the head Clause (d) cause of action

Clause (a) application not framed as required by rule 2.—Failure to calculate the Court fee value in accordance with the provisions of the Court Fees Act and O 7 r 1 of the Code is a non compliance with the provisions of Clause (a) of this rule and the application must be rejected (*l*)

Clause (c) fraudulent disposal of property—Thus if a person has property worth Rs 1 000 and he disposes of it in August 1915 to enable himself to sue as a pauper and applies for leave to sue as a pauper in September 1915 the application should be rejected under this rule

Clause (d) cause of action—The corresponding clause of the old section ran thus That his allegations do not show a *right to sue in such Court* It was contended that the words sue in such Court referred to the *jurisdiction* of the Court and not to the *cause of action* disclosed in the application But this contention was rejected and it was held that the clause did not limit the Court to an inquiry whether the right to sue arose within the *jurisdiction* but that it had a more extended meaning and that the Court was to ascertain if the application showed a good subsisting *cause of action* capable of enforcement in Court and calling for an answer and not barred by the law of limitation or any other law (*m*) It was accordingly held that the application to sue as a pauper must be rejected if the right to sue was barred by the law of limitation (*n*)

(*k*) *Jogendra* v *D rga* (1919) 46 C 1 6 1 ... I C 610

(*l*) *M u q P* v *Ma Shwe* (19 0) Rang 359 118 I C 1 (9) A R 124

(*m*) *Ch tt rp l* v *Raja P m* (188) All 661 *A mr th Nath* v *S d r Nath* (1898) 20 All 99 *I jendra* v *Sudh dra* (1896) 19 Mad 19 *Amirtham* v *Alwa* (1904) ... M d 37 *D lars* v *Vallabd s* (19) 13 Bom 1 6

(*n*) *Chattarp l* ... *I ja Pam* (188) All 661 *Ha Kaur* v *M* ... *Lal* (1919) Punj R c no 134 p 349 53 I C 441

or as *res judicata* (o) or if it did not disclose a good cause of action as where the application was for leave to sue on a contract which was void as being immoral and opposed to public policy (p) The expression cause of action has been substituted for the words right to sue in such Court to give effect to these decisions The Court must as stated above consider the question of limitation to see if the applicant has a subsisting cause of action (q) But this does not mean that the Court should at this preliminary stage decide a question of limitation as to which there has been a considerable difference of judicial opinion (r)

Rule 4 provides that where the application is in proper form and duly presented the Court may *examine* the applicant regarding the *merits* of the claim and the property of the applicant The expression the *merits* of the claim has reference to r 5 (d) which says that the Court shall reject the application if the allegations of the applicant do not show a cause of action It has accordingly been held that it is the duty of the Court to consider not only the statements made in the plaint but also the statements made by the applicant in his examination in order to determine whether his allegations do or do not show a cause of action (s) and further to determine at the preliminary stage whether the plaintiff is or is not entitled to succeed on the basis of the alleged cause of action In some cases it was contended that in order to determine whether there was a cause of action the allegations in the plaint were the sole matters to be looked to As to this the Allahabad High Court (t) said If the allegations in the plaint were the sole matters to be looked to and the applicant were admittedly a pauper the granting of this application to sue as a pauper would depend not on whether he had any merits to go upon but on the skill of the gentleman who drafted his petition and his plaint and the examination as to the merits under sec 406 (r) would be superfluous

In an Allahabad case it was held that the Court had no power under cl (d) of this rule to reject an application on the ground that the matter in dispute was res judicata (u) This decision it is submitted is erroneous for a cause of action means a valid and subsisting cause of action not barred by limitation or res judicata

Insolvency is not one of the grounds on which an application can be rejected under this rule (v)

Clause (e) transfer of interest in subject matter of proposed suit.—The interest transferred may be either vested or contingent Thus an agreement authorising a pleader to recover his fees out of the revenues of a village forming the subject matter of the proposed suit *in the event of* the applicant failing to pay the fees to the pleader is an agreement under which the pleader obtains a contingent interest in the subject matter of the suit If such an agreement is proved the application for leave to sue in forma pauperis must be rejected (w)

Revision.—An order rejecting an application under this rule is not appealable (x) but it is open to revision in a proper case (y) though the Allahabad High Court has in a later case held that no revision lies (z)

(o) Ir.j d a v S dh dra (1896) 19 Mad 19
(p) Dul i v I all bd (1889) 13 B m 1 6
(q) Gov ndasam v The Munic pal Counc l (1918) 41 M d 6 0 4 I C 45
(r) Govindasam Pillay v Munic p l Council Kumbako m (1918) 41 M d 6 0
(s) Chittarpal v R ja R m (198) 7 All 661 Kam kh Nath v S nda Nath (1898) 0 All 293 D la i v I allabdas (1889) 13 Bom 1 6 Naw b Bahad v H m h Cha dr (1911) 13 C l L J 593 11 I C 55 Jog d a v D rga (1918) 46 Cal 6 1 6 I C 610 commenting on Debo Das v Ram Ch rn (1898) C W N 4 4 Gopal v B goo (1903) 8 C W N 0
(t) Kam akh Nath v S nda Nath (1898) 0 All 299
(u) L chmi v R B had r (19 5) 23 All L J 200 86 I C 81 (5) A A 5
(v) Chid mb ram v K tler (19 5) 48 Mad L J 491 87 I C 0 (25) A M. L
(w) Manohar v L kshman (1895) 9 Bom
(x) Secret ry of State v Jillo (1899) 21 All 1
(y) Muhamm d v Ajudhia (18) 10 All 4 D bo Das v I m Charn (1) C W N 4 4 Gopal v Bigoo (190) 9 C W N 0 Pa ha d a v [illegible] M d L J 330 101 I C 1 ( ) A M. 441
(z) Shanker B n v Ram De (4 All 493 94 I C 494 ( ) A A [illegible] v Secretary of State (44 All 2 65 I C 2 5 ( ) A A L

Letters Patent appeal—No appeal is allowed by the Code from an order made under this rule But the Madras High Court has held that an appeal lies under cl. 15 of the Letters Patent from an order allowing or refusing to allow a plaintiff to sue as a pauper on the ground that such an order is a judgment and that it is neither interlocutory nor made in the exercise of discretion (a)

6 [S 408] Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof

Notice of day for receiving evidence of applicant's pauperism

Evidence—See notes to r 4 above under the head Examination

Notice—As to form of notice see App H form no 12

7 [S 409] (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence

Procedure at hearing

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper

Sub rule (2)—The Court when issuing notice under r 6 for receiving evidence in proof of pauperism has presumably decided ex parte that none of the prohibitions in r 5 exists But this does not preclude the Court from deciding whether the allegations of the applicant do or do not show a cause of action on the evidence of the applicant though it may be taken after the issue of the notice This question however cannot be decided on the evidence of witnesses called to give evidence on the issue of pauperism, not even the evidence of the applicant's own witnesses. It has accordingly been held that the Court has no power to determine on the evidence of witnesses as distinguished from the evidence of the applicant himself that the applicant has no cause of action (b) or that his claim is barred by limitation (c) This rule enables the parties to argue the question if they so desire whether the application is or is not subject to any of the prohibitions

(a) *B ba v I ru kothama* (19 5) 49 Mad 00 85 I C 01 (5) A M 16 d it g *App m v S m n d a* (1903) 6 M d 43

(b) *Sh ra B l v Abd S m d* (19 3) 45 All 49 3 I C 538 (3) A A

( ) *Jog ndra Naray n v D ga Chara* (1919) 46 Cal 6 1 5 I C 610 *Shaik M ham m I N ar ll v Sh kh M hammad Sh k rulla* (19 4) 3 Pat 2 3 83 I C 8 1 (23) A 1 30 *Ma Shopjambi v M barak* (1929) 7 Rang 361 ( ) A R 2 3

specified in r 5 above It does not preclude the Court if no argument is offered from considering that question (*d*)

Review —An order under this rule refusing leave to sue as a pauper is subject to review (*e*) The application for review is not liable to any Court fee (*f*)

Propriety of order allowing applicant to sue in forma pauperis —Where after due consideration of an application for leave to sue as a pauper the Court of first instance has allowed the suit to be instituted *in forma pauperis* and has passed a decree in favour of the plaintiff it is not open to the defendant in appeal from the decree to question the propriety of the order permitting the plaintiff to sue as a pauper S 105 does not apply to such an order (*g*)

Legal representative —If the applicant dies before the application is granted and registered as a suit there is no suit pending and his legal representative cannot be brought on the record to continue the application (*h*)

Limitation where application granted —Where an application for leave to sue as a pauper is *granted* the date on which the application is *filed* will be deemed to be the date on which the pauper suit is instituted for all purposes of limitation and *not* the date on which the application is *numbered and registered as a suit* [Limitation Act 1908 s 4] Therefore when the rate of Court fee was enhanced between the date of filing and the date of granting the application the Court fees were in the calculation of costs assessed at the former rate (*i*)

Limitation where application refused —Where an application for leave to sue as a pauper is *refused* and the applicant subsequently institutes a suit in respect of the same subject matter in the ordinary way (r 15) the suit will be deemed for the purposes of limitation to have been instituted on the date on which the plaint is presented and *not* the date on which the *rejected application* was filed The reason is that upon an order of refusal under this rule the proceedings instituted under r 2 come to an end (*j*)

Limitation where application is converted into a plaint on payment of court fees —A person who has applied for leave to sue as a pauper may at any time before an order is made under this rule convert his application into a plaint by paying into Court the necessary Court fees In such a case if the application was made *bona fide* the suit would be deemed to have been instituted for the purposes of limitation on the day on which the application was filed and not the day on which the Court fees were paid But if it is found that the application was made in bad faith the suit would be deemed to have been instituted on the day on which the Court fees were paid and not on the day on which the application was filed (*k*)

Illustrations

1 *A* applies for leave to sue as a pauper On the day fixed for the hearing of the application *A* alleging that he has succeeded in negotiating a loan for the payment of the Court fees pays the necessary Court fees into Court The application is thereupon numbered and registered as a plaint The application for leave to sue as a pauper having been made in good faith the suit will be deemed to have been instituted on the

(*d*) *Amirthan* v *Alwar* (1904) 27 Mad 3
(*e*) *Adarj* v *Manikj* (1880) 4 Bom 414
(*f*) *Unda* v *Naima* (1898) 20 All 410
(*g*) *Mumtazan* v *Rasula* (1901) 23 All 364
(*h*) *Subbiah* v *Bala* (19 8) 51 Mad 69 110 I C 318 (28) A M 8 *Lalit Mohan* v *Satish Chandra Das* (1906) 33 Cal 1163
(*i*) *Kamal* v *Mulli* (19) 49 Mad L J 38 91 I C 30? (6) A M 153
(*j*) \ [illegible] *Mula* *Lal* (189) 1 All 6 *Kesh v* \ *Fr sh* *r o* (1896) 20 Bom 508 *Aubl ya* \ *Bissenwari* (1897) 24 Cal 883
(*k*) *Stuart Skinner* \ *Orde* (1880) 2 All 241 \ *a a* *M k n L l* (183) 17 All 5 6 *Ja Idl ary* *J ki* (1901) 8 Cal 4 7 *Sooklal* v *D l Ch d* (19 3) 1 Rang 196 4 I C 83 (3) A R 6 Contra *Abbasi* v *Na hi* (1896) 18 All 06

day on which the *application* was filed and not on the day on which the Court fees were paid

2 On the last day of the period of limitation prescribed for the institution of a suit *A* applies for leave to sue as a pauper The application is heard a fortnight later It transpires at the hearing of the application that *A was possessed of sufficient means to enable him to pay the Court fees* Before an order is made under this rule rejecting the application *A* pays the necessary Court fees into Court and the application is thereupon converted into a plaint The application not having been made in good faith the suit will be deemed to have been instituted on the day on which the Court fees were paid and not on the day on which the application was filed The Court fees having been paid *after* the expiration of the period of limitation the suit is time barred.

Limitation where plaintiff dispaupered—Where a plaintiff is dispaupered under r 9 and he pays the Court fees as provided by r 11 he is entitled to continue the suit and no question of limitation arises (*l*)

8 [S 410] Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit

Procedure if application admitted

Limitation where application granted See notes to r 7 above

9 [S 414] The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

Dispaupering

(a) if he is guilty of vexatious or improper conduct in the course of the suit,

(b) if it appears that his means are such that he ought not to continue to sue as a pauper, or

(c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter

Clause (a)—Non disclosure by the plaintiff of a life policy worth Rs. 225 in a suit where the Court fees were over Rs 500 was held not to justify his being dispaupered (*m*)

(*l*) Na i i v *M kan Lal* (189) 17 All 6

(*m*) *Sha k r h t* v *Sakharambh t* (19) 46 Bom 101 0 I C 964 (22) A R 1

Clause (b)—Receipt of interim maintenance during the suit is not a ground for dispaupering the plaintiff if it is not enough to enable her to save the amount required for Court fees (n) Nor can she be dispaupered because she is living with a rich relation and appearing by eminent counsel (o)

Limitation where plaintiff dispaupered—See notes to r 7 under the same heading

10 [S 411] Where the plaintiff succeeds in the suit, the Court shall calculate the amount of Court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject matter of the suit

Cost where pauper succeeds

See rr 12 and 13

Amount of Court fees shall be a first charge—The charge is to be enforced by an application for the attachment and sale of the subject matter of the suit A separate suit for the sale of the subject matter to realise the Court fees is now barred see r 13 below and s 47 (p) The application for execution by the Government must be made within three years from the date of the decree in the pauper suit (q)

Recovery of Court fees by Government from party ordered to pay the same—If the plaintiff is directed to pay the Court fees the Government may realize the same by an application for execution against the person or property of the plaintiff and if the defendant is directed to pay the Court fees the Government may realise the same by an application for execution against the person or property of the defendant

Mode of realization of Court fees by Government—The plaintiff in a suit *in forma pauperis* obtains a decree against the defendant for possession of certain property It is declared by the decree that the amount of Court fees shall be a first charge on the property and that the same shall also be recoverable by the Government from the defendant In such a case if the defendant fails to pay the Court fees the Government may at its option realize the Court fees either by attachment and sale of the property which was the subject matter of the suit or it may realize the same by an application for execution against the person or property of the defendant (r) The former right is not lost merely because the property for the recovery of which the pauper suit was brought has passed from the hands of the judgment debtor into the hands of the pauper decree holder (s) The Government however have no *no lien upon the decree* for the amount of the Court fees (t) hence if the amount of Court fees is not paid the Government are not entitled to sell the decree obtained by the plaintiff for the purpose of recovering such amount (u) In a case where a successful plaintiff's property was confined to a right to future maintenance a receiver was appointed to collect it and to pay the Government by instalments (v)

(n) *Srinivasa v Secretary of State* (1923) 2 Pat 879 77 I C 611 (1924) A I 27

(o) (1923) 2 Pat 879 77 I C 611 (1924) A P 7 supra

(p) *Ram Das v Secretary of State* (1896) 18 All 419 *Babu v Secretary of State* (1919) 4 Pat L J 166 50 I C 315

(q) *Appaya v Collector of Vizagapatam* (188) 4 Mad 155

(r) *Ram Das v Secretary of State* (1896) 18 All 419

(s) *Babu v Secretary of State* (1919) 4 Pat L J 166 50 I C 315

(t) *Pran Kristo v Collector of Moorshedabad* (1871) 15 W R 20

(u) *Jotindro Nath v Dwarka Nath* (1893) 20 Cal 111

(v) *Secretary of State v Venka* (1926) 49 Mad 567 94 I C 4 (1926) A M 56

r 10 **Effect of first charge.**—Since the amount of Court fees recoverable by Government is a *first* charge on the subject matter of the suit (w) it follows that a sale held in execution of such charge must prevail against a subsequent sale (x) For the same reason the defendant against whom the decree is passed cannot set off against the subject matter of the suit any sum that may be due to him under a cross-decree held by him against the plaintiff *A* obtains a decree against *B* for Rs 1 500 in a suit brought *in forma pauperis* *A* is directed by the decree to pay the Court fees but he fails to pay the same Thereupon the Government apply to attach and sell the judgment debt of Rs 1 500 due to *A* from *B* *B* claims to set off Rs 1 475 due to him under a decree held by him against *A* *B* is not entitled to the set-off claimed by him for the Government has a *first* charge on Rs 1 500 that being the *subject matter* of the suit (y)

Crown s prerogative of precedence in respect of Court fees—If the plaintiff succeeds in the suit and the amount payable under the decree by the defendant is paid *into Court* the Government is entitled to payment of the Court fees out of the fund in the Court on a mere application for payment without *attaching* the fund in the first instance This is because the Crown is entitled to precedence in respect of a Crown debt over all other creditors of the pauper decree holder *A* obtains a decree against *B* for specific performance and costs in a suit brought *in forma pauperis* It is directed by the decree that *B* should pay the Court fees to Government and the Court fees are also declared to be a first charge on the property directed to be conveyed by *B to A* *B* fails to pay *A* s costs *A* thereupon applies for attachment and sale of certain property belonging to *B* for payment of his costs The property is sold and the sale proceeds amounting to Rs 1 000 are paid into Court Thereafter *A* s solicitor *C* applies to the Court for payment to him out of the Rs 1 000 of the costs incurred by him on behalf of *A* At the same time a claim is made by the Government Solicitor for payment of the Court fees out of the Rs 1 000 in priority to *C* s claim The Government are entitled to precedence in respect of the Court fees and *C* is entitled only to the balance left after payment of the Court fees (z)

It is to be observed that in the Calcutta case cited above *C* was a creditor of *A* inasmuch as he was entitled to be paid his costs by *A* But he was merely an *ordinary* creditor as distinguished from a *secured* creditor It is also to be observed that Court fees form a Crown debt and the Crown was to that extent a creditor of *A* It has to be borne in mind that it is only when claims of the Crown and claims of *ordinary* creditors or common persons (to use an old expression) concur or come into competition that the Crown is preferred The Crown has no more right than a common person to seize X s property and apply it in or towards discharge of a debt due from X It was so observed by Lord Macnaghten in a case in which the Privy Council held that where a money decree is obtained by a pauper in a suit by him against X and X is directed by the decree to pay the Court fees the Government are not entitled to realize the Court fees by a sale of X s property previously mortgaged by him to Y so as to defeat the right of Y (a) All that could be sold by the Government in such a case is the equity of redemption of X in the property (b)

Appeal.—Questions arising between the Government and any party to the suit under this rule would be questions relating to the *execution discharge and satisfaction* of a decree within the meaning of s 47 And it is provided by r 13 below that they should be deemed to be questions arising *between the parties to the suit*

(w) See (p t v *Collector of Ka ra* (18 6) 1 Bom 7
( ) *Puth a* v *lock* (190) M 33
(y) *Ja k* v *Collector of Allah b d* (18) 9 All 64
(z) *G y oda* v *B tt Kr st* (1906) 33 Cal 1040 *Ga pat* v *Collector f Ka ra* (18 6) 1 Bom 7 *Secretary of Stat* v *Bombay La d g d Shipp g Co* (18) 5 B H C O C 23
(a) *I gh Prasad* v *Mewa L l* (191) 34 All 3 3 I A 6 15 1 7
(b) *Dost M hamm d* v *M l lam* (190) All 53

within the meaning of s 47 It follows that an order deciding any such question is appealable as a decree [see s 2 cl (2) and s 96] (c) Under the Code of 1882 it was held by the High Courts of Bombay and Madras that the Government not being a *party* to the suit such questions could not be said to be questions arising *between the party to the suit* within the meaning of s 244 [now s 47] and that orders determining such *questions were not appealable as decrees* (d) *On the other hand* the High Court of Allahabad held that such orders were appealable (e) Rule 13 (which is new) sets this conflict at rest by providing that though the Government *is not* a party to the suit the Government *shall be deemed* to be a party to the suit for the purposes of s 47

Costs where pauper partly succeeds and partly fails—Rule 10 deals with the case of a pauper plaintiff who succeeds in the suit Rule 11 deals with the case of a pauper plaintiff who fails in the suit There is no separate provision for the case in which a pauper plaintiff has partly succeeded and partly failed Presumably the Court is intended to deal with such a case by combining the provisions of the two rules In such a case therefore the Court fees payable on the plaint should be apportioned between the plaintiff and the defendant The Madras and Allahabad High Courts have held that it is illegal to lay upon the defendant in such a case a larger proportion of the Court fee leviable from the plaintiff than would have been payable by the plaintiff if the claim had been limited originally to that portion which was successful (*f*) But the Calcutta High Court considers that the Court has a discretion and is not bound by any hard and fast rule of apportionment (*g*) In a suit for Rs 3 000 the plaintiff got a decree for Rs 88 15-0 and was ordered to pay the defendant s costs amounting to Rs 151 The Court held that as plaintiff was precluded by O 21 r 19 from executing his decree the case fell under rule 11 (*h*) Again when a pauper appeal was allowed on a point that did not touch merits of the case the Court ordered the Court fees to be paid by the appellant and respondent in equal moieties (*i*)

11 [S 412] Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed,—

Procedure where pauper fails

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court fees or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing,

the Court shall order the plaintiff or any person added as a co plaintiff to the suit, to pay the Court-fees which would

(c) *Secretary of State v Narayan* (190) 9 Bom 10

(d) *Collector of P t g v J rdan* (188) 6 Bom 590 *Collector of Ka ra v mbhot* (1894) 18 Bom 454 *Collector of Trichinopoly v Sivaramakrishna* (1900) 23 Mad 3

(e) *Secretary of State v Bhagw ti* (1891) 13 All 3 6

(f) *Chandrar La v Secretary of State* (1890) 14 Mad 163 *Ga g v Ga ra* (1916) 38 All 469 3 I C 46 *Secretary of State v Tr pu d* (19 6) 30 Mad L J 80 96 I C 112 (6) A M 4 4 *Sr n a a v I k h i* (19 8) 54 Mad L J 530 108 I C 1 (8) A M 16

(g) *Poh i K ma v Kus n K m ni* (19 8) 55 Cal 488 10 I C (8) A C 196

(h) *Chak p n v Government of India* (19 1) 4 Mad L J 191 63 I C 43 ( ) A M 1 5

(i) *Balam i v Ram* (19 5) 48 Mad L J 273 87 I C 57 ( ) A M 86

11 have been paid by the plaintiff if he had not been permitted to sue as a pauper

See rules 12 and 13

Alterations in the rule

1 The word withdrawn has been newly added See notes below un l r the head Withdrawn.

2 Besides the liability to pay the Court fees the plaintiff was under the old section subject to a further penalty of fine or imprisonment if the Court found that the suit was frivolous or vexatious This provision has been omitted in the present rule

Scope of the rule —An order under this rule directing the pauper plaintiff to pay the Court fees can only be made in the following four cases —

(1) where the plaintiff *fails* in the suit

(2) where the plaintiff is *dispaupered* under r 9

(3) where the suit is *withdrawn* or

(4) where the suit is *dismissed under the circumstances specified* in cl (a) or cl. (b)

If follows from what has been stated above that where an application fo leave to sue *in forma pauperis* is returned under O 7 r 10 for want of jurisdiction to be presented to the proper Court no order can be made under this rule directing the applicant to pay the Court fees It cannot be said in such a case that the plaintiff has *failed* in the suit (*j*) The decision may also be put on the ground that the present rule does not apply until the application is granted and is numbered and registered under r 8 above But a dismissal of the suit at the request of the plaintiff and the defendant on the suit being settled out of Court amounts to a *failure* within the meaning of this rule (*k*)

Withdrawn. —This word has been newly added. Under the old section there was a conflict of decisions as to whether the Court could order the plaintiff to pay the Court fees if the suit was withdrawn (*l*) The insertion of the word withdrawn makes it clear that the Court has the power under this rule to order the plaintiff to pay the Court-fees if the suit is withdrawn whether the withdrawal is without the leave of the Court or with leave to bring a fresh suit under O 23 r 1

Costs —This rule does not preclude the Court from awarding a successful defendant his costs in a pauper suit. The Court has full power under s. 35 to give and apportion costs in any manner it thinks fit Nothing in this rule limits or otherwise affects the power conferred upon the Court by s. 35 to give and apportion costs (*m*)

Omission to make an order for payment of Court fees —The Government has the right at any time to apply to the Court to make an order for the payment of the Court fees (r 12) If the order is refused the Government may by virtue of the provisions of r 13 (which is new) prefer an *appeal* from the order of refusal Under the Code of 1882 it was held that the Government not being a party to the suit had no right of appeal and it could therefore proceed only by an application for *revision* (*n*).

(*j*) *Collector of I at agiri v Janard n* (188) 6 Bom 590

(*k*) *Secretary of Stat v Na yo* (1911) 3 Bom 448 1_1 (29

(*l*) *Collector f Visagapatam v Abd l Karim* (1 98) 1 Mad 113 *Secret ry of Stat v Naraya* (190) 29 Bom 10 *Secret ry f Stat v Bh girath bai* (190) 31 B m 10 [Court fees ordered] *Collector of K ara v Krish ppa* (1891) 15 B m *Chandaba v Kuver* (1 94) 15 Bom 464 [Co rt fees not ord red]

(*m*) *Jetha v C lraj* (1884) 8 Bom

(*n*) *Collect r f I at ag ri v J nard* (18) 6 Bom 590 *Collector f Kanara Krishnappa* (1891) 1 Bom *Chandaba v K er* (1 94) 19 Bom 464

12 [*New*] The Government shall have the right at any time to apply to the Court to make an order for the payment of Court fees under rule 10 or rule 11

Government may apply for payment of Court fees

This rule is new It enables the Government, in cases of error and omission with regard to Court-fees to have the error or omission rectified by a mere application to the Court. See r (13) below

13 [*New*] All matters arising between the Government and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47

Government to be deemed a party

This rule is new See notes to r 10 under the head Appeal and notes to r 11 under the head Omission to make an order for payment of Court fees

14 [*New*] Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector

Copy of decree to be sent to Collector

15 [S 413] An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue, but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature

Order refusing to allow applicant to sue as pauper—This rule provides that an order *refusing* to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue. The words order refusing to allow the applicant to sue have given rise to the question whether an order *rejecting* an application under r 5 above is an order *refusing* to allow the applicant to sue within the meaning of this rule or whether those words refer only to an order made under r 7 where the words used are also *refuse* to allow the applicant to sue as a pauper It has been held in some cases that there is no distinction between an order of rejection made under r 5 and an order of refusal made under r 7 and that rejection of an application under r 5 is a bar to a subsequent application in respect of the same right to sue (o) On the other hand it has been held that there is a distinction between orders made under r 5 and those made under r 7 and that the rejection of an application under r 5 is no bar to a subsequent application (p)

(o) *Ranchod v Bezanj* (1896) 20 Bom 86 *Atul Chand v Raja Perry* (1913) 20 C W N 669 *Al Afzal v Purna* (1941) 40 Cal L H 188 84 I C 703 (1941) A C 1033 ... *Ma Kya* (1926) 4 Rang 24 ... (26) A R 290 ... *R mayya* (1927) ... I C 96 (26) A ... *Ma Shwe* (1929) 7 Rang 54 ... 15 (29) A R ...

(p) *Musammat Bal Kaur v Shib Das* (1900) 1 Lah 151 56 I C 07 *Ma Sein v* ...

3 **Dismissal of application for default or for want of prosecution.**—It has
16 been held in some cases that the dismissal of a pauper application for default (q) or dismissal owing to the applicant's failure to prosecute the application is a bar to a subsequent application (r) while in some that it is not (s)

Bar to subsequent application—The bar to a subsequent application being a bar to the *jurisdiction* of the Court the Court is competent and bound to take notice of it at any stage of the suit (t)

Right to sue.—There is no substantial distinction between the words right to sue in this rule and the words cause of action in rule 5 It has accordingly been held that the dismissal of an application to sue in forma pauperis for maintenance for a particular period is no bar to a subsequent application for maintenance for a different period (u).

16 [S 415] The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit

Costs

ORDER XXXIV

Suits relating to Mortgages of Immovable Property

· 1 **1** [*New* Act 4 of 1882 s 85] Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage

Parties to suits for foreclosure sale and redemption

Explanation—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit, and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage

Suits relating to mortgages—This Order is new It is a re enactment with some alteration of sections 85 90 92 94 96 97 and 100 of the Transfer of Property Act, 1882 relating to suits on mortgage The Transfer of Property Act did not contain any provision for the passing of a final decree in cases where payment was made in accordance with the terms of the preliminary decree This omission has now been remedied and provision has been made in rules 3 5 and 8 for the passing of a final decree in such cases. The object of transferring the provisions relating to mortgage suits from the Transfer of Property Act to the Code is explained in the notes to r 3 below Limitation for application for final decree

Transfer of Property Act, 1882 s 85.—This rule is a reproduction with some alterations of s 85 of the Transfer of Property Act which ran as follows

Subject to the provisions of the Code of Civil Procedure s 437 [now O 31 r 1] all persons having an interest in the *property comprised in a mortgage must* be joined as parties to any suit under this chapter relating to such mortgage *provided that the plaintiff has notice of such interest.*

(q) *Ranchod v Bensa ji* (1896) 20 Bom 86.
(r) *Atul Chandra v Raja J ary* (1915) 20 C W N 662
(s) *Ma Sein v Ma Kya* (1926) 4 Rang 415 98 I C 6 (1926) A R. 00
(t) *Ranchod v Bensa ji* (1896) 20 Bom 86 (1) *Afzal v Purn* (1931) 40 Cal L J 1 84 I C 03 (24) A C 1037
(u) *Pat a Mala Das v K mak hya* (1920) 31 Cal L J 3.1 57 I C 9

A comparison of the present rule with s 85 of the Transfer of Property Act will shew that the words in the mortgage security or in the right of redemption have been substituted for in the property comprised in the mortgage An Explanation has been added and the provi o relating to notice is omitted. The explanation was added as *it was generally thought that s 85 made it imperative on a puisne mortgagee to make* a prior mortgagee a party to his action for foreclosure The substitution of the words in the mortgage security or in the right of redemption have made it clear that an adverse claimant who is a stranger to the security or the equity of redemption need not be joined (t) see notes below Persons having an interest either in the mortgage security or in the right of redemption

Scope and object of the rule—The object of this rule requiring all persons having an interest either in the mortgage security or in the right of redemption to be joined as parties is to avoid multiplicity of suits (*w*) The rule applies only to suits *relating to a mortgage* that is to say to suits for foreclosure sale and redemption as indicated by the marginal note to the rule The rule therefore does not apply to suits by a mortgagee for a *personal decree* against the mortgagor (as to which see r 6 below)

Persons having an interest either in the mortgage security or in the right of redemption—The corresponding words in the Transfer of Property Act s 85 were persons having an interest in the *property comprised in a mortgage* The e words gave rise to a conflict of views According to one view which coincides with the English law and the law as enunciated in the present rule those persons only should be joined as parties to a suit relating to a mortgage who were either interested in the mortgage security or in the right of redemption A person who sets up a title paramount to that of the mortgagor and mortgagee should not be joined as a party to such suit for he is neither interested in the mortgage security nor in the right of redemption (*x*) *Thus if A lets his property on a lease to B and B mortgages the leasehold to C A* holding the property by title paramount should not be joined as a party defendant to a suit by *C* to enforce the mortgage (*y*) Similary if *A* and *B* are co owners of certain property and *B* mortgages his undivided share to *C A* should not be joined as a party to a suit for sale by *C* as *A* has no interest in the right of redemption ( ) According to the other view which prevailed in Allahabad all persons must be joined as parties if they had an interest in the *property* though they might have no interest either in the mortgage security or in the equity of redemption The word property according to the Allahabad High Court means the actual immovable property mortgaged and not merely particular rights and interests in such property such as a bare right to redeem(*a*) The view held by the Allahabad High Court is no longer tenable The present rule gives effect to the former view which as already stated is in accordance with the English law

But though the Allahabad High Court held that all persons interested in the *mortgage property* must be joined as parties to a suit on mortgage that Court agreed with the other High Courts in holding that a person who claimed adversely to the mortgagor and the mortgagee is not a necessary party to such suit Thus if *A* mortgages certain property to *B* and *B* sues *A* for sale of the mortgaged property and *C* claims the property as his

(*v*) Ghose on mortgag 4th ed p 9 7

(*w*) *Lala Su aj P os d* v *G lab Chand* (1901) 28 Cal 517 5 9 530 *Shaha aheb* v *Sad hie* (1919) 43 Bom 575 578 51 I C 3

(*x*) *Nilakant Ba erji* v *Su e h Chandra* (1886) 1 Cal 414 4 1 4 12 I A 171 *Jagg war Dutt* v *Bh ban M hun* (1906) 33 Cal 4 *Radha Kunwar* v *Reol Singh* (1916) 43 I A 187 188 38 All 493 491 35 I C 939 *M ng S n* v *U Pon G jaw* (19 4) 2 Rang 106 80 I. C 753 (24 A R. 240 *Visuanathan* v *Ma Aye* (19 6) 4 Rang 214 98 I C 11 (26) A R 208

(*y*) *J ggeswar Dutt* v *Bhuban Mohan* (1906) 33 Cal 4 5 See also *Krishna Ayy* v *Muthukuma aswamiya* (1906) 29 Mad 217 2 4

(*z*) *Mon Moh n Ghose* v *Parvati Nath Ghose* (1905) 3 Cal 716 *Jogo Mohun Deb* v *Daudoong* (1908) 12 C W N 94

( ) *Mata Din* v *Kazim Husain* (1891) 13 All 44 [Mahmood J dissenting

1 [illegible] C is not a necessary party to the suit [illegible] of C's paramount title cannot be [illegible] in D's suit [illegible] is a tenant [illegible] the present rule.

On the other hand, the question is not one of [illegible] but at most one of [illegible], and when it is allowed that the person claiming adversely to the title [illegible] is a [illegible] of the mortgagee [illegible] is in possession [illegible] the [illegible] of the [illegible] in the mortgage suit [illegible] be convenient [illegible] as a party.

See notes [illegible] under the head "Parties to suits [illegible]."

[illegible] prior mortgagees.—The [illegible] to the rule is new [illegible] enacted [illegible] s. 85 of the Transfer of Property Act [illegible] the effect that a prior mortgagee is a necessary party to a suit for sale or [illegible] by a puisne or subsequent mortgagee [illegible]. The [illegible] declares that a prior mortgagee is not a necessary party [illegible] such a suit. Thus if A mortgages his property to B, and subsequently to C, C may sue for sale without making B a party to the suit. In such a case if a decree for sale is passed, the property will be sold subject to B's mortgage [illegible]. But this rule does not preclude C from joining B as a party [illegible] B would be a proper party if C offers to redeem B's mortgage [illegible]. But if C merely joins B as a party and claims no relief against him, B's position is that of a holder of a paramount title outside the controversy and he will not be affected by the decree for sale which C obtains [illegible] sale will be subject to B's mortgage. This is what happened in the case of [illegible] v. [illegible] [illegible]. The prior mortgage was of [illegible] and [illegible] in September [illegible] the plaintiff. The puisne mortgage was of [illegible] C who sued for sale in August [illegible] making D a party but claiming no relief against him. After [illegible] the decree for sale, the plaintiff sued on his prior mortgage and was met by the plea [illegible] on the ground that he [illegible] D might and ought to have enforced the security in the former suit. The defence failed as C had not in his suit sought to displace D's title or to redeem it as his own.

[illegible] from the first branch of the Explanation to the rule that where the same person holds two mortgages of different dates upon the same property he may sue on the mortgage of the later date subject to his rights under the first mortgage.

The second branch of the Explanation declares that a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. [illegible] mortgages his property first to B, and then to C. B is not a necessary party to a suit by [illegible] against C for redemption of the mortgage to C.

Parties to suits for redemption, foreclosure or sale.—All persons [illegible] in the [illegible] and therefore in the proper taking of the account [illegible] as the mortgagor, or [illegible] by operation of law as the

[illegible]

[illegible]

Official Assignee or Receiver of the assets of the mortgagor in insolvency (*l*) or by voluntary alienation as the transferee of the equity of redemption (*m*) should be made parties to a suit relating to a mortgage (*n*) In other words persons mentioned in s 91 of the Transfer of Property Act as persons entitled to redeem the mortgaged property should be joined as parties (*o*) If not joined as plaintiffs they should be joined as defendants (*p*) But a person not having any interest in the mortgage at the date of the suit need not be joined as a party (*q*)

If a mortgagee suing on his mortgage either for sale or foreclosure thinks fit to exempt from his suit some portion of the mortgaged property and to sell or to foreclose the mortgage in respect of the remainder there is nothing in law to prevent his doing so If he exempts a portion of the mortgaged property from his suit he is not obliged to make parties to the suit persons interested in the portion so exempted (*r*) The same rule applies where a part of the property originally mortgaged has been absolutely released from the mortgage and has become excluded from the operation of the security (*s*) If the mortgagee by his laches loses his remedy against the owner of part of the equity of redemption and does not make him a party to the suit that part of the property is treated as released from the mortgage and the mortgagee must submit to a deduction from his claim (*t*)

Where there are two or more mortgagors that is two or more persons interested in the equity of redemption any one of them may sue for redemption but then the other mortgagors must be made party defendants (*u*) Where there are two or more encumbrances created on the same property the mortgagor seeking to redeem the first mortgage must join the subsequent mortgagees as parties Similarly a second mortgagee seeking to redeem a prior mortgage must join the mortgagor as a party (*v*) But the prior mortgagee is not a necessary party to a suit by the mortgagor to redeem a subsequent mortgage *see* Explanation to the rule

All persons *interested in the mortgage security* either (1) *primarily* as the mortgagee or (2) *derivatively* (i) by operation of law as the Official Assignee or Receiver of the assets of the mortgagee in insolvency or (ii) by voluntary alienation as the transferee of the security or debt should be made parties to a suit relating to the mortgage (*w*) If not joined as plaintiffs they should be joined as defendants

A mortgages his property to *B* *B* sues *A* on the mortgage During the pendency of the suit *A* executes a second mortgage of his property to *C* *C* is not a necessary party to *A* s suit the mortgage to him having been executed subsequently to the institution of the suit (*x*)

Trustees executors and administrators—The rule begins with the words subject to the provisions of this Code The reference is to O 31 r 1 which provides

(*l*) *Punuth elu* *Bhashyam* (1902) 25 Mad 406 4 But see *Jagannath* v *Kalachan* (19 5) 41 C I L J 290 86 I C 1042 ('25) A C 785

(*m*) *Hi alal* v *Kishan Lal* (1897) 19 All 543 *Sivathi* v *I amasubbayar* (1898) 21 Mad 64 *Brojonath* v *Kh lut Chunder* (1871) 14 M I A 144

(*n*) *R gho Vinay k* v *Sheikh Daud* (1889) 13 Bom 51 53

(*o*) *Ghulam Hus n* v *Dina Nath* (1901) °3 All 467 [attaching decree holder] *Dadoba* v *Damodar* (1892) 16 Bom 486 [auction purchaser] *Ahmad Hus ain* v *Muhammad Q s m* (19 6) 48 All 171 90 I C 80 (26) A A 46 (*co-mortg gor*)

(*p*) *Ragho Salvi* v *Balkrishna* (1885) 9 Bom 123

(*q*) *Ragho* v *D ud* (1888) 13 Bom 51 *Trimbak* v *S kharam* (189) 16 Bom 599

(*r*) *Sheo Tahal* v *Sh odan Rai* (1906) -8 All 174 *Sh o Prasad* v *Behari Lal* (1903) 25 All 79 See also *Ganeshi* v *Cha a* (1913) 35 All -47 19 I C 614

(*s*) *Nazi Hu ain* v *Nihal Chand* (1905) All W N 156 *Hari Kissen* v *Velial Hossein* (1903) 30 Cal 755 *Ponnusami* v *Srinivasa* (1908) 31 Mad 333

(*t*) *Imam Al* v *Baijnath* (1906) 33 Cal 613 (P C) *Budhmal* v *Rama* (1920) 44 Bom 23 65 I C 3 7 *Harchandra* v *Mahumed* (19 1) 25 C W N 594 66 I C 312

(*u*) *B n Singh* v *Nawal Singh* (1902) 24 All 2 6 *Mariyil Raman* v *Naraya an* (1903) 26 Mad 461

( ) *Thompson* v *Baskerville* (1689) 3 Ch Rep 215

(*w*) See Seton on Decrees 6th ed vol. ii 193 Daniell s Chancery Practice 8th ed vol I., pp 184 189

(*x*) *Ishaq Ali Khan* v *Chunni* (1899) 21 All 149

for suits concerning property vested in a trustee executor or administrator Having regard to the provisions of that rule a suit for redemption (*y*) or foreclosure ( ) or sale may be brought by trustees without making the beneficiaries parties.

Benamidar—A benamidar can maintain a suit on a mortgage Thus if a mortgage is executed ostensibly in favour of *A* but the real mortgagee is *B* *A* may sue the mortgagor on the mortgage It is not open to the mortgagor to contend that *A* being merely the benamidar he cannot maintain the suit (*a*)

Sub mortgagee—A mortgagee may create such estates as he pleases. He may convey by way of sub mortgage to whom and in as many parcels as he pleases (*b*) It has been held by a Full Bench of the Allahabad High Court that when a mortgagee has sub mortgaged his interest in the property mortgaged to him the sub mortgagee is *entitled to sell* the interest in the property of his sub mortgagor without impleading the mortgagor and foreclosing his equity of redemption in other words he is entitled to sell the sub mortgagor s interest leaving the equity of redemption outstanding in the mortgagor (*c*) In an earlier case (*d*) the Allahabad High Court took the view that a sub mortgagee is entitled only *to a decree for money* against the sub mortgagor but this was doubted in later cases (*e*) and it is not good law See notes to r 2 below Sub mortgagee

A person cannot be both plaintiff and defendant.—In a foreclosure action by a first mortgagee where the plaintiff also joined himself as a defendant as one of the puisne mortgagees *his name was struck out as a co defendant* (*f*)

Consequences of non joinder—Under the corresponding section 85 of the Transfer of Property Act it was held by the Allahabad High Court that the non *joinder of a person who ought to have been made a party to a suit on a mortgage was a defect fatal to the suit* and that the suit should therefore be dismissed but that the Court if it sees fit to do so may add him as a party under s. 32 of the Code of 1882 [O 1 r 10 (2)] Those decisions proceeded on what the Court said was the imperative character of the word must in section 85 of that Act (*g*) In a recent case under the present rule the same Court held that the result of non joinder of a subsequent mortgagee in a suit on a prior mortgage though intentional would not be the dismissal of the whole suit but only so much of it as relate to the property affected by the subsequent mortgage (*h*) The High Courts of Bombay (*i*) and Calcutta (*j*) took the same view as the Allahabad High Court.

The word must which occurred in s 85 of the Transfer of Property Act having been dropped and the section having been transferred into the Code the question as to the effect on non joinder is it is submitted governed by the provisions of the Code O 1 r 9

(*y*) *Mills* v *Jennings* (1880) 13 C. D 639 affd 6 App Ca 698

(*z*) *Morley* v *Morley* (1858) 25 Beav 253 [illegible] *Francis* v *Harrison* (1890) 43 C D 183

(*a*) *Gur Narayan* v *Sheo Lal Singh* (1919) 46 I A 1 9 46 Cal 66 574 49 I C 1 *Bhola Pershad* v *Ram Lal* (1897) 24 Cal 34 [illegible] v *Makund* (1898) Bom 678 *Nand Ram* v *Umrao Singh* (1899) 21 All 391

(*b*) *Taylor* v *Russell* [189] A C 235 per Lord Herschell

(*c*) *Ram Shankar* v *Ganesh Prasad* (1907) 29 All 3 (F B) approved [illegible] v *Basudeo* (19) 24 Bom L R 911 64 I C. 741 ( ) All [illegible] *Motiram* v *Bharat* (19 1) 3 Lah L J 373.

(*d*) *Ganga Prasad* v *Chhab Lal* (1896) 18 All 113 *Ram Jata* [illegible] v *Ramhit Singh* (1905) 27 All 511

(*e*) *Ram Sahay* v *Narsingh* (1905) All 472, 477 [illegible] *Muthu* [illegible] v *Venkatachalam* (1897) 20 M 1 35

(*f*) *Warell* v *Mulhall* (1889) 61 L. T 560

(*g*) *Mata Din* v *Kasim Husain* (1891) 13 All 43 465 *Bhawani Prasad* v *Kallu* (1895) 17 All 537, 553 556 *Ghulam Kadir Khan* v *Muhammad Hakim Khan* (1896) 18 All 109 112 *Kunj Lal* v *Fateh Chand* (1905) 27 All 5 [Parties added] *Tula Singh* v *Thakur Kishore* (1 24) 23 All 144 [parties added]

(*h*) *Alam Singh* v *Chhail Singh* (1913) 35 All 481 21 I C 71

(*i*) *Sorabji* v *Rattonji* (1898) 2 Bom 701 707

(*j*) *Jamsala Jahad* v *Ganga Pershad* (189) 19 Cal 401 411

provides that no suit shall be defeated by reason of non joinder of parties and O 34 r 1 is subject to O 1 r 9 (l) Under O 1 r 10 (2) the Court has the power to add parties at any stage of the suit By s 99 of the Code it is enacted that no decree shall be reversed or substantially varied in appeal on account of any misjoinder of parties [which include non joinder (l)] unless it affects the merits of the case or the jurisdiction of the Court The result is that no suit on a mortgage should be dismissed by reason of non joinder of parties unless the parties are *necessary* parties and the plaintiff refuses to add them as parties If the parties are merely *proper* parties as distinguished from necessary parties (m) the Court may though the plaintiff refuses to add them as parties proceed under O 1 r 9 to deal with the matter in controversy so far as regards the rights and interest of the parties actually before it This was in effect held by the High Court of Bombay in *Shahasheb* v *Sadashiv* (n) a case under the present rule In that case a suit was brought by a mortgagee against the widow and daughters of the deceased mortgagor for sale of the mortgaged properties The deceased was a Mahomedan and besides the widow and daughters he left a brother as one of his heirs It was contended on behalf of the defendants that the brother having an interest in the right of redemption he ought to have been joined as a defendant and that the plaintiff having omitted to join him as a defendant the suit should be dismissed in its entirety At the date when the objection as to non joinder was taken by the defendants the period of imitation as against the brother had expired It was held overruling the contention that the brother was not a *necessary* party and that a decree could be passed against the widow and the daughters to the extent of their interest in the properties So in a mortgage suit a second mortgagee is a proper party but not a necessary party and the suit should not be dismissed because he has not been joined (o)

Where a person who ought to have been joined as a party under this rule is not joined as a party and a decree is passed in the suit the decree cannot affect his rights (p) [see notes below Mahomedan co heirs] To take a case which frequently occurs if a second or subsequent mortgagee who ought to be but is not joined as a party to a suit by the prior mortgagee the proceedings in the suit are not binding on him so as to affect his rights under the second mortgage (q) As second mortgagee he could have sued the mortgagor for a sale of the property subject to the first mortgage or he could have redeemed the first mortgage and then sued the mortgagor for sale on both the mortgages The point to be noted is that the second mortgagee does not lose either of these rights merely because a decree has been passed in the prior mortgagee s suit and the mortgaged property has been sold in execution of the decree The sale has not the effect of displacing the second mortgagee and leaving him with nothing but a claim against the balance (if any) of the sale proceeds of the property after satisfying the first mortgagee (r) The omission to implead the second mortgagee does not in any way

(k) *Sital Prasad* v *Asho Singh* (19 3) 2 Pat 175 69 I C 677 (2) A P 6 1

(l) See notes to s 99 Misjoinder of parties or causes of action

(m) As to the distinction between necessary parties and proper parties see notes to O 1 r 10 ( ) Who ought to have been joined

(n) (1919) 43 Bom 575 51 I C 223 followed in *Kherodamoyi Das* v *Habib Shaha* (19 5) 9 C W N 51 8 I C 638 (5) A C 152

(o) *Sital P asad* v *Asho Singh* (19 2) Pat 175 69 I C 677 (2) A P 651 *Parsh d Lal* v *Laiq S gh* (1923) 21 All L J 701 74 I C 943 (24) A A 107

(p) *Brojonath* v *Khe ai Chunder* (1871) 14 M I A 144 *Ragho Salvi* v *Balkrishna* (1885) 9 Bom 128 *Hassanbhai* v *Umaj* (1904) 28 Bom 153 *Ram Na ain* v *Bandi Pershad* (1904) 31 Cal 737 *Judgeo Singh* v *Habibulla* (1908) 1 C W N 107 *Hi a Lal* v *Kishan Lal* (1897) 19 All 543 *Brij Kishore* v *Madho Singh* (1906) 28 All 279 *S athi* v *Pamasubbayya* (1898) 1 Mad 64 *Punnthavelu* v *Bhashyam* (190) 25 Mad 406 4 *R ngasamy* v *Jelli Bod* (1903) 6 Mad 484 *Mallikarjunadu* v *Li ga Murti* (1903) 26 Mad 33 *Kail h* v *Girja* (1912) 39 Cal 9 5 14 I C 299 *Birinchi S ngh* v *Sa ado P as d* (19 4) 3 Pat 114 75 I C 942 (24) A P 452 *Parasr m* v *Pandohi* (19) 44 All 46 67 I C 533 (2) A A 135

(q) *Umesh Chunder* v *Zahur Fatima* (1891) 18 Cal 164 17 I A 201 *Het Ram* v *Shadi Lal* (1918) 45 I A 130 133 40 All 407 410 45 I C 793 *Matru Mal* v *Kunwar* (19 0) 47 I A 71 4 All 364 55 I C 969 *Maung Shwe* v *Karambu* (19 8) 6 Rang 1 110 I C 701 (8) A R 1

(r) *Gobind Lal* v *Ramjanam* (1894 21 Cal 70 20 I A 165

1 of the Privy Council (p) that where a suit is brought on a mortgage by or against the manager of a joint Hindu family *in his representative capacity* the other members of the family are not necessary parties to the suit and that the suit will not fail by reason of the non joinder of those members. It makes no difference whether the manager is a father or collateral relation such as an uncle or a brother

According to the Bombay decisions it would seem that the other co parceners are necessary parties to a suit brought on a mortgage by or against the manager (q) But if they are not joined as parties and a decree is passed for the sale of the joint family property against the manager *in his representative character and* the property is sold in execution of the decree the sale it has been held passes the interest of the other co parceners also in the property the mere fact that they were not parties to the mort gage suit is no ground for setting aside the sale unless it be shown by them that the debt contracted by the manager was one for which they are not liable (r)

According to the Calcutta High Court the other co parceners are necessary par ties to a suit on a mortgage of joint family property and if a decree is passed in such a suit without their being joined as parties the decree is not binding on them and they may by suit obtain a declaration that not being parties to the suit their interests are n t *bound* by the decree in the suit (s)

In another case before the Privy Council governed by the Transfer of Property Act 1882 where a foreclosure decree was passed against the *manager* of a joint Hindu family and the other members brought a suit to set aside the decree on the ground of their non joinder as persons interested in the equity of redemption under s. 85 of the Transfer of Property Act their Lordships held that the decree was in the circumstances of the case binding upon them though they were not parties to the suit. Their Lordships said There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure suits when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of the case and the findings of the Courts upon them that this is a case where this principle ought to be applied *Th re is not the slightest ground for suggesting that the manager of the joint family did not act in every way in the interests of the family its lf* and no ques tion arises under s. 85 of the Transfer of Property Act [O 34 r 1] *because the mortgagee had no notice of the plaintiff's interests* (t) Note that the words provided that the plaintiff has *notice* of such interest which occurred in s. 85 of the Transfer of Property Act do not occur in the present rule

The recent Privy Council case of *Ganpat Lal* v *Bindbasini Prasad* (u) is an autho rity for the proposition that in a suit on a mortgage against the manager of a joint Hindu family all the other members of the family are represented by the manager The mortgage was by the manager and the mortgagee obtained a decree for sale joining as parties the manager and the other members of the family The mortgagee purchased the property himself But one of the members of the family who was a minor was wrongly described in the suit as an adult. He sued to redeem on the ground that not having been represented in the suit by a guardian *ad litem* he was not a party to the mortgagee s suit. This claim would have been unanswerable if he had not been

(p) *Kishan Pra ad* v *Har N ra n S gh* (1911) 33 All ? 38 I A 45 9 I C ?39

(q) *Ramchand a* v *Shripatra* (1916) 40 Bom 18 33 I C 771

(r) *Ramkrishna* v *Vinay k* (1910) 34 Bom 3 4 5 I C. 961 *Chamna* v *ada* (1910) 12 Bom I J 811 7 I C 990

(s) *Lala S raj P asad* v *Golab Chand* (1901) 28 Cal 17 *Lala S rja Prosad* v *Golab Chand* (1900) 27 Cal ?? *Debi Prosad* v *Dha amj t* (1914) 41 Cal ? ?? I C. 517

(t) *Sheo Shank* v *Jaddoo K* ?? (1914) 36 All 3 3 41 I A. 216 ? I C. ?? affirmi g (1911) 33 All 71 7 I C ??

(u) (19 ?) 47 I A 91 47 Cal 9 ? 56 I C 271 See also *Lingaj pa* v *E* ?? (19?7) 51 I A 1? 1 5 51 Bom 4?0 4 3 101 I C 44 (?7) A IC. 56

represented by the manager in the suit But the Privy Council held that as he had not sued to set aside the sale and did not impeach the mortgage or the decree the suit was not maintainable In other words he was represented by the manager and it did not matter whether he was a party or not The only ground which he could take was that he was not liable for the mortgage debt contracted by the manager and that he had not done The same rule was applied by the High Court of Bombay in a suit for sale on a mortgage against the grandfather who was the manager (t)

Where parties are not governed by the Hindu law and the only interest which a son has under the customary law is a reversionary interest in the property and a right to protect that interest by interfering to prevent unnecessary alienations the son has no such interest in the property as is contemplated by the present rule and he is not therefore a necessary party to a suit on a mortgage against his father (u)

Preliminary decree in foreclosure suit

2 [*New* Act IV of 1882, *sec* 86] (*1*) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage security, together with interest thereon, or

(b) declaring the amount so due at that date, and

(c) directing—

(i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints,

(t) *Madhusudan* v *Bhagwan* (19 9) 53 Bom 444 118 I C 88 (.9) A B 213

(u) *Sh v Dev Singh* v *Jai Ram* (1919) Punj Rec no 1.5 p 327 53 I C 411

2 all documents in his possession or power relating to the mortgaged property, and shall, if so required, re transfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time extend the time fixed for the payment of the amount found or declared to be due under sub rule (1) or of the amount adjudged to be due in respect of subsequent costs and interest

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of any such mortgagees are joined as defendants the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No 9 or Form No 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require

The old rule —The above rule has been substituted for old r 2 by the Transfer of Property (Amendment) Supplementary Act 1929 which comes into operation on the 1st April 1930 The old rule will be in operation till the above date It is as follows —

2 In a suit for foreclosure if the plaintiff succeeds the Court shall pass a decree—

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to or

(b) declaring the amount so due at the date of such decree and directing—

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court the plaintiff shall deliver up to the defendant or to such person as he appoints all documents in his possession or power relating to the mortgaged property and shall if so required re transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him or where the plaintiff claims by derived title by those under whom he claims and shall also if necessary put the defendant in possession of the property but

(d) that if such payment is not made on or before the day to be fixed by the Court the defendant shall be debarred from all rights to redeem the property

Transfer of Property Act 1882 s 86—This rule corresponds to s 86 of the Transfer of Property Act except in the following particulars —

1 The words to the plaintiff or which occurred in s 86 after the word pays in cl (c) have been omitted the object being that in every case the defendant should pay the money *into Court*

2 In cl (c) the words if so required have been added before the words re transfer the property as according to mofussil practice a re transfer is not ordinarily required

The old rule and the new rule —

1 The new rule expressly states that the decree to be passed under it is a *preliminary* decree

2 The old rule was not clear as to the date up to which accounts were to be taken The new rule makes it clear that the Court should direct accounts to be taken up to the date of the preliminary decree

3 The new rule expressly provides that in taking accounts the amount to be spent by a mortgagee for necessary costs charges and expenses incurred by the mortgagee in respect of the mortgage security together with interest thereon should be taken into account

4 The old rule was not clear as to the day on which payment was to be made by the mortgagor in cases where accounts were directed to be taken This is now made clear in sub rule (1) (c) (i)

5 The provision in new sub rule (1) (c) (i) as to subsequent interest is new See rule 11 (b)

6 New sub rule (1) (c) makes it clear that the costs of re transfer are to be borne by the mortgagor

7 New sub rule (1) (c) (ii) makes it clear that if default is made by the mortgagor in payment of the amount due under the preliminary decree the mortgagee has to apply to the Court for a final decree

8 New sub rule (2) relates to the power of the Court to extend the time for payment It is in substance a reproduction of old rule 3 (2) See note below Power to extend time in foreclosure suits

9 New sub rule (3) draws specific attention to the forms of decrees to be passed where subsequent mortgagees are joined as parties to a suit for foreclosure

Form of preliminary decree for foreclosure—See Appendix D Form No 3 when accounts are directed to be taken and Form No 3A when no accounts are taken and the Court declares the amount due

Foreclosure and sale—Until 1st April 1930 *i e* until the Transfer of Property (Amendment) Act 1929 comes into operation a suit for foreclosure can only be brought where the mortgage is an English mortgage or a mortgage by conditional sale After that date it is no longer open to the holder of an English mortgage to sue for foreclosure In the case of a mortgage by deposit of title-deeds in Bombay where the remedy by way of foreclosure was held to be open to such a mortgagee s 1ა (2) of the Transfer of Property (Amendment) Supplementary Act allows a period of two years *i e* upto 1st April 193 to such a mortgagee to enforce his remedy by way of foreclosure Under the Transfer of Property Amending Act 1929 the remedy by way of foreclosure is allowed only (1) in the ca e of a mortgage by conditional sale and (2) an anomalous mortgage where there is an express stipulation in that behalf A suit for sale can only be brought where the mortgage is an English mortgage or a simple mortgage

The holder of a mortgage by conditional sale cannot institute a suit for sale A simple mortgagee cannot institute a suit for foreclosure A usufructuary mortga ee cannot institute a suit either for foreclosure or sale [Transfer of Property Act s 6;] Rules 2 and 3 provide for decrees for foreclosure Rules 4 and 5 provide for decrees for sale

The Transfer of Property Amending Act 1929 places a mortgage by depo.it of title-deeds on the same footing as a simple mortgage In the case therefore of a mortgage by deposit of title deeds the only remedy open to the mortgagee is by way of sale except in Bombay where the mortgagee is allowed a further period of two years as stated above See secs 67 96 and 100 of the Transfer of Property Act 1882 and r 15 below

Right of redemption—The mortgagor has at any time after the mortgage money has become payable by him a right on payment of deposit in Court or tender of the mortgage money to require the mortgagee to deliver up to him all documents in the mortgagee s possession relating to the mortgaged property and to re transfer the property to him This right is called the right of redemption The right to redeem subsists so long as a mortgage subsists (*x*) [Transfer of Property Act s. 60] *Rules 7 and 8 provide for decrees for redemption*

Account against mortgagor—Whether the suit be one for foreclosure sale or redemption the preliminary decree in each case must either declare the amount due or direct an account to be taken of what is due to the mortgagee for principal interest and costs and for other costs charges and expenses in respect of the mortgage security Where the same property is mortgaged to several persons in succes.ion and the subsequent mortgagees are joined as parties to the suit they are entitled if they appear and prove their mortgages to ask for a decree for an account on each of their mortgages and a declaration of their right in a suit for sale to participate in the surplus sale-proceeds in order of priority An account is then taken of what is due on each mortgage the sums so found due to each mortgagee are included in one report and the sale proceeds are subsequently divided between the plaintiff and the puisne mortgagees in accordance with their claims as found by the report (*y*) See Appendix D Forms of Decrees Nos 9 to 11 Where the mortgagee is in possession an account is to be taken of what is due to the mortgagee for principal and interest and also of the income derived by him from the property Whatever may be the nature of the suit it lies upon the mortgagee to prove what is due to him for principal and interest If the mortgage-deed is not put in evidence as where it is not stamped and the mortgagee refuses to pay the penalty he can only be credited in the account with the sum which the mortgagor admits was the amount of the principal ( )

(*x*) *Ramj v P ndharinath* (1919) 43 Bom 334 49 I C 894 *Ramchandra v Han mant* (1920) 44 Bom 939 58 I C 45

(*y*) *Barhamdeo Pershad v Tar Cha d* (1906) 33 Cal 9? 111

(*z*) *Ga pa Mulik v Bayaji* (1882) 6 Bom 653 670

Principal.—The amount of principal and the rate of interest payable thereon are almost invariably stated in the instrument of mortgage Such statement amounts to an admission on the part of the mortgagor that he has received the amount mentioned in the instrument But an admission is not conclusive proof of the matter admitted (a) and it is open to the mortgagor to show that a smaller consideration or no consideration at all passed under the instrument of mortgage (b) But the burden of proof in that case lies on the mortgagor (c) But though an admission is not conclusive proof of the matter admitted it may operate as an estoppel so as to preclude the mortgagor from asserting that a smaller consideration or no consideration passed under the instrument of mortgage (d) This is so in cases where the mortgagee transfers his interest in the mortgage to a third party who has no notice that the full amount acknowledged to have been received on the face of the mortgage deed has not been received In such a case the mortgagor is not entitled to redeem except on payment to the transferee of the amount stated in the mortgage deed to have been received by the mortgagor (e)

Interest—See r 11 below and notes See also notes to sec 34 The rule of damdupat

Costs of suit—Whether the suit is one for foreclosure sale or redemption the mortgagee is entitled to all costs properly incurred (f) by him including costs subsequent to decree (r 10) This right resting substantially upon contract can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract (g) Thus costs incurred by the mortgagee after a proper tender has been made have been disallowed (h) And where in a suit for redemption the mortgagee though he had been fully paid contended that a large amount was still due to him he was directed to pay costs of the suit (i)

Other costs charges and expenses—Sec 72 of the Transfer of Property Act 1882 enables the mortgagee to spend such money as is necessary for the preservation of the mortgaged property from destruction, forfeiture or sale for supporting the mortgagor s title to the property for making his own title thereto good against the mortgagor etc and, in the absence of a contract to the contrary to add such money to the principal money at the rate of interest payable on the principal Sec 63A enables the mortgagee in possession to make such improvements as are necessary to preserve the property from destruction or deterioration and to add such money to the principal money at the rate of interest payable on the principal These are the costs charges and expenses referred to in r 2 (1) (a) (iii) and they are to be taken into account in determining the amount payable by the mortgagor to the mortgagee (j) Rule 10 below provides for payment by the mortgagor to the mortgagee of similar costs charges and expenses incurred by the mortgagee after the date of the preliminary decree up to the time of actual payment

Subseqent Interest.—There was no provision either in old r 2 or in old r 3 for payment of interest by the mortgagor subsequent to the day fixed under the decree for payment of the amount due Provision has now been made for it in r 11 (b) below

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(a) Evidence Act 187 s 31
(b) Evidence Act 187 s 9 proviso (1)
(c) *M hab P ad* v *Bishan Dayal* (190) 7 All 71 *Al Khan Bahad* v *Indar Parsha l* (1896) 23 Cal 9 0 ‑3 I A 9 See also *Br jeshua e* v *Budhanuddi* (1881) 6 Cal 268 277 278
(d) Evidence Act ss 31 115
(e) *Bickerton* v *Walker* (1886) 31 C D 151 *Bateman* v *H nt* (1904) 2 K B 530
(f) *Dryd n* v *Fro t* (1838) 8 L J Ch 235 *M haraj Bahad r S ngh* v *Banrudd n* (19 5) 41 Cal L J 607 93 I C 361 (‑5) A C 1135
(g) *Bank of New South Wales* v *Connor* (1889) 14 App Case ‑73 2 8
(h) *Dhondo* v *Balkr shna* (1884) 8 Bom 190
(i) *Ashworth* v *Lord* (1887) 30 Ch D 545 See also *Cha les* v *Jones* (1887) 35 Ch D 545
(j) See *Da dbha* v *Daudbhai* (1890) 14 Bom 113

2 **Plaintiff to apply for final decree for sale**—Sub rule (1) (c) (ii) makes it clear that if default is made by the mortgagor in payment of the amount due the mortgagee has to *apply* for a final decree for sale. In one case the application was made by the transferee from the mortgagee and it was contended that the decree made on his application was a nullity but it was held that the decree having been passed in the presence of the mortgagor he was bound by it (*k*)

Account against mortgagee in possession—Where under the terms of a usufructuary mortgage the mortgagee is to enjoy the rents and profits in lieu of interest, or the rents and profits are to be taken as an equivalent of the interest and of specific portions of the principal there is no obligation on the mortgagee to render any accounts (*l*). In other cases a mortgagee in possession is bound to render an account of the rents and profits of the mortgaged property (*m*) As to annual rents against a mortgagee in possession see the undermentioned cases (*n*)

Power to extend time in foreclosure suits—The proviso to old r 3 (°) empowered the Court upon good cause shown and upon such terms as it thought fit from time to time to postpone the day fixed for payment by the mortgagor of the mortgage money This proviso has now been transferred to sub rule (2) of the present rule with some alterations Sub rule (2) empowers the Court upon good cause shown and upon terms to be fixed by the Court from time to time at any time before a final decree is passed to extend the time fixed for payment The power to extend the time is discretionary and the mortgagor is not entitled to an extension as of right (*o*) It is not a good ground for extending the time that the mortgagee was under a misconception or payment in time was unnecessary (*p*). It was held under the old rule that the application for extension of time need not be made before the expiry of the time originally fixed for payment and that it could be made even after the expiry of that time provided it was made before a final decree for foreclosure was passed (*q*) This is now made clear by substituting the words extend the time for the words postpone the day

It was held under the old rule that even if there was no order postponing the day fixed for the payment of the mortgage-money a payment into Court by the mortgagor of the mortgage money before the passing of a final decree for foreclosure was an effectual payment (*r*) Effect has been given to these decisions by substituting in r 3 (1) the words before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed for the words on or before the day fixed which occurred in old r 3 (1)

Appeal from order refusing to extend time—An appeal lies from an order refusing to extend the time for payment under O 43 (1) (o)

Sub mortgage—A sub mortgagee may sue for foreclosure or sale to the same extent as the mortgagee himself (*s*) Where the sub mortgagee is a party to the suit the preliminary decree must direct an account to be taken of what is due to the mortgagee and of what is due to the sub mortgagee As to the form of decree in a suit by a sub mortgagee against the mortgagee and mortgagor see Appendix D form No 11 As to the form of decree in a suit for redemption by the mortgagor against the

(*k*) [illegible] (1919) 4 Pat L J 317 [illegible] 51 I C 881
(*l*) Transfer of Property Act ss 6 [illegible] 6 and 77
(*m*) Transfer of Property Act s 76 (g)
(*n*) [illegible] v [illegible] (1884) 6 All 203 *Ashworth* v *Lord* (1887) 36 Ch D 545 [illegible] See also Fisher on Mortgage pp [illegible] and Tagore Lectures, 1875 [illegible]
(*o*) [illegible] v [illegible] (1916) 39 Mad [illegible] 31 I C [illegible] [illegible] v [illegible] (1919) 4 Pat L J 317 51 I C 841 [illegible] [illegible] v [illegible] (19[illegible]2) 26 [illegible] 53 [illegible]
(*p*) *Motilal* v [illegible] (19[illegible]) 35 I A [illegible] 35 Cal [illegible] 10[illegible] I C [illegible] 46 [illegible] I C 13
(*q*) [illegible] v [illegible] (1892) 2[illegible] Mad 133 [illegible] v [illegible] (19[illegible]) 2[illegible] Mad [illegible] [illegible] v [illegible] (19[illegible]) [illegible] Mad 300 [illegible] v [illegible] (1894) 2[illegible] Bom 771 [illegible] v [illegible] (1904) 28 Bom 10 [illegible] v [illegible] (1916) 39 Mad [illegible] 31 I C [illegible]
(*r*) [illegible] v [illegible] (1[illegible]) 3[illegible] Cal 1[illegible] I C 7[illegible]
(*s*) See *Mutha* [illegible] v [illegible] (18[illegible]) [illegible] Mad 85

mortgagee and sub mortgagee see the undermentioned case (t) See notes to r 1 above Sub mortgagee

Subsequent incumbrancers —For forms of decree in cases where there are subsequent incumbrances see Appendix D forms Nos 9 10 and also the undermentioned ca e (u)

Mortgage of chattels and of intangible property —A mortgage of chattels is entitled to sue for foreclosure So also a mortgagee of intangible property such as *palas* or turns of worship in a temple (v)

Res judicata —See notes to s 11 Application of the above rules to suits on mortgage on p 51 above

3 [*New* Act 4 of 1882, s 87] (1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

Final decree in foreclosure suit

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re transfer at the cost of the defendant the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property

(2) Where payment in accordance with sub rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property

(3) On the passing of a final decree under sub rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged

(t) *Na yan* v *G noj* (1891) 15 Bom 69
(u) *Gopi Narain* v *Bansidhar* (1905) 7 All 3 5
(v) *Mahamayya* v *Haridas* (1915) 4 Cal 455 477 478 27 I C 400

3 **The old rule** —The above rule has been substituted for old r 3 by the Transfer of Property (Amendment) Supplementary Act 1929 which comes into operation on 1st April 1930 The old rule will be in operation till the above date It is as follows —

3 (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10 the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the document which under the terms of the preliminary decree he is bound to deliver up

and if so required—

(b) ordering him to re transfer the mortgaged property as directed in the said decree

and also if necessary —

(c) ordering him to put the defendant in possession of the property

(2) Where such payment is not so made the Court shall on application made in that behalf by the plaintiff pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also if necessary ordering the defendant to put the plaintiff in possession of the property

Provided that the Court may upon good cause shown and upon such terms (if any) as it thinks fit from time to time postpone the day fixed for such payments

Power to enlarge time

Discharge of debt.

(3) On the passing of a decree under sub-rule (²) the debt secured by the mortgage shall be deemed to be discharged.

Transfer of property Act, 1882 s 87 —This rule corresponds to s 87 of the Transfer of Property Act except in two particulars :— (1) sub r (1) provides for the passing of a *decree* where payment is made s 87 of the Transfer of Property Act contained only the words the defendants shall (if necessary) be put into possession of the mortgaged property (2) Sub r (2) again provides for the passing of a *decree* where no payment is made Under s 87 the Court had merely to pass an *order* See as to this distinction notes to r 5 below Final decree for sale Limitation

The old rule and the new rule —

(1) The new rule makes it clear that the decree to be passed under it is a *final decree*

(2) The words before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed in new sub rule (1) have been substituted for the words on or before the day fixed which occurred in old sub-rule (3).

(3) The defendant mortgagor has to *apply* to the Court for a decree after paying the amount into Court

(4) The proviso to old sub rule (2) regarding the power of the Court to extend the time for payment has been transferred to new rule 2

(5) In sub rule (3) it is made clear that on the passing of the final decree for foreclosure not only the mortgage debt is extinguished but all liabilities of the defendant in respect of the mortgage and on account of the suit are discharged.

Final decree for foreclosure —For form see Appendix D new form No 4 [old form No 10] Where the mortgagor fails to pay the amount due by him on the date fixed by the preliminary decree the mortgagee may apply under sub r (2) for a *final decree* declaring that the mortgagor is debarred from all right to redeem the mortgaged property No formal notice of such application is necessary to a mortgagor who is sui juris but notice is necessary where the mortgagor is a minor absence of notice however

will not invalidate the final decree unless prejudice is caused to the minor (r) until a final decree is passed the mortgagor may apply under rule (2) for an extension of the time for payment He may even without an extension at any time before the final decree is passed pay the money into Court and so avert foreclosure (x) See note to r 2 above Power to extend time in foreclosure suits

Only one final decree for foreclosure —The law contemplates the passing of only one final decree and that a final decree can be made only after the Appellate Court has decided the appeal from the preliminary decree Thus if *A* sues *B* for foreclosure of a mortgage comprising two properties and a preliminary decree for foreclosure is passed as regards one of the properties but the suit is dismissed as regards the other and *A* appeals from that part of the decree by which his suit was dismissed and pending the appeal applies for and obtains a final decree for foreclosure in respect of the property ordered to be foreclosed he cannot afterwards if he succeeds in the appeal obtain another final decree for foreclosure of the other property (y) See note to r 5 below Only one final decree in a suit for sale

Payment into Court —The payment into Court may be made by the mortgagor at any time before the final decree for foreclosure has been passed See notes to r 2 above Power to extend time in foreclosure suits

Effect of appeal on time for payment.—A preliminary decree is passed in a foreclosure suit fixing a period of six months from the date of *the decree* for payment by the mortgagor of the amount due The mortgagor prefers an appeal from the decree but the decree is confirmed in appeal The decree of the appellate Court is *silent as to the time allowed for redemption* This does not operate as an extension of the time for payment so as to enable the mortgagor to redeem the mortgage within six months from the date of *the appellate decree* The mortgagee is entitled to a final decree for foreclosure after the expiration of six months from the date of the original decree though six months may not have expired from the date of the appellate decree The appellate decree simply confirming the original decree cannot be read as giving the mortgagor six months from the date of the decree on appeal (z) Nor does the summary dismissal of an appeal extend the time for payment (a) This is in accordance with the general principle that where time is prescribed by the decree of the lower Court for the performance of a condition precedent and the appellate Court simply confirms the decree of the lower Court or summarily dismisses the appeal it cannot be regarded as enlarging the time fixed by the original decree for the performance of the condition (b) The result is the same where the appeal is withdrawn and no decree is passed in appeal The withdrawal does not give the mortgagor a fresh period for redemption (c) To avoid the difficulty arising in such cases the mortgagor should take care to have a fresh date fixed for payment by the appellate Court offering at the same time to pay interest up to that date (d) or he should apply under r 2 (2) for an extension of the time for payment See note under s 34 Time for payment fixed by decree

Sub rule 3 Discharge of debt etc on foreclosure —Old sub rule (3) provided that on the passing of a final decree for foreclosure the debt secured by the mortgage shall be deemed to be discharged. The present sub rule (3) provides that

(w) *Mahadev* v *Somnath* (19 6) 48 All 8 8 97 I C 277 (6) A.A 757
(x) *Somesh* v *Ram Krishna* (1900) 27 Cal 70 *Salig Ram* v *Muradan* (1903) 25 All 231 See also *Debi Prasad* v *Jai Karan* (190) 24 All 479
(y) *Sham Sundar* v *Muhammad* (1905) 27 All 501
(z) *Bhola Nath* v *Kant Chandra* (1898) 25 Cal 311 *Basanta Kumar* v *Radha Rani* (19) 26 C W N 440 70 I C 735 (2) A C 3 9 See also *Charanjit Lal* v *Dharam Singh* (1896) 18 All 455 *Marudakraman* v *Unnappan* (189) 15 Mad 170 *Kanara* v *Govinda* (1893) 16 Mad 214 where the same question arose in suits for redemption
(a) *Dattatraya* v *Wasudeo* (19 3) 47 Bom 956 76 I C 10 3 (4) A B 98
(b) *Ramaswami* v *Sundara* (1908) 31 Mad 28 *Aminabi* v *Sadu* (1893) 17 Bom 547
(c) *Pattoji* v *Ganu* (1891) 15 Bom 370 *Chudasama* v *Ishwarg* (189) 16 Bom 43
(d) *Rafikunnissa Bibi* v *Tarini Charan* (1893) 0 Cal 2 9

3 on the passing of a final decree for foreclosure all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged. The liabilities in respect of the mortgage refer not only to the mortgage debt but also to the other costs charges and expenses referred to in r 2 (1) (a) (iii). The liabilities on account of the suit include costs of the suit awarded against the mortgagor

Limitation for application for a final decree—The period of limitation *for an application* for a final decree in a suit for foreclosure sale or redemption is three years under art 181 of the Limitation Act 1908 As to limitation *for execution* of a final decree for foreclosure sale or redemption see note below Limitation for execution of final decree

Where no payment is made by the mortgagor of the amount due on or before the day fixed the mortgagee may apply for a final decree The procedure prescribed by the Transfer of Property Act in suits for foreclosure redemption and sale was in the first place to pass a *decree* and then an *order absolute*. This phraseology gave rise to conflicting decisions In some cases it was held that an application for an order absolute for sale under s 89 of the Transfer of Property Act was an application *to execute the decree* and that the period of limitation was three years from the date of the decree as provided by art 179 of the Limitation Act of 1877 [Limitation Act 1908 art 182]. In other cases it was held that such an application was one *to obtain a further decree* that the only article of the Limitation Act that could possibly apply to it was the general article 178 [now art 181] but that even that article could not apply as it applied only to applications *under the Code of Civil Procedure* and that there being no other article there was no period of limitation at all for an application for an order absolute *under the Transfer of Property Act* [It is interesting to note that the former view was taken by the Privy Council in cases under the Transfer of Property Act decided in 1914 (*e*)]. To put an end to this conflict of decisions it is now provided that the application which follows a preliminary decree is one to *obtain a final decree* [see r 3 (2) r 5 (3) r 8 (1)] so as to bring it within the purview of art 181 of the Limitation Act of 1908 [old art 178] and *not one to execute the decree* (*f*) Further the provisions relating to mortgage suits have been transferred from the Transfer of Property Act to the Civil Procedure Code so that it is no longer possible to contend that these applications are not under the provisions of the Civil Procedure Code (*g*) The result is that an application for a final decree for foreclosure sale or redemption is now governed by the residuary article 181 of the Limitation Act 1908 and the period of limitation is three years from the date on which the right to apply accrues (*h*) Where an appeal is preferred from the preliminary decree the right to make such an application accrues not on the expiry of the time limited by the preliminary decree but on the date of the decree of the Court of appeal (*i*) This rule applies although the decree of the Appellate Court has been made three years after the time fixed for redemption by the decree of the trial Judge (*j*) Where a decree was passed before the new Code came into force and the application for a final decree was made after the new Code

(*e*) *Abdul M jid* v *Jawah r Lal* (1914) 36 All. 350 I C 619 [P C] *Bai k Nath* v *Mu (Dei* (1914) 36 All 284 41 I.A 104 23 I C 611 followed in *Muhammad* v *Abd l Karim* (1916) 39 Mad 544 29 I C 737

(*f*) *Khetnath* v *Tara Chand* (1920) 25 Cal W N 59 597 59 I C 177

(*g*) *Amlook Chand* v *Sarat Chunder* (1911) 38 Cal 913 9 I 9... 11 I C 913 affirmed s b-nominee *M na Lal* v *Sarat Ch nder* (1915) 4 I A 85 42 Cal 776 27 I C 643

(*h*) *Dat* v *Sha k* (1914) 35 Bom 37 21 I C. 219 *Bent S gh* v *Berhamdeo* (1915) 19 C W N 473, 24 I C. 211 *M nna Lal* v *Sarat Chunder* (1915) 4 I A 85 27 I C 643 *Subbaiah Ami* v *Rama jam* (1919) 4 Mad 49 I C 293 [acknowledgment under s 19 of the Limitation Act] *Bala Ram* v *Asahai* (1916) 1 P L J 361 34 I C 345, *M mmad* v *Venkata* (1922) 45 Mad L J 51 69 I C. 356 (22) A M 65

(*i*) *Jowand Hus a n* v *Gendan S gh* (1926) 53 I A 19 6 P t 24 94 I C 492 (26) A PC 93 approving *G jadhar* v *Kishan* (1917) 39 All 641 42 I C 93 overruling *Madho* v *Nihal* (1916) 38 All 21 30 I C. 424 *Naseem-ud-d* v *Bakra* (1918) 40 All. 203 43 I C 8 0 *Javvaji P ake Damoeri* (1921) 44 Mad. 718 64 I C 4 0, (21) A M 414

(*j*) *Fitzholmes* v *B k of Upper India Ltd* (192) 51 I A 3 8 Lah. 2 3 100 I C. 2 ( ) A I C. 25.

came into force it was held that the right to apply never having accrued to the decree holder until the new Code conferred it upon him the period of limitation under art 181 did not begin to run until the new Code came into force that is until 1st January 1909 (k) If the preliminary decree directs the mortgagee to pay off a prior mortgage but fixes no period for such payment the starting point for limitation for an application for a final decree is at the expiry of six months from the preliminary decree (l) In a case where the Court erroneously expressed an opinion that a puisne mortgagee could not sell the property without paying off a prior mortgagee it was held that limitation was suspended for the time spent in ascertaining the balance due to him (m) An omission to draw up a final decree has been treated as an irregularity and in a case where the Court erroneously made an order absolute instead of a final decree for sale execution was allowed to proceed (n)

Application for execution of final decree—Limitation for an application for execution of a final decree is under art 182 of the Limitation Act 1908 (o)

Preliminary decree in suit for sale

4 [*New* Act 4 of 1882, s 88] (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, *together with such amount as may have been adjudged due in* respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest

Power to decree sale in foreclosure-suit

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested

(k) *Narasingrao* v *Bindo* (1918) 4 Bom 309 46 I C 107 See also *Keshawesaranand a* v *Rai Debendra* (1919) 4 P t L J 213 48 I C 245

(l) *Gyan Singh* v *Ala Husain* (1921) 43 All 3 0 60 I C 817 (21 A A 56

(m) *Hemendra* v *Dhanmi* (19 1) 25 C W N 376 6_ I C 418 (21) A C 381

(n) *Chhagan Lal* v *J yaram* (19) 51 Bom 125 100 I C 9 6 (27) A B 131

(o) *Samar Singh* v *Deonandan* (19 7) 6 Pat 80 10 I C 811 (27) A P 215 [suit for sale]

r 3 on the passing of a final decree for foreclosure all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged. The liabilities in respect of the mortgage refer not only to the mortgage debt but also to the other costs charges and expenses referred to in r 2 (1) (a) (iii). The liabilities on account of the suit include costs of the suit awarded against the mortgagor

Limitation for application for a final decree —The period of limitation *for an application* for a final decree in a suit for foreclosure sale or redemption is three years under art 181 of the Limitation Act 1908 As to limitation *for execution* of a final decree for foreclosure sale or redemption see note below Limitation for execution of final decree

Where no payment is made by the mortgagor of the amount due on or before the day fixed the mortgagee may apply for a final decree The procedure prescribed by the Transfer of Property Act in suits for foreclosure redemption and sale was in the first place to pass a *decree* and then an *order absolute.* This phraseology gave rise to conflicting decisions In some cases it was held that an application for an order absolute for sale under s 89 of the Transfer of Property Act was an application *to execute the decree* and that the period of limitation was three years from the date of the decree as provided by art 179 of the Limitation Act of 1877 [Limitation Act 1908 art 18] In other cases it was held that such an application was one *to obtain a further decree* that the only article of the Limitation Act that could possibly apply to it was the general article 178 [now art 181] but that even that article could not apply as it applied only to applications *under the Code of Civil Procedure* and that there being no other article there was no period of limitation at all for an application for an order absolute *under the Transfer of Property Act* [It is interesting to note that the former view was taken by the Privy Council in cases under the Transfer of Property Act decided in 1914 (e)] To put an end to this conflict of decisions it is now provided that the application which follows a preliminary decree is one to *obtain a final decree* [see r 3 (2) r 5 (3) r 8 (1)] so as to bring it within the purview of art 181 of the Limitation Act of 1908 [old art 178] and *not one to execute the decree* (f) Further the provisions relating to mortgage suits have been transferred from the Transfer of Property Act to the Civil Procedure Code so that it is no longer possible to contend that these applications are not under the provisions of the Civil Procedure Code (g) The result is that an application for a final decree for foreclosure, sale or redemption is now governed by the residuary article 181 of the Limitation Act, 1908 and the period of limitation is three years from the date on which the right to apply accrues (h) Where an appeal is preferred from the preliminary decree the right to make such an application accrues not on the expiry of the time limited by the preliminary decree but on the date of the decree of the Court of appeal (i) This rule applies although the decree of the Appellate Court has been made three years after the time fixed for redemption by the decree of the trial Judge (j) Where a decree was passed before the new Code came into force and the application for a final decree was made after the new Code

(e) *Abdul Majid* v *Jawahir Lal* (1914) 36 All 350 I C 619 [I C] *Bhuk Nath* v *Mu I Das* (1914) 36 All 31 41 I.A 104 23 I C 644 foll wed in *Muhammad* v *Abdul Karim* (1916) 39 Mad 544 29 I C 37

(f) *Ramnath* v *Tara Chand* (1920) 25 Cal W N 597 59 I C 177

(g) *Amlook Chand* v *Sarat Chunder* (1911) 38 Cal 913 9 I C 11 I C 913 affirmed sub-nomine *Mina Lal* v *Sarat Chunder* (1915) 4 I A 89 4 Cal 776 27 I C 663

(h) *Dati* v *Shanka* (1914) 38 Bom 3 I C 319 *Beni Singh* v *Berhmadeo* (1915) 19 C.W N 473, 28 I C 211 *Mina Lal* v *Sarat Chunder* (1915) 4 I A 89 27 I C 683 *Subbaiah* v *Ramasam* (1919) 4 Mad 52 48 I C 93 [acknowledgment under s 19 of the Limitation Act] *Bala Ram* v *Kanhai* (1916) 1 Pat L J 361 39 I C 335, *Mummal* v *Feates* (19) 4 Mad L J 51 63 I C 366 A M 65

(i) *Jowand Husain* v *Genda Singh* 3 I A 19 6 Pat 24 98 I C 49 A PC 93 approving *Unjadha* v (1917) 39 All 641 42 I C 93 overruling *Madho* v (1916) 38 All 21 *Nizam-ud-din* v *Bohra* (1919) 494 All 03 43 I C 8 0 *Javeri* *Damisetti* (1921) 44 Mad I C A M 414

(j) *Fulcholmes* v *Bank of Upper India Ltd* (1927) 54 I A 5 8 Lah I C A I C 25.

came into force it was held that the right to apply never having accrued to the decree holder until the new Code conferred it upon him the period of limitation under art 181 did not begin to run until the new Code came into force that is until 1st January 1909 (k) If the preliminary decree directs the mortgagee to pay off a prior mortgage but fixes no period for such payment the starting point for limitation for an application for a final decree is at the expiry o six months from the preliminary decree (l) In a case where the Court erroneously expres ed an opinion that a puisne mortgagee could not sell the property without paying off a prior mortgagee it was held that limitation was suspended for the time spent in ascertaining the balance due to him (m) An omission to draw up a final decree has been treated as an irregularity and in a case where the Court erroneously made an order absolute instead of a final decree for sale execution was allowed to proceed (n)

Application for execution of final decree—Limitation for an application for execution of a final decree is under art 182 of the Limitation Act 1908 (o)

4 [*New* Act 4 of 1882, s 88] (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same

Preliminary decree in suit for sale

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested

Power to decree sale in foreclosure suit

(k) *Nars gr o* v *Bando* (1918) 42 Bom 309 46 I C 107 See also *Keshawes rindra* v *F nı D bendra* (1919) 4 Pat L J 213 48 I C 245

(l) *Gyan S ngh* v *Ata Husa n* (1921) 43 All 3 0 60 I C 817 (21 A A 56

(m) *Hemend a* v *Dha* ı (19 1) 25 C W N 3/6 6 I C 418 (1) A C 381

(n) *Chhagan Lal* v *Ja/a am* (19) 51 Bom 125 100 I C 956 (27) A B 131

(o) *Samar S ngh* v *Deo dan* (19 7) 6 Pat 80 10 I C 811 (27) A P 215 [suit for sal]

4 in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No 9, Form No 10 or Form No 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require

The old rule —The above rule has been substituted for old r 4 by the Transfer of Property (Amendment) Supplementary Act 1929 which comes into operation on the 1st April 1930 The old rule is as follows —

4 (1) In a suit for sale if the plaintiff succeeds the Court shall pass a decree to the effect mentioned in clauses (a) (b) and (c) of rule 2 and also directing that in default of the defendant paying as therein mentioned the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs and that the balance (if any) be paid to the defendant or other persons entitled to receive the same

(2) In a suit for foreclosure if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale the Court may at the instance of the plaintiff or of any person interested either in the mortgage money or in the right of redemption pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure the performance of the terms

Transfer of Property Act s 88 —This rule corresponds with sec 88 of the Transfer of Property Act The reference to subsequent interest and subsequent costs is new

The old rule and the new rule —(1) The new rule expressly says that the decree to be passed under it is to be a *preliminary decree*

(2) The new rule says that on default in payment by the mortgagor the mortgagee has to *apply* for a final decree for sale

(3) The new rule makes it clear that the mortgagee has to pay not only subsequent interest and subsequent costs as under the old rule but also subsequent costs charges and expenses See r 10 below

(4) Sub rule (2) of the new rule empowers the Court to extend the time for payment *There was no such provision in the old rules*

(5) Sub rule (4) of the new rule provides for decrees in suits to which subsequent mortgagees are parties

Preliminary decree for sale —A suit for sale of mortgaged property can only be brought where the mortgage is an English mortgage or a simple mortgage or a mortgage by deposit of title deeds or where the property is subject to a charge within the meaning of sec 100 of the Transfer of Property Act (see r 15 below) The preliminary decree to be passed in a suit for sale corresponds to the preliminary decree in a suit for foreclosure in all respects except that instead of a direction providing for foreclosure the decree is to contain a direction providing for sale of the mortgaged property The notes therefore on r 2 above as to the taking of accounts and the determination of principal interest and costs apply equally to this rule

Sub rule (1) Subsequent costs charges expenses and interest —See rr 10 and 11 below

Sub rule (2) Power to extend time in suit for sale —This sub rule is new It empowers the Court in a suit for sale to extend the time fixed for payment of the amount due by the mortgagor on good cause shown There was no such provision in the old rule enabling the Court to extend the time for payment in a suit for sale It was therefore held that if the mortgagor failed to pay on or before the day fixed the Court had no power to extend the time for payment and that it was bound to pass a final decree for sale (p) At the same time it was held that even if time was not extended the mortgagor was entitled under O 21 r 69 to stop the sale by payment of the amount due and costs (q) and further if the property was sold to have the sale set aside on making the deposit as provided by O 21 r 89 (r) In the cases cited above the Court held that the provisions of the Code relating to execution of decrees applied to sales under mortgage decrees There were however cases in which it was held that the sections of the Code relating to execution did not apply to sales under mortgage decrees (s) But the latter view is no longer tenable and it was to negative that view that the sections of the Transfer of Property Act relating to decrees in mortgage suits were transferred to the Code As to O 21 r 83 it is expressly provided that nothing contained therein applies to a sale in execution of a mortgage decree (t) See notes to r 5 below Mortgagor s rights before confirmation of sale

Form of decree —As to the form of a preliminary decree for sale see App D Form No 5 [old Form No 4] On referring to the form it will be observed that it does not contain any declaration of *personal* liability of the defendant for principal interest or costs Such a declaration in fact ought not to be included in the decree for sale If the sale proceeds are not sufficient to pay the amount due to the mortgagee the mortgagee may apply for a personal decree against the mortgagor under r 6 below (u) See Appendix D Form No 8 [old Form No 11]

Subsequent incumbrancers —For the contents of a decree for sale in a suit by the first mortgagee (v) see Appendix D Form No 9 [old Form No 7] For the contents of a decree for sale in a suit by a second mortgagee see Appendix D Form No 10 [old form No 8]

Rights of second mortgagee in a suit for sale by first mortgagee —*M* mortgages his property first to *A* and then to *B* *A* sues *M* for a sale of the mortgaged property making *B* a party defendant In such a suit the only right of *B* the second mortgagee is to redeem *A* s mortgage or to receive his mortgage money

(p) *T* v *Gaja n* (1900) 4 B m 00 (q) *H r R* v *Rameshar* (1898) 20 All 354 *I ja l m* v *Ch n Lal* (1897) 19 All 20 *Bibijan* v *Sacl* (1904) 31 Cal 863 *Ad p ra am* v *Gopalasami* (1908) 31 M d 354

(r) See *T umal* v *Syed Dastagh r* (1899) M d 86 *M ll ka j alı* v *L nga r* (190) M d 44 *Krish ij* v *Mah d* (1901) Bom 104

(s) See *P a u tha Ch dra* v *Khetra* (190) 9 Cal 6 1

(t) *I a a Lal* v *Punjab Nat o al Ba k* (19 3) 5 Lah L J 6 5 I C 816 (1) A L. 384

(u) See *K mal n a* v *Komandur* (1907) 30 Mad 464

(v) See *Be hamd* v *T a Chand* (1906) 33 Cal 9 111

out of the surplus sale proceeds after satisfaction of *A* s mortgage He is entitled to treat the suit brought by *A* the first mortgagee as one for his benefit It follows therefore that *B* cannot ask for a sale of the property if *A* s claim is satisfied by *M* before sale Also if a decree for sale is passed in *A* s suit *B* cannot ask for a decree for sale of another property of *M* included in his mortgage In either case *B* must bring a separate suit for sale on his mortgage (w)

Award and consent decree—An arbitrator is not bound by this rule A decree in terms of an award may order the sale of the property mortgaged although no preliminary decree under this rule or final decree under rule 5 has been passed (x) So also if the decree is a consent decree (y) In *Kashi Chandra* v *Priyanath* (z) Mookerjee J directed that before execution an order absolute should be obtained under O 34 r 5 but the consent decree in that case was in the form of a preliminary decree

Sub rule (3) Power to decree sale in a foreclosure suit—Under the Transfer of Property Amending Act 1929 foreclosure is allowed in the case only of anomalous mortgage where there is an express stipulation in that behalf and in the case of a mortgage by conditional sale The remedy by way of foreclosure is no longer open in the case of an English mortgage The words in the case of an anomalous mortgage have accordingly been added after the words in a suit for foreclosure in new sub-rule (3) which corresponds to old r 4 (2) In the case of a mortgage by conditional sale the only remedy open to the mortgagee is foreclosure and there is no scope for an alternative decree for sale

Appeal from order refusing to extend time—An appeal lies from an order refusing to extend the time for payment under O 43 r (1) (o) The provision for extension of time contained in sub rule (2) of this rule is now and so is the provision for an appeal from an order refusing to extend the time under sub rule (2) See O 43 r (1) (o) and notes clause (o)

Final decree in suit for sale

5 [*New* Act 4 of 1882, s 89] (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the said decree,

(w) *S r I Chandra* v *Khapiel* (1910) 37 Cal 907 8 I C 114 *Vedaryasa* v *Madura Hindu Sabha Nidhi Co* (1919) 4 Mad 90 49 I C 36

(x) *Nripendra Nath* v *Jhimak* (1924) 3 Pat 1 80 I C 589 (24) A P 463

Hem nd a Lal v *Fakirchand* (1923) 50 Cal 650 74 I C 9[illegible] (23) A C 6 6 *Ishan Chandra* v *[illegible]* 2 Pat 633 7 I C 1019 (23) A P 184 *Sital Singh* v *B nath* (19[illegible]) 44 All 668, 75 I C 485 ( ) A A 383 *Askari Husain* v *Jahangira Mal* (1927) 49 All [illegible]97 100 I C 59 (27) A A 167 F B *Kumar Ganganand* v *Maharaja Sir Rameshwar Singh* (1927) 6 Pat 388 10 I C 449 (27) A P 271

(z) (1924) 28 C W N 550 83 I C 421 (24) A C 615

and, also, if necessary,— O 34

(c) ordering him to put the defendant in possession of the property

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub rule (3) of this rule, the Court shall not pass an order under sub rule (1) of this rule unless the defendant, in addition to the amount mentioned in sub rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into Court by the purchaser

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase money paid into Court by him together with a sum equal to five per cent thereof

(3) Where payment in accordance with sub rule (1) has not been made, the Court shall on application made by the plaintiff in this behalf pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub rule (1) of rule 4

The old rule —The above rule has been substituted for old r 5 by the Transfer of Property (Amendment) Supplementary Act 1929 which comes into operation on the 1st April 1930 The old rule is as follows —

5 (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10 the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up

and if so required —

(b) ordering him to re transfer the mortgaged property as directed in the said decree

and also if necessary —

(c) ordering him to put the defendant in possession of the property

(2) Where such payment is not so made the Court shall on application made in that behalf by the plaintiff pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale be dealt with as is mentioned in rule 4

Transfer of Property Act 1882 s 89 —This rule corresponds with sec 89 of the Transfer of Property Act except in the following particulars —

1 The provision contained in sub r (1) for the passing of a *decree* in the case where payment is made in accordance with the terms of the preliminary decree is new

5 2 By sub rule (2) it is provided that the application which follows a preliminary decree for sale is not for an *order* for sale as it was in sec 89 of the Transfer of Property Act but for a *decree* for sale See notes below Final decree for sale Limitation

3 The words to the plaintiff or which occurred in sec 89 after the word pays (see l 2 of this rule) have been omitted See notes below Paym nt into Court

4 The words and thereupon the defendant s right to redeem and the security shall both be extinguished which occurred at the end of sec 89 have been omitted. See notes to r 1 above Consequences of non joinder

The old rule and the new rule —

(1) The words or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub rule (3) of this rule in sub rule (1) are new

(2) If the mortgagor pays the amount due into Court he has to apply for a final decree for a re transfer of the mortgaged property to him and if a final decree has already been passed and the amount is deposited before confirma tion of sale for an order for a re transfer

(3) Sub rule (2) is new There was no such provision in the old rule

(4) Sub-rule (3) makes it clear that if the mortgagor fails to pay the amount into Court the mortgagee has to *apply* for a final decree for sale

Consent decree providing for payment in instalments —Where in a suit for sale on a mortgage the consent decree provides for payment of the mortgage money in instalments and does not provide for payment on a fixed date within six months from the date of declaring the amount due as provided by r 4 r 4 has no application and consequently it is not necessary for the mortgagee to apply for a final decree in terms of the present rule (*a*)

No power to go behind preliminary decree —On an application of the mortgagee for a final decree the Court has no power to go behind the preliminary decree Its powers are limited to those mentioned in this rule (*b*)

Only one final decree for sale —In *Gajadhar* v *Kishen* (*c*) Banerji J said It seems to me that this rule i e the rule regulating applications for final decrees in mortgage actions— contemplates the passing of only one final decree in a suit for sale upon a mortgage The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties Where an appeal has been preferred it is the decree of the Appellate Court which is the final decree in the cause This statement of the law was approved by the Judicial Committee in *Jowad Hussain* v *Gendan Singh* (*d*) From this it is concluded by the Allahabad High Court (*e*) though not without a note of dissent (*f*) that if the mortgagee obtains a final decree for sale pending an appeal from the preliminary decree the decree is invalid and incapable of execution though the mortgagee may apply for a final decree on foot of the preliminary decree as passed by the Appellate Court In a Patna case (*g*) however a final decree in exactly similar circumstances prior to the dismissa of the mortgagor s appeal from a preliminary decree was treated as valid though operative only from the date of dismissal of the appeal

(*a*) *Askari Has n* v *Jahang a Mal* (19 7) 49 All. 97 100 I C 59 (7) A A 167
(*b*) *Kalloo* v *\ uder S gh* (19 9) 27 All L. J 4 5 115 I C 46 (9) A A 25
(*c*) (19 7) 3 All 641 4 L. C 93
(*d*) (19 6) 53 I A 197
(*e*) *Lalman* v *Shiam* (19 6) 24 All L. J 89 9 I C 608 (26) A A 291
(*f*) *Khair-un-nis a Bibi* v *Oudh Commercial Bank Ltd* (19 9) 27 All L. J 490 (29) A A 287
(*g*) *Suman Singh* v *Deo andan* (19 7) 6 Pat. 780 103 I C 811 (7) A P 215

Mortgagor s rights before confirmation of sale—In sub rule (1) the words or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule are new They enable the mortgagor to pay the amount due into Court even after sale provided the sale is not confirmed under O 21 r 92 The mortgagor may exercise this right even if no order has been made extending the time for payment Where the deposit of the amount due is made after the property has been sold the mortgagor must also deposit for payment to the purchaser a sum equivalent to five per cent of the purchase money as provided by sub rule (2) If he does so the sale becomes ineffective and the purchaser is entitled to repayment of the purchase money paid by him into Court together with the deposit of five per cent On the mortgagor depositing the amount due and the five per cent he is entitled to an order under sub rule (1) ordering the mortgagee to deliver up the title deeds and to re transfer the mortgaged property to him See notes to r 4 above Power to extend time in suit for sale O 3

Payment into Court—Under sec 89 of the Transfer of Property Act the defendant was at liberty to pay the amount to the plaintiff or into Court Under the present rule [sub r (1)] the payment has to be made into Court If the money is not paid into Court the Court must pass a final decree for sale [sub rule (3)] It has been held in some cases that if money payable under the preliminary decree is paid out of Court but the payment is not certified as required by O 21 r 2 the Court should not take any notice of the payment and no credit should be given to the mortgagor in respect thereof (*h*) On the other hand it has been held that an application for a final decree is not an application for execution and O 21 r 2 does not apply (*i*) and this seems to be the correct view In a Patna case (*j*) the High Court held that O 3 r 3 applied to such a case and directed the trial Court to take an account of the money alleged to have been paid by the mortgagor after the date of the preliminary decree If the decree is a consent decree or one which is not passed under rr 4 and 5 there is no obligation to pay into Court and the Court can inquire into the payment or adjustment whether certified or not (*k*)

Dismissal of mortgagee s application for final decree for default—Where an application is made by the mortgagee for a final decree it should not be dismissed for his subsequent absence If it is dismissed the order of dismissal must be set aside and a final decree must be passed (*l*)

Sufficient part thereof—It is not necessary to sell all the properties mortgaged at once Ordinarily the right of selling in a particular order rests with the decree holder but in view of equities arising in favour of various parties the Court may direct the order in which they should be sold (*m*)

Effect of sale under mortgage decree—By a sale of property in execution of a decree for the payment of money the interest of the judgment debtor alone passes to the purchaser (*n*) By a sale of mortgaged property in execution of a mortgage decree the interest both of the mortgagor and mortgagee passes to the purchaser (*o*) See notes to r 1 above under the head Consequences of non joinder

Injunction restraining mortgagor from receiving income of mortgaged property—It has been held in Allahabad that it is not competent to the Court after a final decree for sale has been passed to restrain the mortgagor by an injunction from

(*h*) *S nga Raja* v *Pethu R j* (1919) 4? Mad 61 48 I C 196 *P B b* v *Jitendriya* (1917) 5 C l L J 553 40 I C 845

(*i*) *Ramji Lal* v *S ngh Karan* (1917) 39 All 53 40 I C 424

(*j*) *Jogend a* v *Gouri* (1917) Pat L J 533 40 I C 345

(*k*) *M ngar Sahu* v *Bhaloo S gh* (19 0) 5 Pat L J 672 57 I C 473 *S tal S ngh* v *Ba jnath* (19) 44 All 668 75 I C 485 ( ) A A 383

(*l*) *Jodha* v *Gokaran* (19 5) 47 All 546 87 I C 2 5 (25) A A 6 *Cha d a* v *Amir* (19 7) 49 All 59 101 I C 6 6 (27) A A 439

(*m*) *F jkeshwar Pra ad* v *Mahommad Rahiman* (1924) 3 Pat 5 78 I C 796 (4) A P 459

( ) See notes to O 21 r 94

(*o*) *Maganlal* v *Shakra* (1898) ? Bom 945 *Desai Lallubha* v *M ndas* (1896) ?0 Bom 390 *Perumal* v *Kareri* (1893) 16 Mad 1 1

r 5

2 By sub rule (2) it is provided that the application which follows a preliminary decree for sale is not for an *order* for sale as it was in sec 89 of the Transfer of Property Act but for a *decree* for sale See notes below Final decree for sale Limitation

3 The words to the plaintiff or which occurred in sec 89 after the word pays (see l 2 of this rule) have been omitted. See notes below Payment into Court

4 The words and thereupon the defendant s right to redeem and the security shall both be extinguished which occurred at the end of sec 89 have been omitted. See notes to r 1 above Consequences of non joinder

The old rule and the new rule —

(1) The words or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub rule (3) of this rule' in sub-rule (1) are new

(2) If the mortgagor pays the amount due into Court he has to apply for a final decree for a re transfer of the mortgaged property to him and if a final decree has already been passed and the amount is deposited before confirmation of sale for an order for a re transfer

(3) Sub rule (2) is new There was no such provision in the old rule

(4) Sub rule (3) makes it clear that if the mortgagor fails to pay the amount into Court the mortgagee has to *apply* for a final decree for sale

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(*b*) *Kalloo* v *Nauder Singh* (19 9) 27 All L J 4 115 I C 46 (9) A A 5

(*c*) (19 7) 39 All 641 4 I C 93

(*d*) (19 6) 53 I A 197

(*e*) *Lalman* v *Sham* (1926) 24 All L J 83 9 I C 608 (26) A A 91

(*f*) *Khair-un-nissa Bibi* v *Oudh Commercial Bank Ltd* (19 9) 27 All L J 430 (9) A A 8

(*g*) *Suman Singh* v *Deonandan* (19 7) 6 Pat 780 103 I C 811 (27) A P 215

Mortgagor s rights before confirmation of sale—In sub rule (1) the words or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub rule (3) of this rule are new They enable the mortgagor to pay the amount due into Court even after sale provided the sale is not confirmed under O 21 r 92 The mortgagor may exercise this right even if no order has been made extending the time for payment Where the deposit of the amount due is made after the property has been sold the mortgagor must also deposit for payment to the purchaser a sum equivalent to five per cent of the purchase money as provided by sub rule (2) If he does so the sale becomes ineffective and the purchaser is entitled to repayment of the purchase money paid by him into Court together with the deposit of five per cent On the mortgagor depositing the amount due and the five per cent he is entitled to an order under sub-rule (1) ordering the mortgagee to deliver up the title deeds and to re transfer the mortgaged property to him See notes to r 4 above Power to extend time in suit for sale

Payment into Court.—Under sec 89 of the Transfer of Property Act the defendant was at liberty to pay the amount to the plaintiff or into Court Under the present rule [sub r (1)] the payment has to be made into Court If the money is not paid into Court the Court must pass a final decree for sale [sub rule (3)] It has been held in some cases that if money payable under the preliminary decree is paid out of Court but the payment is not certified as required by O 21 r 2 the Court should not take any notice of the payment and no credit should be given to the mortgagor in respect thereof (*h*) On the other hand it has been held that an application for a final decree is not an application for execution and O 21 r 2 does not apply (*i*) and this seems to be the correct view In a Patna case (*j*) the High Court held that O 23 r 3 applied to such a case and directed the trial Court to take an account of the money alleged to have been paid by the mortgagor after the date of the preliminary decree If the decree is a consent decree or one which is not passed under rr 4 and 5 there is no obligation to pay into Court and the Court can inquire into the payment or adjustment whether certified or not (*k*)

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Sufficient part thereof—It is not necessary to sell all the properties mortgaged at once Ordinarily the right of selling in a particular order rests with the decree holder but in view of equities arising in favour of various parties the Court may direct the order in which they should be sold (*m*)

Effect of sale under mortgage decree—By a sale of property in execution of a decree for the payment of money the interest of the judgment debtor alone passes to the purchaser (*n*) By a sale of mortgaged property in execution of a mortgage decree the interest both of the mortgagor and mortgagee passes to the purchaser (*o*) See notes to r 1 above under the head Consequences of non joinder

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(*i*) *R mj Lal v Si gh Karan* (1917) 39 All 632 40 I C 4 4

(*j*) *Joge dra v Gouri* (1917) Pat L J 533 40 I C 345

(*k*) *Mangar Sahu v Bhatoo Si gh* (1920) 5 Pat L J 672 57 I C 473 *Sital Singh v Baijnath* (19) 44 All 663 75 I C 485 2) A A 383.

(*l*) *Jodha v Gok n* (19 5) 47 All 546 87 I C 2 5 (25) A A 6 *Ch nd a v Am r* (1927) 49 All 59 101 I C 6 6 ( ) A A 439

(*m*) *Rajkeshwar Prasad v Mahommad Rahiman* (1924) 3 Pat 5 78 I C 796 (4) A P 459

(*n*) See notes to O 21 r 91

(*o*) *Maganlal v Shakra* (1898) 2 Bom 945 *Desai Lallubhai v M ndas* (1896) 0 Bom 390 *Perumal v Kaveri* (1893) 16 Mad 1 1

receiving the income of the mortgaged property even if there be a good ground for it The reason given is that all that the decree holder is entitled to is to have the property sold and nothing more (p)

Limitation for application for final decree—See note to r 3 above under the same head

Limitation for application for execution of final decree—See note to r 3 above under the same head

Appeal—Under the present Code a party aggrieved by a preliminary decree passed under r 4 of this Order may appeal from it if he does not appeal from it he is precluded from disputing its correctness in an appeal which may be preferred from the final decree passed under this rule [s 97] (q) Even under the old Code the correctness of the decree under sec 88 of the Transfer of Property Act [now O 34 r 4] could not be questioned in an application for an order absolute under sec 89 [now O 34 r 5] or in an appeal *from an order absolute made on such an application* (r)

An adjudication dismissing an application under this rule for a final decree for sale is not an order under s 47 but a decree and is appealable as such under s 96 (s) and is therefore not open to revision (t)

Dekkan Agriculturists Relief Act 17 of 1879—As to the applicability of this rule to cases under the Dekkan Agriculturists Relief Act see the undermentioned case (u)

Court fees Act—An appeal from a final decree for sale under this rule requires an ad valorem court fee and cannot be stamped as an appeal from an order (v)

Costs not recoverable from mortgagor personally—*In a mortgage* decree for sale costs are part of the amount due upon the mortgage and are recoverable from the mortgaged property and not personally from the mortgagor unless the decree itself so directs (w)

Recovery of balance due on mortgage in suit for sale

6 [*New* Act 4 of 1882 s 90] Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application by him, may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance

The old rule—The above rule has been substituted for old r 6 by Transfer of *Property (Amendment) Supplementary Act 1929 which comes into operation* on the 1st April 1930 The old rule is as follows —

6 Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff if the balance is legally recoverable from the defendant otherwise than out of the property sold the Court may pass a decree for such amount

(p) *Muhammad Inamullah* v *Varain* (1915) 37 All 423 29 I C 601

(q) *Kul da* v *Ramananda* (1921) 48 Cal 1036 61 I C 9-3 (1) A C 109 *Jogend a* v *S tyend a* (19 5) 29 C W N 640 90 I C 380 (5) A C 790

(r) *Murlidha* v *Vishnudas* (1916) 40 Bom 321 327 33 I C 749

(s) *S bbalakshmi* v *Ramanujan* (1919) 42 Mad 5" 48 I C 98

(t) *K m r Ga ganand* v *Pirthichand* (19 0) 5 Pat L J 342

(u) *Kashinath* v *Rama* (1916) 40 Bom 49 37 I C 255 *Suklya* v *Suklal* (19"4) 48 Bom 172 81 I C 684 (24) A B 169

(v) *Baigra i Lal* v *Mahabir* (1913) 35 All 476 21 I C 498 (F B) *Janki bai* v *Chimna* (19-0) 2- Bom L R 811 57 I C 579

(w) *Matukdhari* v *Ramdas* (1917) 2 Pat L J 51 38 I C 214 *Damba Si gh* v *Kaiya S gh* (1918) 40 All 109 43 I C 557 *Maqbul* v *Lalta* (1898) 20 All 5-3 *Muhammad* v *Banki Lal* (19 1) 43 All 630 73 I C 950 ('21) A A 104 But see *Amina* v *Ram* (1919) 41 All 473, 50 I C 730 *Sheo Da han* v *Beni Chaudhri* (19 6) 48 All 4-5 94 I C 8 2 ('26) A A 424

The old rule and the new rule—The words any sale held under the last preceding section in the new rule have been substituted for the words any such sale It is thus made clear that this rule applies to a sale held in execution of a decree passed under rule 5 which rule 8 A applies to a sale held in execution of a decree passed under rule 8 O

Personal Decree for balance against mortgagor—Where after the sale of the mortgaged property there is still a balance due to the mortgagee and that amount is legally recoverable from the mortgagor the mortgagee may apply for and obtain a decree under this rule against the mortgagor personally which he may execute against the person of the mortgagor or by attachment and sale of his other properties (x) A decree under this rule is a decree to be passed in the original suit and not in a fresh suit (y) The object of the rule is to obviate the necessity of a fresh suit to recover the balance (z) Such a suit in fact could not be brought except where the mortgagee had reserved his right to do so with the leave of the Court under O 2 r 2 (a) A personal decree under this rule for the balance should not be passed until after the mortgaged property had been sold and the proceeds found insufficient to pay the mortgage money in other words the Court should not while passing a decree for sale under r 5 pass a personal decree for the balance and a personal decree can only be passed when the sale proceeds are found to be insufficient to satisfy the mortgagee s claim (b) In a recent case the Judicial Committee held that a decree for sale und sec 88 of the Transfer of Property Act 1882 can validly provide that if the proceeds of sale are not sufficient to pay the mortgage debt the mortgagor should pay the balance personally though the personal decree could not be executed until after the property was sold and the nett sale proceeds were found to be insufficient to satisfy the debt (c) But the form of the decree to be passed *under this rule* Appendix D Form No 11 makes it clear that a personal decree cannot be passed until after the sale is held and the balance ascertained If it is passed before sale and the mortgagor does not object he is estopped from doing so at a later stage (d) When the decree only gives the mortgagee a remedy against the mortgaged property the *personal remedy having become time barred the mortgagee can only recover against* the mortgaged property (e) See App A Form No 45 and App D Form No 4

A personal decree cannot be passed under this rule unless *all* the properties directed to be sold under rr 4 and 5 have been sold This is because the remedy of the mortgagee in the first instance is against the properties mortgaged and such properties should in the first instance be exhausted before a personal liability can be imposed upon the mortgagor But this does not mean that if a portion of the properties is destroyed or has ceased to be available for sale through no fault of the mortgagee there can be no decree for personal liability against the mortgagor (f) It has similarly been held that the omission to include in the plaint a portion of the mortgaged property does not debar the mortgagee from obtaining a personal decree under this rule provided the omission was not intended to prejudice and has not prejudiced the mortgagor (g) In a case of a mortgage by the father of a joint Hindu family not being

(x) *Sonatun Shah* v *Ali Newaz* (1889) 16 Cal 423

(y) *Raj Singh* v *Purmanand* (1889) 11 All 486 *Musaheb* v *Inayat ul lah* (189) 14 All 513

(z) *Mallika junadu* v *Lingamurti* (190) 25 Mad 244 286

(a) *Ibid* p 287

(b) *Lal Beh ry Si g* v *Habibur Rahm n* (1899) 26 Cal 166 *Ram Ranjan* v *Ind a Na a n* (1906) 33 Cal 890 *Damodar* v *Vyanku* (1907) 31 Bom 244 *Badri Das* v *Inayat Khan* (1900) All 404 *Aiyasam er* v *Venkata kela* (1917) 40 Mad 989 996 37 I C 741 *Janardhan* v *Krish ji* (19) Bom L R 953 58 I C 377

(c) *Jeuna Bahu* v *Parmeshwar* (1919) 46 I A 94 47 Cal 370 49 I C 620

(d) *Teja* v *T ka Ram* (19 4) 46 All 32 77 I C 32 (24) A A 5

(e) *B nm t* v *Raghavendrarao* (19) 4 Bom L R 410 67 I C 847 (2) A B 237

(f) *Chand Mull* v *Ban Behari* (19 3) 50 Cal 718 74 I C 10 1 (24) A C 209 *Satish Ranjan* v *Mercantile Bank of India Ld* (1918) 45 Cal 70 48 I C 3 *Ram Ranjan* v *Indra Na a n* (1906) 33 Cal 890 *Badri Das* v *Inayat Khan* (1900) 2 All 404 explained in (1917) 45 Cal 70 716 48 I C 3 *Samanta* v *Lokenath* (19 1) 6 Pat L J 106 61 I C 635 (1) A P 49 *Sahu Bisheshar* v *Chandu Lal* (19 3) 50 All 3 1 108 I C 459 ('28) A A 71

(g) *Gopal* v *B ikuntha* (1917) Pat L J 538 4 I C 56

one for necessity the High Court of Madras held that the mortgagee was entitled to a conditional decree under this rule against the father personally and against the joint family property of himself and his undivided sons for the recovery of the balance in case the sale proceeds of the father's share of the mortgaged property was insufficient (h) Where a sale in execution of a decree on a mortgage by a Hindu lady was set aside at the instance of her grandson who was the real owner the Allahabad High Court passed a personal decree against her under this rule saying that the mortgagee having been compelled to refund the purchase money to the purchaser the net proceeds of the sale were nil and therefore insufficient to pay the amount due (i) The absence of any reservation in the preliminary decree of liberty to the decree holder to apply for a personal decree does not disable him from doing so later (j)

Where net proceeds of any such sale held under r 5 are found insufficient.— A personal decree under this rule can only follow *th mortgage decre und r which the sale is held* Therefore if a sale has taken place under a decree on a prior mortgage that would not entitle a subsequent mortgagee who has also obtained a decree for sale to apply for and obtain a decree under this rule The reason is that the sale was not held under *his* decree (k) Similarly where a person holding two mortgages over the same property brings two suits on those mortgages and obtains two decrees and the mortgaged property is sold under one of those decrees the fact that the sale proceeds after discharging that decree are not sufficient to pay the amount due *under the other decree* would not entitle him to apply for and obtain a personal decree under this rule for the balance due under the other decree The reason is that the property was sold not under that decree but under the first decree (l)

Amount due — A personal decree under this rule can only be passed where the net proceeds of the sale are insufficient to pay the *amount due* to the mortgagee The ex pre sion amount due includes costs (m) [see r 4 (1)] It also includes when a puisne mortgagee is plaintiff the amount paid by him in satisfaction of prior mortgages (n)

Personal obligation to pay a question of construction — In India a mortgage does not necessarily import a personal obligation to repay Prima facie this obligation is present in simple mortgages and of course in English mortgages Prima facie it is not present in mortgages by conditional sale and in usufructuary mortgages In each case the question is one of construction of the mortgage instrument and the personal liability to repay may become barred before the right of recourse to the mortgaged property is barred (o)

Legally recoverable — No decree can be passed for the balance under this rule unless the balance is *legally recoverable* The balance is not legally recoverable if the right to recover the mortgage debt from the mortgagor personally is barred by limitation at the date of the suit for sale It would be barred in the case of an unregistered instrument after the expiration of three years from the date on which it is repayable and in the case of a registered instrument after the expiration of six years from that date (p) unle s the right is kept alive by acknowledgment as provided by s 19 of the

(h) *Kanda mi v Kuppu Mooppan* (19 0) 43 Mad 421 55 I C 390
(i) *Badal S gh v Debi Sa an* (19 7) 49 All 506 100 I C 775 (7) A A 395
(j) *Go ndaswami v K lanam* (19 7) 53 M d L J 489 103 I C 5 8 (7) A M 7 9 *Pal Saheb v J hn* (19 8) 33 C W N 300 (29) A C 387
(k) *Badri D s v Inayat Khan* (1900) All 104 *Durbari Mal v Moola Singh* (19 0) 4 All 519 56 I C 132
(l) *Bulaki Das v Secretary of State* (1909) 31 All 371 1 I C 896
(m) *Kamalamma v Kom nd* (1907) 30 Mad 461, *I j Kuma v Sheo y* (1908) 35 Cal 431 *M qbul v Lalta* (1898) 20 All 5 3
( ) *Al Jan v Mariam Bi i* (1904) 6 All 93
(o) *I ll v G rg y* (19 5) 5 Cal 8 8 843-844 89 I C 1 (5) A C 834 *J gi S gh v Ch da Mal* (1908) 30 All 383 [simple mortg g]
(p) *Musaheb Z man v Inayat ul-lah* (1892) 14 All 513, 518 *I am D s v Kalta* (1885) 7 All 502 12 I A 1 *Miller v R nga Nath* (1886) 1 Cal 349 *Gulam Hus e n v Mahamadali* (1910) 34 Bom 540 7 I C 455 *M kra j v Kalu* (1919) 41 All 581 50 I C 610 *Ganesh Lal Pand t v Khet amohan Mahapat a* (1926) 53 I A 134 5 1 t 585 95 I C 832 (26) A PC 6

Limitation Act 1908 or by payment of interest or part payment of principal as provided by s 20 of that Act If the right to recover the mortgage debt from the mortgagor personally is not barred at the date of the suit for sale the mortgagee is entitled if there is a deficiency to a personal decree for the balance though the application under this rule may be made after the expiry of the period of limitation for a suit for a personal decree (q) The mortgagee however is not entitled to wait indefinitely for a personal decree after the deficiency has been ascertained He must apply for a personal decree within three years from the date when the deficiency is ascertained as provided by Art 181 of the Limitation Act otherwise the application will be time barred (r)

Legally recoverable from the defendant otherwise than out of the property sold —These words mean by way of illustration that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold (s)

Personal liability of purchaser from mortgagor —The transferee of the equity of redemption in mortgaged property who has agreed with the *mortgagor* to pay to the mortgagee the amount due to him is not a person from whom the balance is legally recoverable within the meaning of this rule there being no contract between him and the mortgagee Hence no personal decree can be passed against the transferee under this rule at the instance of the mortgagee (t)

Costs against puisne mortgagee —A prior mortgagee is not entitled to a decree under this rule against a puisne mortgagee for the amount of his costs The present rule does not apply to such a case (u)

Limitation —See notes above Legally recoverable

Consent decree —A consent decree may provide for personal recovery from the mortgagor by execution of the decree if the sale proceeds are insufficient and in that case no further decree under this rule is necessary (v)

Appeal —An appeal from a decree under this rule lies to the District Judge and not to the High Court notwithstanding that the decree be for a sum exceeding Rs 5 000 if the original mortgage suit was valued at less than Rs 5 000 (w) See notes to sec 96 Forum of appeal

Preliminary decree in redemption suit

7 [*New* Act IV of 1882, s 92] (1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(q) *Hamid ud-din* v *Kedar Nath* (1898) 20 All 386 *Chattar Mal* v *Thakuri* (1898) 20 All 512 *Jangi Singh* v *Chandar Mol* (1908) 30 All 388 *Rahmat Karim* v *Abdul Karim* (1907) 34 C 1 67 *Ram Het* v *Ram Ratan* (1929) 4 Luck 237 114 I C 769 ('29) A O 59

(r) *Muhammad* v *Alim-un-nissa* (1918) 40 All 551 47 I C 56 *Pell* v *Gregory* (19 5) 5 Cal 828 89 I C 1 ('25) A C 834 (F B)

(s) *Musaheb Zaman* v *Inayat ul-lah* (189) 14 All 513 518

(t) *Jamna Das* v *Ram Autar* (191) 34 All 63 39 I A 7 13 I C 304 [P C] affirming (1909) 31 All 3 2 I C 460 *Sanku Prasad* v *Kalka Prasad* (19 2) 26 C W N 771 95 I C 970 ('23) A PC 54 [P C]

(u) *Ram Lal* v *Sital Chand* (1901) 23 All 439 *Mata Amber* v *Sri Dhar* (1904) 6 All 507

(v) *Aditya Prasad* v *Har govind Singh* (1928) 3 Luck 411 108 I C 723 ('28) A O 490

(w) *Badi un Nissa* v *Shankar* (1919) 41 All 384 49 I C 687

6 one for necessity the High Court of Madras held that the mortgagee was entitled to a conditional decree under this rule against the father personally and against the joint family property of himself and his undivided sons for the recovery of the balance in case the sale proceeds of the father's share of the mortgaged property was insufficient (h). Where a sale in execution of a decree on a mortgage by a Hindu lady was set aside at the instance of her grandson who was the real owner the Allahabad High Court passed a personal decree against her under this rule saying that the mortgagee having been compelled to refund the purchase money to the purchaser the net proceeds of the sale were nil and therefore insufficient to pay the amount due (i) The absence of any reservation in the preliminary decree of liberty to the decree holder to apply for a personal decree does not disable him from doing so later (j)

Where net proceeds of any such sale held under r 5 are found insufficient.—A personal decree under this rule can only follow *the mortgage decree under which the sale is held* Therefore if a sale has taken place under a decree on a prior mortgage that would not entitle a subsequent mortgagee who has also obtained a decree for sale to apply for and obtain a decree under this rule The reason is that the sale was not held under *his* decree (k) Similarly where a person holding two mortgages over the same property brings two suits on those mortgages and obtains two decrees and the mortgaged property is sold under one of those decrees the fact that the sale proceeds after discharging that decree are not sufficient to pay the amount due *under the other decree* would not entitle him to apply for and obtain a personal decree under this rule for the balance due under the other decree The reason is that the property was sold not under that decree but under the first decree (l)

Amount due —A personal decree under this rule can only be passed where the net proceeds of the sale are insufficient to pay the *amount due* to the mortgagee The expression amount due includes costs (m) [see r 4 (1)] It also includes when a puisne mortgagee is plaintiff the amount paid by him in satisfaction of prior mortgages (n).

Personal obligation to pay a question of construction—In India a mortgage does not necessarily import a personal obligation to repay Prima facie this obligation is present in simple mortgages and of course in English mortgages Prima facie it is not present in mortgages by conditional sale and in usufructuary mortgages In each case the question is one of construction of the mortgage instrument and the personal liability to repay may become barred before the right of recourse to the mortgaged property is barred (o)

Legally recoverable —No decree can be passed for the balance under this rule unless the balance is *legally recoverable* The balance is not legally recoverable if the right to recover the mortgage debt from the mortgagor personally is barred by limitation at the date of the suit for sale It would be barred in the case of an unregistered instrument after the expiration of three years from the date on which it is repayable and in the case of a registered instrument after the expiration of six years from that date (p) unless the right is kept alive by acknowledgment as provided by s 19 of the

(h) *Kandasami v K ppu Mooppan* (19 0) 43 Mad 421 5 I C 3 0
(i) *Badal S ngh v Deb Sa an* (19 7) 49 All 506 100 I C 7 5 (7) A 4 395
(j) *Gorind wami v Kundas am* (19 7) 53 Mad L J 48) 103 I C 5 8 (7) A M 779 *I I Sah b v John* (19 8) 33 C W N 300 (29) A C 387
(k) *B dri Das v Inayat Kh* (1900) ? All 104 *D rbari Mal v Moola S gh* (19 0) 42 All 519 58 I C 132
(l) *Bulaki Das v Secretary of State* (1909) 31 All 371 1 I C 896
(m) *Kamalamma v Kom nd* (1907) 30 Mad 461 *I aj Kumar v Sheo Na ay n* (1908) 35 Cal 431 *Maqbul v Lalla* (1898) .0 All 5_3
(n) *Ali Jan v Mariam Bibi* (1904) 26 All 95
(o) *P ll v Gregory* (19 5) 5? Cal 8 ? 813-814 89 I C 1 (5) A C 834 *J n ?* v *Cha dar Mal* (1908) 30 All 343 (simple mortg)
(p) *Musaheb Zaman v Inayat ul-lah* (1892) 14 All 513 518 *Ram D n v Kalu* (1885) 7 All 50? 12 I A 1 *Muller v Ru ga Nath* (1886) 12 Cal 389 *Gula Hus n v Mahamalalli* (1910) 34 Bom 540 7 I C 455 *Makra A v Kalu* (1919) 41 All 581 50 I C 610 *Ganesh Lal P nd t v Khetramohan Mahapatra* (1926) 53 I A 134 5 P t 85 9 L C 859 (6) A I C 6

Limitation Act 1908 or by payment of interest or part payment of principal as provided by s 20 of that Act If the right to recover the mortgage debt from the mortgagor personally is not barred at the date of the suit for sale the mortgagee is entitled if there is a deficiency to a personal decree for the balance though the application under this rule may be made after the expiry of the period of limitation for a suit for a personal decree (*q*) The mortgagee however is not entitled to wait indefinitely for a personal decree after the deficiency has been ascertained. He must apply for a personal decree within three years from the date when the deficiency is ascertained as provided by Art 181 of the Limitation Act otherwise the application will be time barred (*r*)

Legally recoverable from the defendant otherwise than out of the property sold —These words mean by way of illustration that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold (*s*)

Personal liability of purchaser from mortgagor —The transferee of the equity of redemption in mortgaged property who has agreed with the *mortgagor* to pay to the mortgagee the amount due to him is not a person from whom the balance is legally recoverable within the meaning of this rule there being no contract between him and the mortgagee Hence no personal decree can be passed against the transferee under this rule at the instance of the mortgagee (*t*)

Costs against puisne mortgagee —A prior mortgagee is not entitled to a decree under this rule against a puisne mortgagee for the amount of his costs The present rule does not apply to such a case (*u*)

Limitation —See notes above Legally recoverable

Consent decree —A consent decree may provide for personal recovery from the mortgagor by execution of the decree if the sale proceeds are insufficient and in that case no further decree under this rule is necessary (*v*)

Appeal —An appeal from a decree under this rule lies to the District Judge and not to the High Court notwithstanding that the decree be for a sum exceeding Rs 5 000 if the original mortgage suit was valued at less than Rs 5 000 (*w*) See notes to sec 96 Forum of appeal

Preliminary decree in redemption suit

7 [*New* Act IV of 1882, s 92] (1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any awarded to him, and

(*q*) *Hamid ud-din* v *Kedar Nath* (1898) 20 All 386 *Chattar Mal* v *Thakuri* (1898) 20 All 512 *Ja gi Singh* v *Chanda Mol* (1908) 0 All 388 *R hmat K rim* v *Abd l K rim* (1907) 34 Cal 6 _ *R m H t* v *Ram Rat n* (19 9) 4 Lu k _37 114 I C 769 (29) A O 59

(*r*) *Muhamm d* v *Al m-un-nissa* (1918) 40 All 551 47 I C 56 *P ll* v *Gregory* (19 5) 52 Cal 8_8 89 I C 1 (5) A C 834 (F B)

(*s*) *Mus h b Zaman* v *Inayat-ul-lah* (189) 14 All 513 518

(*t*) *Jamna Das* v *Ram Autar* (191) 34 All 63 39 I A 7 13 I C 304 [P C] affirming (1909) 31 All 3 2 I C 460 *Nanku P a ad* v *Kanta Prasad* (19) 26 C W N 771 9 I C 9 0 (3) A PC 54 [P C]

(*u*) *R m Lal* v *Sil Chand* (1901) 23 All 439 *M la Amber* v *Sri Dhar* (1904) 6 All 507

(*v*) *Aditya Prasad* v *Hargovind S ngh* (19_8) 3 Luck 411 108 I C 723 (_8) A O 490

(*w*) *B d un Nissa* v *Shankar* (1919) 41 All 334 49 I C 687

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage security, together with interest thereon, or

(b) declaring the amount so due at that date, and

(c) directing—

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if neces sary, put the plaintiff in possession of the property, and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufruc tuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale O 3
or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest

The old rule —The above rule has been substituted for old r 7 by the Transfer of Property (Amendment) Supplementary Act 1929 which comes into operation on the 1st April 1930 The old rule is as follows —

7 In a suit for redemption if the plaintiff succeeds the Court shall pass a decree—

(a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to or

(b) declaring the amount so due at the date of such decree

and directing—

(c) that if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court the defendant shall deliver up to the plaintiff or to such person as he appoints all documents in his possession or power relating to the mortgaged property and shall, if so required retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him or where the defendant claims by derived title by those under whom he claims and shall if necessary put the plaintiff in possession of the property but

(d) that if such payment is not made on or before the day to be fixed by the Court the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold

The old rule and the new rule —

1 The general changes in this rule are on the lines of those in new rules 2 and 4 above See note to r 2 and to r 4 The old rule and the new rule

2 In sub rule (1) (c) (ii) the cases in which a decree for sale and the cases in which a decree for foreclosure can be passed have been specifically mentioned See Transfer of Property Act sec 67

3 Sub rule (2) empowers the Court to extend the time for payment until a final decree for foreclosure or sale has been passed.

Preliminary decree for redemption —This rule excepting sub rule (1) (c) (ii) corresponds with r 2 above which relates to a preliminary decree for foreclosure The notes on that rule apply mutatis mutandis to this rule For the form of a preliminary decree for redemption see Appendix D form no 5

Other costs charges and expenses —See notes to r 2 above under the same head

Subsequent costs, charges and expenses —See r 10 below

Subsequent interest —See r 11 below

Power to extend time in suit for redemption—The proviso to old r 8 was in these terms provided that the Court may upon good cause shown and upon such terms (if any) as it thinks fit from time to time postpone the day fixed for payment. Under the present rule the Court has the power to extend the time *at any time before the passing of a final decree for foreclosure or sale* It is clear that the new sub rule 7 ( ) applies in every case where a decree for redemption has been passed whatever may be the nature of the mortgage (x) When in a partition suit an alienation of part of the property was held binding for a certain amount only and the alienee was ordered to give possession on payment being made of that amount in a certain time this was held to be in effect a decree for redemption and subject to the power of enlargement of time (y) But this decision is of doubtful authority See notes to r (2) above Power to extend time in foreclosure suit The application for extension of time should be made to th Court of the first instance even if the decree for redemption was pas ed by the appellate Court (z)

Appeal—An appeal lies from an order refusing to extend the time for payment under O 43 r 1 (o)

8 [*New* Act 4 of 1882, s 93] (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

Final decree in redemption suit

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub rule (3)

(x) Na g v Iart p (19 8) 0 All 88 111 I C 24 (8) A.A 480 [illegible]

(y) Id mba Ia av v Ieth Reddy (19 0) 43 Mad 5 , 54 I C 451

(z) Ram Dha i v Lalit S gh (1909) 31 All 3 8 I C 0 Dharmaraja v Srin a a (1916) 39 Mad 8 6 31 I C 40 B i Prasad v Harnam Das (191) 39 All 396 39 I C 630

of this rule, the Court shall not pass an order under sub rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into Court by the purchaser

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase money paid into Court by him, together with a sum equal to five per cent thereof

(3) Where payment in accordance with sub rule (1) has not been made, the Court shall, on application made by the defendant in this behalf —

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property , or

(b) in the case of any other mortgage not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same "

The old rule —The above rule has been substituted for old r 8 by the Transfer of Property (Amendment) Supplementary Act 1929 which comes into operation on the 1st April 1930 The old rule is as follows —

8 (1) Where on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10 the Court shall pass a decree—

(a) ordering the defendant to deliver up the documents which under the terms o the preliminary decree he is bound to deliver up

and, if so required —

(b) ordering him to re transfer the mortgaged property as directed in the said decree and also if necessary —

(c) ordering him to put the plaintiff in possession of the property

(2) Where such payment is not so made and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same.

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for payment.

The old rule and the new rule.—The changes in this rule have been made on the lines of those in rules 3 and 5 above. See notes to rr. 3 and 5, "The old rule and the new rule".

The provision regarding the power of the Court to extend the time for payment which appeared as a proviso to old rule 8 (4) has been transferred to new rule 7.

Sub-rule (1): decree for mortgagor.—Sub-rule (1) of this rule corresponds with sub-rule (1) of rules 3 and 5. See notes to rules 3 and 5. Where the amount declared due in a decree for redemption is paid by the mortgagor into Court, the mortgagor does not lose his right to a decree under sub-rule (1) because he has attached and withdrawn from Court a portion of the sum so paid in execution of that portion of the decree which awarded him costs against the mortgagee (*a*). If time for payment has been extended, payment within the time so extended gives the mortgagor a right to a decree (*b*). The mortgagee is not entitled under O. 21, r. 1 (c) to notice of payment into Court (*c*).

Sub-rule (2): decree for foreclosure.—The mere fact that the preliminary decree for redemption does not contain a direction for foreclosure or sale in default of payment on the day fixed does not disentitle the mortgagee to a decree for foreclosure or sale as the case may be. The omission of the Court to draw up the proper decree under r. 7 does not deprive the mortgagee of the relief provided by this rule (*d*). The decree for foreclosure or sale under this rule should be passed by the Court which passed the preliminary decree for redemption, notwithstanding that the latter decree has been varied by the appellate Court (*e*).

8A. [*New.*] Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.

Recovery of balance due on mortgage in suit for redemption.

(*a*) *Parmanand* v. *Lokman Das* (1905) 27 All. 3[illegible].
(*b*) *M[illegible]* v. *C[illegible]ngolal* (19[illegible]) 50 Bom. 730, 98 I. C. 91, ([illegible]7) A. B. [illegible].
(*c*) *[illegible]mbi* v. *[illegible]allu* (19[illegible]3) 45 Mad. L. J. 687, 75 I. C. 66, ([illegible]) A. M. 20.
(*d*) *Muct[illegible]* v. *[illegible]* (1901) 3 Bom. L. R. 101.
(*e*) *Venk[illegible]* v. *Thiyagaraya* (19[illegible]) 3[illegible] Mad. 5[illegible]; *Sheona[illegible]* v. *Ch[illegible] Lal* (1901) 3 All. 8[illegible].

Personal decree in suit for redemption—This rule is new. It has been added by the Transfer of Property (Amendment) Supplementary Act 1929. Rule 6 provides for a personal decree against the mortgagor in a suit for sale brought by the mortgagee. The present rule provides for a personal decree in a suit for redemption brought by the mortgagor.

Decree where nothing is found due or where mortgagee has been overpaid

9 Notwithstanding anything hereinbefore contained if it appears upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant if so required, to retransfer the property and to pay to the plaintiff the amount which may be found due to him and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

This rule provides for cases where nothing is found due to the mortgagee and for cases where the mortgagee has been overpaid as may well happen where he is in possession. There was no such provision in the Transfer of Property Act but the practice followed under that Act was the same as that prescribed by this rule (*f*).

Costs of mortgagee subsequent to decree

10 [*New* Act 4 of 1882 s 94] In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure sale or redemption the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

The old rule—The above rule has been substituted for old r 10 by the Transfer of Property (Amendment) Supplementary Act 1929 which comes into operation on 1st April 1930. The old rule is as follows —

10 In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption the Court shall unless the conduct of the mortgagee has been such as to disentitle him to costs add to the mortgage money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

Other costs charges and expenses—The words and other costs charges and expenses are new. The addition of these words makes it clear that all costs charges and expenses properly incurred by a mortgagee subsequent to the passing of the preliminary decree are to be added to the mortgage money and the mortgagor has to pay them before he can redeem the mortgage. Such costs charges and expenses were added to the mortgage money even before the amendment of the present rule by the Act of 1929 (*g*).

(*f*) S e *F hu* v *L ksh ns gh* (1901) Bom 115 *I yal* v *D ttat aja* (190) 6 Bom 661

(*g*) *Allahabad Bank* v *Motilal Barman* (1917) 44 Cal 448

But costs of a successful appeal by the mortgagee from an order striking off execution proceedings cannot be so added. The mortgagor is liable for them personally (h) If the costs of an appeal from a preliminary decree have by mistake been omitted in the final decree the Court of execution cannot include them (i) Subsequent interest not mentioned in the final decree must be taken as refused (j)

11 [*New*] In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely —

Payment of interest

(a) Interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or, where no such rate is fixed at such rate as the Court deems reasonable

(ii) on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage security up to the date of the preliminary decree and added to the mortgage money,—at the rate agreed between the parties or failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent per annum, and

(b) Subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

(i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause, and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10

(h) *Het Ram v Raja D tt* (19 6) 48 All 68 96 I C 59 (6) A A ?
(i) *Ram Sarup v Nar n D* (19) 45 All 198 69 I C 944 (3) A A 141
(j) *Tekait Krishna v Surendra* (19?0) 5 Pat L J 598 58 I C 2 3

The old rule—This rule relates to interest The old r 11 had nothing to do with interest It gave a right to a mesne mortgagee to redeem and foreclose It is not transferred to the Transfer of Property Act as sec 94 It was as follows — O

11 Where property is mortgaged for successive debts to successive mortgagees any mesne mortgagee may institute a suit to redeem the interests of the prior mortga ge s and to foreclo e the rights of those that are posterior to himself and of the mortgagor

Interest in mortgage suits—This rule is new It has been added by the Trans fer of Property (Amendment) Supplementary Act 1929 It comes into operation on 1st April 1930 It gives effect to judicial decisions under the Transfer of Property Act 1882 and under O 34 of the Code Summarising those deci ions it may be said that in a suit on a mortgage the Court awarded—

(1) int rest on the principal *prior to the date of the suit* at the *rate provi led by th mortgage* [Usury Laws Repeal Act 18__ s 2] unless the rate is penal in which case the Court may award such interest as it deems proper (*k*) [Indian Contract Act 187_ s 74] or the interest is exce ive and the transaction was substantially unfair in which case also the Court may reduce it [U urious Loans Act 1918 s 3] and

(2) interest on the principal from the *date of the suit* up to the date *fixed by the Court for payment of the mortgage debt also* at the *rate provided by the mortgage* [Transfer of Property Act ss 86 88 now O 34 rr _ and 4] unless the rate is penal in which case the Court may award interest at such rate as it deems proper (*l*) or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it (*m*)

(3) intere t on the *aggregate amount* of principal interest and co ts from the *date fixed for the payment of the mortgag debt* up to the *date of re li ation or actual payment* at such rate as the Court deems proper It may be allowed at the Court rate that is 6 per cent per annum (*n*) or at any other rate (*o*) The Court is not bound to award it at the contract rate (*p*)

As to item (3) above it was contended on behalf of the mortgagor before their Lord ships of the Privy Council in *Maharaja of Bharatpur* v *Kanno Dei* (*q*) that according to the true construction of s 88 of the Transfer of Property Act the Court had no *power* to award interest subsequent to the date fixed for payment of the mortgage debt but this contention was overruled and it was held that that section did not preclude the payment of such interest and this view was reiterated by their Lordships in *Sunder Koer* v *Rai Sham Kishen* (*r*) and *Raja Gokuldas* v *Sheth Gl asiram* (*s*) O 34 r 4 which is in substance a reproduction of sec 88 of the Transfer of Property Act now contains an express provision for payment of subsequent interest

(*k*) *F[illegible] jaram* v *Ra[illegible] Sank* (1915) 4 Cal 6 27 I C 815 [Interest reduc d from per cent to 4 per cent]

(*l*) *P[illegible]* v *M hd Hossein* (1899) 6 Cal 39 2 I A 1 9 as xplain d in *Sund r Koer* v *R i Sh m Kish n* (1907) 34 Cal 150 34 I A 9 *Jagannath Prosad* v *S r j al* (19 7) 4 I A 1 *S rja* v *Jog d a* (1893) 0 Cal 360 *Chatu bhai Harbh ji* (1806) 0 Bom 44 *S bba ya* v *P n m i* (18J8) 21 Mad 364 *R jwa ta* v *Shiam* (1914) 36 All 2 0 3 I C 88

(*m*) In *Raja Sir M hammad* v *Qazi Ramza Ali* (19 0) 24 C W N 6 58 I C 80 the I C disallowed intere t for the period tak n up by appeal by the m rtgag e the case having been hung up by his persis tence in a serting an unwarrantable claim for intere t

(*n*) *S da Ko* v *Ri sh m K sh en* (190) 34 Cal 1 0 34 I A 9 *S bba a[illegible]* v *I[illegible] sam* (1838) 21 M d 364 *S n nath* v *Swaminappa* (1906) 9 Mad 1 0

(*o*) *Lach i Na ain* v *L ia Dat* (1907) 9 All 3 [where the Co rt awarde l imple i terest at the contract rat which w s 10½ per cent p r nnum] *Bh gat S gh* v *J Ram* (191) I R no p 1 6 I C 40 [9 per c nt per annum allowed]

(*p*) *Su l r Koe* v *Rai Sham Kishen* (190) 34 Cal 150 34 I A 9

(*q*) (1901) 23 All 181 28 I A 3

(*r*) (1907) 34 Cal 1 0 34 I A 9

(*s*) (1908) 3 Cal 1 3 I A 8

11 On a preliminary decree for foreclosure or sale under rr 2 and 4 a mortgagee is entitled to interest at the rate and with the rests stipulated in the mortgage down to the date fixed for redemption by the decree and if the decree i varied on appeal down to the date fixed for redemption by the Appellate Court (*t*)

Although a mortgage for ample security provides for excessive and usurious interest no presumption arises that it was induced by undue influence in the absence of proof by the mortgagor that the mortgagee was in a position to dominate his will (*u*)

There was a considerable conflict of decisions as to whether if there was no express provision in the mortgage deed for payment of interest after the due date for payment specified in the deed the Court could allow interest subsequent to that date It was held in some cases that if on an examination of the deed the Court came to the conclusion that there was an intention to pay interest not only up to the due date but also after that date and up to the date of payment the Court should allow interest on the footing that the deed contained a provision for the payment of such interest (*v*) Where the deed contained a stipulation for periodical payment of interest and there was nothing in the deed to suggest that the liability in respect of interest should cease on the due date it was presumed by the Court that there was an intention to pay interest up to the date of payment (*w*) If on the other hand the Court came to the conclusion that there was no intention to pay interest after the due date the practice was to allow interest by way of damages at the contract rate At the same time it was recognised that the contract rate was not necessarily the measure of damages (*x*) Where interest was allowed by way of damages it was held by the High Courts of Calcutta and Madras that it could be added to the mortgage money and recovered out of the mortgaged property (*y*) The High Court of Allahabad held that it could not be recovered out of the mortgaged property and that there could only be a personal decree against the mortgagor for such interest (*z*) It was thought in some cases that the claim for interest by way of damages being a claim for compensation for breach of contract the claim would be barred unless it was made in a suit on a mortgage within three years from the due date fixed for payment of the mortgage money in the case of an unregistered instrument and six years in the case of a registered instrument (*a*) In the undermentioned case (*b*) however the Judicial Committee observed that such a claim was a recurring one within the meaning of sec 23 of the Limitation Act and that so long as the principal was not barred interest for three or for six years as the case may be could be recovered These nice distinctions have been done away by the present rule and provision is made in sub r ile (b) for interest subsequent to the date of the preliminary decree and the rate of interest is left to the discretion of the Court

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(*t*) *J ga ath v S rajn l* (19) 4 I A 1 54 Cal 161 99 I C 686 ( ) A I C 1

(*u*) *Rajh ath Pra ad v S j P a al* (19 4) 1 I A 101 3 Pat 79 8 I C 81 (24) A PC 60

(*v*) *M th a Das v Raj N i l* (189) 19 All 39 23 I A 138 *B de n Nal v Ca ga Sa an Sal i* (1898) 20 All 171 I A 9 *Sarat i Das v J g n ira* (1898) Cal 46 *I lla S lla iya v Cang i* (189) 0 M d 149 *N tja da v Sri I dh* (189) 0 M 1 3 1 *Gla tajji v Iapayj* (1900) 3 M d 534

(*w*) *J a a v App l i* (1849) Mad 339 *M ger I th ba T ap Sa ll g v I g w* (1898) B m 10 wh re it I ppe ir d from th id n that the mortg gor h d p i ld int re t for s veral y ar *aft tl d d t*

(*x*) *Cl j l Das v B j Bhukan L l* (189) 1 All 511 9 I A 193 *Math r D s v Raja Na ndar* (189) 19 All 39 3 I A 138

(*y*) *Bikra j t v D rga Da jal* (1894) 1 C l 74 *Moti v Ramohan* (189) 24 Cal 699 *Rama Pedd v App j R d l* (18) 18 M d 248 See also *Chajn al v Brij Bh ikan* (189) 17 All 511 17 I A 199 wh re intere t aw irded as dam es was directed to b added to the pr n ipal in taking the accounts

(*z*) *N n lra B l ad v I hat m Hus* (189) 1 All 581 *R kh R m v Sheo I a han* (1896) 18 All 316

(*a*) *G dri Koer v Bh banesvari* (189) 19 Cal 19 *M t v Ram hari* (190) 4 Cal 633 *Na ilri v Kh l m* (18) 1 All 81 *B l v S* (189) 18 Ma l 7 *Th ja Ammal v Laksh i* (189) 18 Mad 331

(*b*) *M th ra Das Raja Na indar* (189) 19 All 39 4 23 I A 138

12 [Act 4 of 1882, s 96] Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold

Sale of property subject to prior mortgage

Sale of property free from prior mortgage—A puisne mortgagee may sue for foreclosure or sale without making the prior mortgagee a party to the suit [see the Explanation to r 1] In such a case as also where the prior mortgagee is joined as a party and his mortgage is admitted (c) the prior mortgagee may consent to the property being sold free from his mortgage in which case he acquires the right to have his claim satisfied first out of the proceeds of the sale of the mortgaged property [see r 13 below]

Where the prior mortgagee is a usufructuary mortgage—A holds two mortgages on the same property the first a usufructuary and the second a simple mortgage Can A sue for sale of the mortgaged property on the simple mortgage *free from* the usufructuary mortgage *and claim to be paid out of the sale proceeds the amount due upon the usufructuary mortgage under this and the next rule?* Yes according to the Madras ruling (d) No according to the Allahabad rulings unless the two mortgages are in favour of different persons (e)

The High Court of Patna has held that where a person holds two mortgages on the same property the first a usufructuary and the second a simple mortgage he is entitled to sue for the sale of the mortgaged property on the simple mortgage *subject to* his prior usufructuary mortgage and also that he is entitled to have the prior mortgage notified at the sale in execution of the decree obtained on the subsequent mortgage for the information of bidders at the sale though the prior mortgage was not mentioned in his plaint The omission to mention the prior mortgage in the plaint does not preclude him from keeping alive that mortgage by notifying it at the sale (f)

13 [Act 4 of 1882 s 97] (1) Such proceeds shall be brought into Court and applied as follows —

Application of proceeds

first in payment of all expenses incident to the sale or properly incurred in any attempted sale,

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed and of the costs of the suit in which the decree directing the sale was made,

(c) *Sri ra a v I m aba* (1906) 9 Mad 84
(d) *I e g m v Subb oja* (1907) 30 Mad 408
(e) *Bhagwan Das v Bhawa* (1904) 6 All 14
(f) *Jagernath v Mohra K ar* (1917) 2 Pat L J 118 39 I C 6

fourthly, in payment of the principal money due on
4 account of that mortgage, and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882

Application of proceeds—Compare s 73 proviso (c) which relates to subsequent and not prior incumbrances See notes to s 73 Clauses (a) (b) and (c)

Whatever is due to the prior mortgagee—This includes interest on the mortgage up to the date of the confirmation of the sale (g)

Persons interested in the property sold—It is provided by the last clause of sub r (1) that the residue of the sale proceeds should be paid to *persons interested in the property sold* This expression includes subsequent incumbrances (h) But it does not include unsecured creditors who cannot be said to be interested in the property sold they are at liberty however to enforce their claims against any surplus payable to the mortgagor (i)

Usufructuary mortgage—See notes to r 12 above

Suit for sale necessary for bringing mortgaged property to sale

14 [Act 4 of 1882, s 99] (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2

(2) Nothing in sub rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended

Scope and object of the rule—This rule corresponds with s 99 of the Transfer of Property Act except that the words claim arising under the mortgage have been substituted for the words any claim whether arising under the mortgage or not The effect of this alteration is to confine the operation of the present rule to cases where a mortgagee has obtained a personal decree against the mortgagor on the *mortgage debt* In such a case the rule provides that the mortgagee shall not be entitled to bring the *mortgaged property* to sale *in execution of the decree* he can have the property sold only by instituting a *regular suit for sale* (j) and obtaining a decree for sale under rules 4 and 5 It is clear that where a mortgagee brings a regular suit for sale and a decree is passed

(g) *B nole* v *H n h* (1910) 15 C W N 783 8 I C 4
(h) See *Padmanabh* v *Khemu* (1894) 18 Bom 684 687 688
(i) *Padmanabh* v *Khemu* (1894) 18 Bom 684
(j) See Transfer of Property Act 1882 s 67

in such suit what would be sold is the mortgaged property free from the mortgage while in the other case where the suit is not for sale but on the mortgage debt only what would be sold is the mortgaged property subject to the mortgage in other words it is only the mortgagor s equity of redemption that would be sold The object of the present rule is to prevent mortgages from suing their mortgagors on the mortgage debt as such and in the execution selling the bare equity of redemption thereby depriving the mortgagor of the right of redemption that would be given to him by the decree for sale (k) [see r 4 above] A mortgages his property to B to secure repayment of Rs 5 000 B sues A to recover Rs 5 000 and obtains a personal decree against A B then applies for attachment and sale of A s interest in the mortgaged property in execution of the decree The property may be attached for there is nothing in this rule to bar the attachment (l) but the sale must be refused under this rule B cannot bring the property to sale except by means of a regular suit for sale Suppose now that B sues A on a *debt unconnected with the mortgage* and obtains a decree against A Is he entitled to have A s interest in the mortgage sold in execution of such decree ? Yes for the rule only precludes B from bringing the mortgaged property to sale in execution of a decree for the payment of money in satisfaction of a *claim arising under the mortgage* Under sec 99 of the Transfer of Property Act however B could not bring the mortgaged property to sale even if the decree was for a debt unconnected with the mortgage debt (m) The scope of that section was very wide for it precluded a mortgagee from bringing the mortgaged property to sale in execution of a decree for the satisfaction of *any claim whether arising under the mortgage or not* It may here be stated that the present rule is a rule of procedure and not a rule of substantive law it has therefore a retrospective operation (n)

Sale made in contravention of this rule is voidable not void —It was at one time thought that a sale made in contravention of this rule was absolutely void (o) and that the purchaser at such sale was not therefore entitled to recover possession from the mortgagor (p) and that if he did acquire possession he was bound to account for the rents and profits realized from the mortgaged property during the term of his possession (q) But this view is no longer tenable and it has been held in recent cases that a sale in contravention of this rule is not void but only voidable at the instance of the mortgagor or any other person interested in the equity of redemption (r) The sale in other words is valid until it is set aside The procedure to set aside the sale is by way of application under sec 47 a separate suit is barred under that section The application must be made before confirmation of the sale unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale The sale cannot be set aside after it is confirmed by the Court (s) Nor is it open to the mortgagor after confirmation of the sale to redeem the mortgage whether the property has been purchased by a third person (t) or by the mortgagee himself (u)

(k) See Syud Emam v Raj Coo r D s (18) 3 W R 187 Kh rajm l v D m (190) 3 Cal 96 3 I A 3 Ch u asi v Bh j n (19 3) - Lat 787 74 I C 114 (4) A 1 20

(l) Ch nd a Nath v Burroda (189) Cal 813 Nathubha v Bai Ujam (1908) 3 Bom 0

(m) T rak N th v Bhubaneswar (191) 4 Cal 780 30 I C 988

(n) Bai Ga ga v Rajaram (1911) 35 Bom 48 10 I C 815

(o) Sheoden v Ram S ran (1899) 6 Cal 164 Sonu b g v B h rs S g (1906) 33 Cal 83 Vigne wara v B pa ja (1893) 16 Mad 43

(p) B ld v Ka l s (1906) 33 Cal 113

(q) h b D s v K li K ma (1903) 30 Cal 463

( ) Khia jmal v Da (190) 3 Cal 96 3 I A 3 Ashutosh v Behari Lal (1908) 35 Cal 61 Muhammad Abdul v D lsukh Rai (1905) 7 All 517 J i h n Lal v Umr o S gh (1908) 30 All 146

(s) Ash to h v B h Lal (1908) 35 Cal 61 Ti h Lal v U n rao Si gh (1908) 30 All 146 Izh ran v Izh r n (1907) 30 M d 313 Mehr Baksh v Sa jhe Khan (1916) P J Rec no 18 p 44 33 I C 80 Bhaichan l v Ranchhoddas (19 0) 2 Bom L R 670 58 I C 231

(t) Izh r n v I h r n (1907) 30 Mad 313

(u) Dha k la v Bi dh iz (1907) 30 Mad 36 L i B l d v Abi a an (1915) 37 All 165 7 I C 79 [F B] P d t Sheo Na v P m J tan (1917) 9 Lat L J 587 41 I C 533 Raja Jagatishchand a v Bh ha s (19) 7 C W N 38 76 I C 41 (3) A C 1 1 I ut see Martand v Dhondo (1899) Bom 6 4

4 **Decree** —An order directing a person who has stood surety on behalf of a judgment debtor for the performance of a decree to pay the amount specified in the surety bond is not a decree within the meaning of this rule It is therefore competent to the decree holder to have the property secured by the bond for the performance of the decree sold in execution under sec 145 without instituting a regular suit for sale (t)

Decree for the payment of money in satisfaction of a claim arising under the mortgage —This rule does not apply unless the decree obtained by the mortgagee is for the payment of money *in satisfaction of a claim arising under the mortgage* The mortgage referred to in this rule must be a mortgage existing *prior* to the date of the decree and not one *created* by the decree [ills (1) and (2)] Further it must be a *subsisting* mortgage and not one which by reason of the efflux of time or any other like circumstance has ceased to be enforceable at law [ill (3)] Again the rule is not applicable when a usufructuary mortgagee has leased to the mortgagor and sues for rent (u) unless the lease was part of the mortgage transaction (x) Nor does the rule prevent a mortgagee purchasing with leave of the Court the equity of redemption *at a Court sale in execution of his money decree on a claim independent* of the mortgage (y)

Further the rule does not prevent a mortgagee who has two distinct mortgages one on property *A* and another on property *B* from selling *B* in execution of a money decree on a claim arising out of the mortgage on *A* and selling *A* in execution of a money decree on a claim arising out of the mortgage on *B* ( )

Illustrations

(1) *A* mortgages certain property to *B* which was then in the possession of X and agrees to deliver possession thereof to *B* after recovering possession thereof from X *A* recovers possession of the property from X but does not deliver possession thereof to *B* *B* sues *A* for possession and a decree is made in *B*'s favour for possession and for costs In execution of the decree for costs *B* applies for attachment and sale of the mortgaged property Is *B* entitled to the order applied for? Yes for the claim in respect of cost is not a claim arising under the mortgage within the meaning of this rule It arises under the decree passed for costs (a)

(2) In a suit for money a decree is passed by consent whereby the defendant is directed to pay to the plaintiff Rs 3,000 It is further declared by the decree that the plaintiff should have a first charge on certain immovable property belonging to the defendant Is the plaintiff entitled to have the property sold in execution of the decree without instituting a regular suit for sale on the charge? Yes because their being no mortgage or charge prior to the decree the decree cannot be said to have been obtained for the payment of money *in satisfaction of a claim arising* under the mortgage within the meaning of this rule The immovable property must have been made security for the payment of the money *before* the decree was obtained otherwise the provisions of this rule do not apply (b)

(t) *Ga ga De* v *Joti Lal* (191) Pat L J 197 3) I C 648
(u) *Utta cha d* v *R j F hna* (10 0) 47 Cal 377 55 I C 1 [I B]
(x) *Ibrahim* v *\ l I l d* (19 0) 44 Bom 366 55 I C 536 *Bhai hand Kirpara n* v *P n chhoddas* (19 0) Bom L R 670 58 I C 231 *Laksh n kutti* v *Mar ll mmal* (19 4) 47 Mad L J 798 8 I C 504 ( ) A M 1 7 *Muh mmad l kib* v *Hamid Ali* (19 8) 5 Cal 104 104 I C 3 3 (7) A C 884
(y) *Pa a J adish Ch ndra* v *Bhubaneswar* (19) 7 C W N 38 6 I C 41 (3) A C 1 1
(z) *B oo ja* v *H sraj* (19 4) 49 Bom 08 86 I C 870 ( ) A B 39
(a) *Ha ba P* v *Sri Nivas* (1913) 35 All 518 0 I C 836
(b) *Ambalal* v *Narayan* (1919) 43 Bom 631 51 I C 9 9 *R ja B j s nd* v *Sar t Kumari* (1917) 2 Pat L J 5 39 I C 791 and *Hari S nkar* v *M Tapa* (19 5) 4 Pat 693 88 I C 9 3 (6) A P 31 (charge created by a decree in a suit for maintenance) *Ram s ami* v *Subbaraya* (19 5) 49 Mad L J 490 88 I C 648 (5) A M 1101

(3) *A* mortgages two properties *X* and *Y* to *B* Subsequently by reason of the wrongful act of *A* *B* is deprived of part of his security namely property *Y* *B* thereupon sues *A* under sec 68 of the Transfer of Property Act and obtains a personal decree for the mortgage debt against *A* In execution of the decree *B* applies for sale of property *X* At this date *B* s remedy on the mortgage had become barred by limitation The mortgage not being a *subsisting* mortgage [and *A* not having to redeem it] *B* is entitled to have property X sold in execution without bringing a regular suit for sale on the mortgage (*c*) O 34

(4) *A* executes a usufructuary mortgage in favour of *B* to secure a debt of Rs 8 000 whereby he mortgages a fixed rate holding and his right to receive offerings at a temple By a subsequent agreement between him and *B* *A* binds himself to pay annually Rs ,00 to *B* in lieu of the offerings Subsequently *B* sues *A* on that agreement and obtains a decree against *A* for Rs 3 200 being the arrears of the annual payments This is a decree for the payment of money in sati faction of a claim arising under the mortgage within the meaning of this rule, and *B* is not entitled to bring the mortgaged property to sale in execution of the decree *B* s right to receive the money rested on his position as mortgagee (*d*)

He may institute such suit notwithstanding anything contained in O 2 r 2.—See notes to O 2 r 2 under the head Exceptions to the rule against the splitting of reliefs

Charge—This rule applies not only to mortgages but also to charges (*e*) In a Calcutta case the holder of a charge on certain properties brought a suit on the charge and obtained a d cree against the defendant personally with a declaration that the plaintiff was entitled to a charge on the properties It was held that the plaintiff was not entitled to sell the properties in execution but must file a suit to enforce the charge as provided by this rule (*f*) But where in a suit on a mortgage bond a decree was passed by consent in the terms that the plaintiff will be entitled to realise the whole amount *by taking out execution* the property mortgaged shall remain charged under the mortgage it was held that the plaintiff was entitled to sell the property in execution (*g*)

In Patna it has been held that where in a suit for maintenance a decree is passed for the plaintiff directing the defendant to pay a fixed sum every month and declaring that the allowance fixed by the decree shall be a charge on certain property the plaintiff is entitled to sell the property in execution and no separate suit is necessary (*h*) In a Bombay case the suit was for money and a consent decree was passed directing the defendant to pay a sum of money to the plaintiffs and declaring a charge on certain properties belonging to the defendant It was held that the plaintiff was entitled to sell the property in execution and that it was not necessary to bring a separate suit for sale (*i*)

Security bond—A security bond given during the pendency of an appeal creating a charge on the sureties property can be enforced by summary procedure and this rule does not apply when no person is named as mortgagee for the Court is not

(*c*) *Chedi Lal* v *S dat Nissa* (1917) 39 All 36 36 I C 907 *Ga esh Si gh* v *Debi Singh* (1910) 3 All 377 5 I C 419 [mortg ge put an end to by consent of parties] *S aj Na ain* v *J gbali* (19 0) 4 All 566 57 I C 14 *Jomathi* v *Alag ppa* (19 1) 41 Mad L J 160 6 I C 756 (1) A M 477 *T na ki R i* v *S Gopal* (19 1) 43 All 6 63 I C 445 (1) A A 131

(*d*) *Ka ima* v *Muhammad Al* (1919) 41 All 399 50 I C 134 *Bhaicha d* v *Runchhoddas* (19 0) 22 Bom L R 6 0 58 I C 231

(*e*) *Aubhoyesury* v *Go n S nk* (1895) Cal 859 (a case under s 89 Transfer of Property Act) *Venk ta* v *Menda* (19 0) 43 M d 786 57 I C 764 *Rajkumar L l* v *J la* (19 0) 5 Pat L J 248 57 I C 6 3

(*f*) *Gob da* v *Kailas* (1917) 45 Cal 530 41 I C 73

(*g*) *K sh Chandra* v *Priya Nath* (19 4) 8 C W N 550 83 I C 4 4 (4) A C 645

(*h*) *Hari* v *M sa im i Tap* (19 5) 4 Pat 693 88 I C 9 3 (6) A P 31 *Raja B aja S der* v *Surat* (1917) Pat L J 55 38 I C 791

(*i*) *Ambal l* v *Na ayan* (1919) 43 Bom 631 51 I C 9 9 *Shank* v *Ga pat* (19 9) 31 Bom L R 439 (29) A B 27

a juridical person (j) See note under O 41 r 5 *post* Security for the performance of
5 the decree and sec 145

Consent decree—This rule does not apply to consent decrees for the mortgagor can waive the benefit of the rule (k)

Transferee of money decree from mortgagee—It has been held by the High Courts of Bombay and Madras that the transferee of a money decree obtained by a mortgagee against his mortgagor is bound by the restriction imposed upon the mortgagee by this rule and that he cannot therefore bring the mortgaged property to sale in execution of the decree (l) The contrary has been held by the High Court of Allahabad (m)

Mortgages by the deposit of title deeds and charges

15 [*New* *Cf* **Act 4 of 1882, ss 96 and 100**]—All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title deeds within the meaning of sec 58, and to a charge within the meaning of sec 100 of the Transfer of Property Act, 1882

The old rule—The above rule has been substituted for old r 15 by the Transfer of Property (Amendment) Supplementary Act 1929 which comes into operation on the 1st April 1930 The old rule is as follows —

15 All the provisions contained in this Order as to the sale or redemption of mortgaged property shall so far as may be apply to property subject to a charge within the meaning of sec 100 of the Transfer of Property Act 1882

The old rule and the new rule —

1 The words as to the sale or redemption of the mortgaged property which were in the old rule have been omitted and instead thereof it is now provided in general terms that the provisions applying to simple mortgages shall apply to charges

2 The words mortgage by deposit of title deeds within the meaning of sec 58 are new

Charge—Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage the latter person is said to have a charge on the property [Transfer of Property Act s 100] A charge for rent created by sec 65 of the Bengal Tenancy Act (n) or by sec 5 of the Madras Estates Land Act I of 1908 (o) is not a charge within the meaning of sec 100 of the Transfer of Property Act See notes to r 14 Charge See Ghose on Mortgage 4th ed pp 103 104 837 846

Mortgage by deposit of title deeds—By sec 96 of the Transfer of Property Act a mortgage by deposit of title deeds is now placed on the same footing as simple mortgages

Sale—A charge is enforced by sale and not foreclosure

(j) *Raghubar Singh v Jai Indra* (1919) 46 I A 228 41 All 158 55 I C 550 *Official Receiver v Nagar* [illegible] (1925) 49 Mad L J 643 92 I C 497 (1926) A M 194

(k) *Indramani Dasi v Surendra* (1921) 35 Cal L J 61 64 I C 8 [illegible] A C 3 *Kashi Chandra v Priya Nath* (1924) [illegible] C W N 50 83 I C 424 (1924) A C 645

(l) *Chhagan v Lakshman* (1907) 31 Bom 46 *Jivarathnam v Srinivasa* (1908) 31 Mad 33

(m) *Bhikh Bal v Manni Lal* (1905) 27 All 451

(n) *Fotick Chunder v Foley* (1898) 15 C L 49 *Rohmuddi v Kali Nath* (1906) 33 Cal 985

(o) *Suramma v Satyanarayana* (1919) 42 Mad 114 48 I C 794

ORDER XXXV

Interpleader

1 [S 471] In every suit of interpleader the plaint shall, in addition to the other statements necessary for plaints, state—

Plaint in interpleader suits

(a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs,

(b) the claims made by the defendants severally, and

(c) that there is no collusion between the plaintiff and any of the defendants

Interpleader suits —See s 88 and notes thereto

2 [S 472] Where the thing claimed is capable of being paid into Court or placed in the custody of the Court the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit

Payment of thing claimed into Court

May be required to so pay or place it —These words have been substituted for the words *must* so pay or place it in view of the addition of the words immovable property in s 88 The procedure by payment or deposit is plainly not applicable to immovable property

3 [S 47] Where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject matter of such suit the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader suit has been instituted, stay the proceedings as against him, and his costs in the suit so stayed may be provided for in such suit but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit

Procedure where defendant is suing plaintiff

Alteration in the rule —The words on being informed by the Court in which the interpleader suit has been instituted have been substituted for the words on being duly informed by the Court which passed the decree in the interpleader suit in favour of the stakeholder that such decree has been passed Under the old section proceedings in other litigation relating to the same subject matter could only be stayed on the *passing of a decree* in the interpleader suit Under the present rule they can be stayed on the very *institution* of the interpleader suit

Appeal —An appeal lies from an order under this rule [O 43 r 1 cl (p)]

Procedure at first hearing

4 [S 473, R.S C, O 57, r 7] (1) At the first hearing the Court may—

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit, or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner

Non appearance of claimant defendants—Where the claimants do not appear at the first hearing the Court may if the suit is properly instituted declare under sub r (1) that the plaintiff is discharged from all liability to the defendants in respect of the money claimed award him his costs and dismiss him from the suit (p)

Sub rule 3—This sub rule has been taken from O 57 r 7 of the English Rules.

Appeal—An appeal lies from an order under this rule [O 43 r 1 cl (p)]

Agents and tenants may not institute interpleader suits

5 [S 474] Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any person other than persons making claim through such principals or landlords

Illustrations

(a) *A* deposits a box of jewels with *B* as his agent *C* alleges that the jewels were wrongfully obtained from him by *A* and claims them from *B* *B* cannot institute an interpleader suit against *A* and *C*

(b) *A* deposits a box of jewels with *B* as his agent He then writes to *C* for the purpose of making the jewels a security for a debt due from himself to *C* *A* afterwards alleges that *C*'s debt is satisfied and *C* alleges the contrary Both claim the jewels from *B* *B* may institute an interpleader suit against *A* and *C*

(p) *Khemchand* v *Khairuddin* (1919) 21 Bom L R 948 53 I C 365

Interpleader suit by Agents—In ill (a) *C* does not claim through *A* (principal) but *adversely* to him hence no interpleader suit can be brought In ill (b) *C* claims *through A* hence *B* may institute interpleader suit against *A* and *C*

Interpleader suit by tenants—*A* lets certain lands to *B* *C* alleges that the lands never belonged to *A* and claims the rent from *B* *B* cannot institute an interpleader suit against *A* and *C* this is because *C* claims *adversely* to *A* (landlord) But if *C* claims the rent alleging that the lands were sold to him by *A* after the same were let to *B* *B* may institute an interpeader suit against *A* and *C* the reason is that in this case *C* claims *through A* that is as purchaser from *A* The result is that an interpleader suit by a tenant can only be maintained if the defendant other than the landlord claims *through* the landlord (q) The following is a peculiar case *A grants* a perpetual lea e of certain villages to his wife *B* *B* sub lets the villages to *C* *A* alleging that the lease granted by him to *B* was executed by him *benami* in the name of *B* gives notice to *C* claiming the rents of the villages *B* denies that the transaction was *benami* and she also claims the rents from *C* *C* can maintain an interpleader suit against *A* and *B* The reason given is that *A* must be deemed to claim *through B* (r) See Indian Evidence Act s 116

Interpleader suit by a Railway Company—A Railway Company is not an agent of the consignor within the meaning of this rule so as to preclude it from filing an interpleader suit against the consignor and a third party claiming adversely to the consignor (s)

6 [S 475] Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way

Charge for plaintiff s costs

Appeal—An appeal lies from an order under this rule [O 43 r 1 cl (p)]

ORDER XXXVI

Special Case

1 [S 527] (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

Power to state case for Court s opinion.

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them, or

(q) *Sh ll i Bonnerjee* v *P i Cha d a Datt* (1910) 37 Cal 5 5 I C 577

(r) *Orr* v *Chiddamba n* (1910) 33 Mad 0 4 I C 319

(s) *Chhaganlal* v *B B & C I Ry* (191) 17 Bom L R 339 28 I C 948

(b) some property, movable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them, or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the questions raised thereby

Where value of subject matter must be stated

2 [S 528] Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement

Agreement to be filed and registered as suit

3 [S 529] (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject matter of which is the same as the amount or value of the subject matter of the agreement

(2) The agreement when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants, and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented

Parties to be subject to Court's jurisdiction

4 [S 530] Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein

Hearing and disposal of case

5 [S 531] (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suit so far as the same are applicable

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,— O 3

(a) that the agreement was duly executed by them,

(b) that they have a *bona fide* interest in the question stated therein and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow

Birth after case set down —In the case of the subsequent birth of an infant the former order to set down should be discharged and the special case amended by making the infant a party (*t*) So also when an infant born a few days before was accidentally omitted to be made a party (*u*)

ORDER XXXVII

Summary Procedure on Negotiable Instruments

Application of order

1 [S 538] This Order shall apply only to— O 3

(a) the High Courts of Judicature at Fort William, Madras and Bombay,

(b) the Chief Court of Lower Burma,

(c) the Court of the Judicial Commissioner of Sind, and

(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied

Courts of Small Causes in Calcutta Madras and Bombay —The corresponding Chapter of the Code of 1882 applied also to Presidency Small Cause Courts Cl (c) of s 538 of the Code which expressly mentioned those Courts has been omitted in this rule the reason given being that its appropriate place would now be in rules under the Presidency Small Cause Act See O 51 r 1

Clause (d) —Although sections 532 to 537 have been applied to a subordinate Court yet the subordinate Judge of that Court when exercising Small Cause Court powers has no jurisdiction under this order (*v*)

Lahore High Court.—The Lahore High Court is not mentioned in clause (a) of this rule See as to this the undermentioned case (*w*)

(*t*) *Savage* v *S* *ll* (1870) L R 11 Eq 64
(*u*) *Ba at* v *Tassell* (18 0) L R 11 Eq 363
(*v*) *I utbud I n* v *I riya y ja* (19 8) 51 Mad 431 100 I C 446 (..8) A M 517
(*w*) *Bho l Mal M ha d* (19) 8 Lah 156 99 I C 648 (..) A L 1 4

2 **2** [S 532] (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed, but the summons shall be in Form No 4 in Appendix B or in such other form as may be from time to time prescribed

Institution of summary suits upon bills of exchange etc

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a judge as hereinafter provided so to appear and defend, and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree—

(a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit, and

(b) for such subsequent interest, if any, as the Court may order under section 34 of this Code, and

(c) for such sum for costs as may be prescribed

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way

(3) A decree passed under this rule may be executed forthwith

Old section—This rule corresponds with s 532 of the Code of 1882 except in the following particulars —

1 The explanation to s 532 has been omitted and in lieu thereof the words the allegations in the plaint shall be deemed to be admitted have been added into sub r (2) See notes below under the head The allegations in the plaint shall be deemed to be admitted

- The fourth paragraph of s 53[2] which provided that the Court should not require the defendant to pay the amount claimed into Court or to give security therefor unless the Court thought that the defendant had not a *prima facie* case or that the defence was not made in good faith has been omitted See r 3 sub r (2) below

3 See also notes below Changes in sub r (2)

Changes in sub rule (2)—Clauses (a) (b) and (c) of sub r (2) and sub rule (3) were substituted after the words shall be entitled to a decree in sub r (2) for the following words by Act 30 of 1926 s 4 —

for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified (if any) to the date of the decree and such sum for costs as may be prescribed unless the plaintiff claims more than such fixed sum in which case the costs shall be ascertained in the ordinary way and such decree may be executed forthwith

See notes below Interest

Points of difference between summary suit and ordinary suit on negotiable instruments

(1) A plaintiff enforcing a negotiable instrument may either bring a *summary* suit or he may bring a suit in the *ordinary* manner The advantage of a summary suit is that the defendant is not as in a suit brought in the ordinary manner entitled as of right to defend the suit The defendant in a summary suit must *apply for leave* to defend within 10 days from the service of the summons upon him (see Limitation Act 1908 sch I art 159) and such leave will be granted only if the affidavit filed by the defendant discloses such facts as would make it incumbent on the plaintiff to prove consideration or such other facts as the Court may deem sufficient for granting leave to the defendant to appear and defend the suit If no leave to defend i granted the plaintiff is entitled to a decree

(2) A summary suit must be brought within one year from the date on which the debt becomes due and payable [Limitation Act 1908 sch I art 5] The period of limitation for a suit brought in the ordinary manner on a negotiable instrument is 3 years Article 5 of the Limitation Act 1908 as it originally stood referred to suits under the summary procedure referred to in section 128 (2) (f) of the Code and this was construed as not including suits under O 37 (x) That article was accordingly amended by Act 30 of 1925 by adding to the entry in the first column the words where the provision of such summary procedure does not exclude the ordinary procedure in such suits and under O 37 of the said Code At the same time the period of limitation was extended from six months to one year

(3) A summary suit can only be brought in the Courts mentioned in r 1

A negotiable instrument means a promissory note bill of exchange or cheque expressed to be payable to a specified person or his order or to the order of a specified person or to the bearer thereof or to a specified person or the bearer thereof (Negotiable Instruments Act 26 of 1881 s 13)

A bill of exchange is an instrument in writing containing an unconditional order signed by the maker directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument (Negotiable Instruments Act s 5)

(x) *Rabindra* v *Abdul* (19 5) 5? Cal 954 88 I C 400 ( ) A C 781

2 **A promissory note** is an instrument in writing (not being a bank note or a currency note) containing an *unconditional* undertaking signed by the maker to pay a *certain* sum of money only to or to the order of a certain person or to the bearer of the instrument (Negotiable Instruments Act s 4)

Illustrations

(a) *A* executes an instrument whereby he promises to pay Rs 5 000 to *B* on demand By the *same* instrument it is provided that *B* should not be entitled to call for payment of the said sum *unless* A fails to deliver certain goods to *B* within six months The instrument is not a promissory note for the undertaking to pay Rs 5 000 is *conditional* upon *A* s failure to deliver the goods *Simon* v *Halim Mahomed* (1896) 19 Mad 368

(b) *A* executes an instrument whereby he promises to pay Rs 5 000 to *B* on demand At the same time a *separate* agreement is made between the parties whereby *B* agrees not to demand payment of the sum of Rs 5 000 unless *A* fails to deliver certain goods to him within six months The instrument is a promissory note *Simon* v *Halim Mahomed* (1896) 19 Mad 368

Limitation for suit—See notes above Points of difference between summary suit and ordinary suit on negotiable instruments

Limitation for application for leave to defend—The period of limitation for an application for leave to appear and defend is 10 days from the date when the summons is served Limitation Act sch I art 159 The Court has no power to extend the time (*y*) unless the Court has by a rule framed in that behalf made sec 5 of the Limitation Act applicable to such application as has been done by the High Court of Bombay See App IV below [Rules made by the High Court of Bombay]

Form of summons in a summary suit—The summons in such a suit requires the defendant to obtain leave from the Court within 10 days from the service thereof to appear and defend the suit and within such time to cause an appearance to be entered on his behalf see Appendix B Form No 4

Defendant shall not appear unless he obtains leave—This rule provides that a defendant who has failed to obtain leave to defend cannot be allowed to appear while the hearing is proceeding It is therefore irregular for the Court to pass at his instance an order for the payment of the decretal amount by instalments under O 20 r 11 (1) above (*z*)

Interest—Sub rule (2) before it was amended by Act 30 of 1926 was in almost the same terms as s 532 of the Code of 1882 The sub rule has now been amended and provision has been made for interest first up to the date of the institution of the suit secondly up to the date of the decree and thirdly after the decree As to interest up to the institution of the suit it is to be calculated in accordance with the provisions of sec 79 or sec 80 as the case may be of the Negotiable Instruments Act 1881 As to interest from the date of the institution of the suit to the date of the decree it may be awarded at the discretion of the Court at the same rate as aforesaid or at such other rate as the Court thinks fit As to interest from and after the date of the decree the same may be awarded under sec 34 of the Code Sec 79 of the Negotiable Instruments Act provides that when interest at the specified rate is expressly payable on a promissory note or bill of exchange interest shall be calculated at the rate specified on the amount of the principal money due thereon from the date of the instrument Sec 80 of that Act was amended by Act 30 of 1926 being the same Act by which sub rule (2) was amended By that section as amended it is provided that when no rate of interest is specified in the instrument interest on the amount due thereon shall *notwithstanding any agreement relating to the interest between any parties to the instrument* be calculated at the

(*y*) *Mahm d* [illegible] v *Sarat Chandra* (1930) 5 Cal W N 539

(*z*) [illegible] (19 6) 50 Bom 6 94 [illegible] (6) A [illegible] 0

rate of six per centum per annum from the date at which the same ought to have been paid by the parties charged This excludes oral agreements to pay interest (a) O rr

The allegations in the plaint shall be deemed to be admitted—These words have been substituted for the explanation to the old section The explanation was inserted to negative the effect of a Calcutta decision (b) But the Explanation was characterized as wholly unintelligible and meaningless by Amir Ali J in the under mentioned case (c) and it has accordingly been replaced by the words cited in the head note The effect of those words is to enable the plaintiff to succeed on his own allegations though the allegations may be of such a nature that if the defendant appear and denied them they would have to be proved by the plaintiff

Suit against firm—The question whether when a summary suit is brought against a firm and service is effected upon a person as an alleged partner and such person appears under protest denying that he was a partner he could appear without obtaining leave under this rule is discussed in the undermentioned case (d)

3 [S 533] (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application

Defendant showing defence on merit to have leave to appear

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court giving security, framing and recording issues or otherwise as the Court thinks fit

Alterations in the rule—Under the old sections it was obligatory upon the Court to grant leave to the defendant to appear and defend if he paid into Court the amount claimed by the plaintiff and mentioned in the summons It is no longer so under the present rule The words upon the defendant paying into Court the sum mentioned in the summons or which occurred in s 533 after the word suit in the third line have been omitted

Limitation—The application for leave to appear and defend must be made within 10 days from the date of service of the summons on the defendant The date shown in the Sheriff s return as the date of service is the only date to which reference could be made to determine the question of limitation arising on an application under this section (e)

Sub rule (2)—As a rule leave to defend should be given unconditionally if the defendant shows a *prima facie* case or raises a triable issue Leave should be made conditional if the Court doubts the *bona fides* of the defendant or thinks the defence is only put in to gain time (f)

Appeal—No appeal is allowed under the Code from an order under this rule It has been recently held by the High Court of Calcutta that an order under this rule directing a defendant to give security as a term on which leave to defend should be

(a) See *K der B k h v Shaik Seraj ld n* (19) 49 C 1 716 0 I C 130 ( ) A C 51
(b) *Pemfry v Sh ll gfo d* (18 6) 1 C 1 130
(c) *Bh p ti v S re dra* (1903) 30 Cal 446
(d) *Cherry v Pol oo al* (19 6) 0 Bom 66 09 I C 49 (6) A B 8
(e) *M dh b Lall v B oop d a n* (1896) 23 C 1 5 3
(f) *Po l t v Fett rle* (1894) 18 Bom 1 *Peny M v v S b a ia Iyer* (19 4) 46 Mad L J 78 I C 50 (4) A M 61

given is not a judgment within the meaning of cl 15 of the Letters Patent and not therefore appealable as such (g)

4 [S 534] *Power to set aside decree* After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit

5 [S 535] *Power to order bill etc to be deposited with officer of Court* In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs, thereof

6 [S 536] *Recovery of cost of noting non acceptance of dishonoured bill or note* The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non acceptance or non payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note

7 [S 537] *Procedure in suits* Save as provided by this order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner

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ORDER XXXVIII

Arrest and Attachment before Judgment

Arrest before judgment.

1 [Ss 447, 478] *Where defendant may be called upon to furnish security for appearance* Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d) the Court is satisfied, by affidavit or otherwise,—

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to

(g) *Sukhlal v Eastern B k Ltd* (1915) 4 Cal 73 31 I C. 33

obstruct or delay the execution of any decree that may be passed against him,— O 38

(i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim , and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court

The proviso to the rule is new

Scope of the Order —Order 21 deals with the arrest of a judgment debtor and the attachment of his property *in execution of a decree* passed against him The present Order lays down rules for the arrest of a defendant and the attachment of his property *before judgment* The object of these rules is to secure the plaintiff against any attempt on the part of the defendant to defeat the execution of any decree that may be passed against him

Reasonable probability —Where the defendant is about to leave British India it is not necessary to prove any intent on his part to obstruct or delay the execution of any decree that may be passed against him It is enough of the circumstances under which he is about to leave British India afford a reasonable probability that any decree that may be passed against him in the suit will thereby be obstructed or delayed in execution (*h*) The Court must be satisfied on two points (1) that the plaintiff has a cause of action which is *prima facie* unimpeachable subject to his proving the allegations in his plaint and (2) that the Court should have reason to believe on adequate materials that unless jurisdiction is exercised there is real danger that the defendant will remove himself from the ambit of the powers of the Court (i)

(*h*) C t er v Pot ert (18 0) 2 N W P 3 | Mad " 94 I C 1 (6) A M 584
( ) eth Ch t M H v I n Potta (19) 0 |

The suit must be bona fide—In every case where an application is made under this rule the Court must be satisfied that the suit is *bona fide* Where the plaintiff is indisputably entitled to a part of the relief claimed in the plaint the mere circumstance of the rest of the plaintiff s claim being of a disputable character does not render the suit *mala fide* (j)

Consequences of obtaining arrest on insufficient grounds—*See s 95*

Form—For form of warrant of arrest before judgment see App F form no 1

2 [S 479] (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule

Security

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit

Rateable distribution—Insolvency of defendant—Where money is deposited by the defendant in Court under this rule it is a payment into Court to the general credit of the action and charged with a lien in favour of the plaintiff on the latter obtaining a decree in his favour Where after payment into Court other judgment creditors of the defendant attach the money or the defendant becomes an insolvent the plaintiff on obtaining his decree is entitled to priority over the claims respectively of the attaching creditors and the Official Receiver The reason is that the amount so paid cannot be taken to have been ordered and levied as security for the defendant s appearance (k) See notes to r 5 below Rateable distribution Insolvency of defendant

Money sufficient to answer the claim—In a Calcutta case (l) Rankin C J said When one looks at Order 38 Rule 2 and Form 2 of Appendix F one does not find it contemplated that a defendant on failing to make deposit is to give security for appearance in a particular sum to be fixed by the Judge but that if this security takes the form of a bond by a surety it is to be the whole amount of the decree If the defendant can give the security himself he will give it for the claim by deposit of moneys or property Otherwise he will get some one to go bail for his appearance This is I think the scheme of Order 38

Appeal—An appeal lies from an order under this rule [O 43 r 1 cl (q)]

Form—For form of security see App F form no 2

(j) *Probode Ch der v Dowey* (1887) 14 Cal 695
(k) *Ramiah v Gopal er* (1918) 41 Mad 1053 49 I C 20
(l) *Ell e Goldberg v Saroj* (19?0) ?6 Cal ?00 (?0) A C 3

O
rr.

3 [S 480] (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation

Procedure on application by surety to be discharged

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security

Appeal —An appeal lies from an order under this rule [O 43 r 1 cl (q)]

Form —For form of summons to defendant see App F form no 3

4 [S 481] Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied

Procedure where defendant fails to furnish security or find fresh security

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject matter of the suit does not exceed fifty rupees

Provided also that no person shall be detained in prison under this rule after he has complied with such order

Appeal —An order for arrest is appealable (*m*) under section 104 (h) though it is not specified under O 43 r 1

Form —For form of order for committal see App F form no 4

Attachment before Judgment

5 [Ss 483, 484] (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

Where defendant may be called upon to furnish security for production of property

(a) is about to dispose of the whole or any part of his property, or

(*m*) *Syed Hoosein* v *Chettiar* (19 4) 2 Rang 36 84 I. C 70 (4) A R 361

5 (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified

Alterations in the rule—The words or has quitted the jurisdiction of the Court leaving therein property belonging to him which occurred in the old section after cl (b) of sub r (1) have been omitted

Object of the rule—The main object of an attachment before judgment is to enable the plaintiff to realize the amount of the decree if one is eventually passed from the defendant s property (n)

The Court is satisfied—Vague allegations are insufficient (o) The power to attach is not to be exercised lightly and without clear proof of the mischief aimed at (p)

Is about to dispose of the whole or any part of his property—The expression property includes property of every description whether movable or immovable (q) The expression his property refers to the property of the defendant It does not refer to property which is the joint property of the plaintiff and the defendant Thus where A sued B for partnership accounts and applied for an attachment before judgment of the *Partnership* property on the allegation that B was about to dispose of the same it was held that the case was not one for an attachment before judgment but for the appointment of a receiver under O 40 below (r) A man is not debarred from dealing with his property because a suit is filed against him and an attempt to sell a small portion of a large estate does not warrant the inference that the defendant intends to obstruct or delay execution (s)

Effect of order of adjudication on attachment before judgment—See notes to r 10 below under the same head

Rateable distribution—Where money is paid into Court by the defendant under this rule the plaintiff acquires no charge on the money and it pa[illegible]es to the Official Assignee

(n) *Ga[illegible] Singh v Janji Lal* (1899) 6 Cal 531 at p 533

(o) *Senaj v Ia[illegible]ji* (19[illegible]1) 46 Bom 431 64 I C 580 ( ) A [illegible] 76

(p) *Ch[illegible]drika Pra[illegible] v [illegible]ralal* (19[illegible]3) [illegible] I C 1 ([illegible]) A [illegible] 31[illegible] *B[illegible] v Clothe Lal* (19[illegible]6) 48 All [illegible]10 9[illegible] I C 8[illegible]8 ([illegible]6) A A 406

(q) *Ched[illegible] L[illegible] v A[illegible]arj* (189[illegible]) 17 All [illegible] *[illegible]shambar v S[illegible]khde[illegible]* (1894) 16 All 1[illegible]6

(r) *D[illegible]nodir v [illegible]alal* (1907) 9 Bom L R 40

(s) *Norr[illegible] v Decca Bank* (19[illegible]1) 45 Bom 1[illegible]56 63 I C 9[illegible]4 ([illegible]1) A B 6[illegible]

on the insolvency of the defendant (t) For the same reason the amount deposited is subject to rateable distribution under sec 73 above (u)

Liability of surety—The Rangoon High Court holds that the liability of the surety ceases with the dismissal of the suit and does not continue during the appeal (v) The Bombay High Court makes the liability continue during the appeal (w) If the defendant dies pending the suit and the cause of action survives against his legal representatives and the legal representatives are brought on the record the death of the defendant does not operate as a discharge of the surety (x)

Mortgage suit—An attachment before judgment may be granted in a suit on a mortgage (y)

Principle of sec 64 applies to attachment before judgment—Sec 64 of the Code provides that when property is attached *in execution of a decree* any private transfer of the property contrary to the attachment shall be void as against all claims enforceable under the attachment The same principle applies to the case of attachment *before judgment* provided that a decree is ultimately passed for the plaintiff at whose instance the attachment was made This clearly appears from r 9 below which provides that an attachment before judgment shall be removed when the suit *is dismissed* (z)

Property situated outside jurisdiction—Where the property sought to be attached is outside the local limits of the jurisdiction of the Court the proper course to follow is to transmit the order for attachment to the Court in whose jurisdiction the property is situated (a) See s 136 above

Provincial Small Cause Court—See r 13 below

Divorce proceedings—An order for attachment before judgment will not be made in divorce proceedings governed by the Indian Divorce Act 4 of 1869 (b)

Forms—For form of attachment before judgment with order to call for surety see App F form no 5 For form of security for productions of property see App F form no 6

Attachment where cause not shown or security not furnished

6 [S 485] (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached

(2) Where the defendant shows such cause or furnishes the required security and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit

(t) Irrl I ppa v Tl Offi l As g ee (1916) 39 Mad 903 3 I C 100 I Da v th v Mohi al I Sen (191) 19 C W N 1 00 31 I C 3
(u) Gh l v Tod ll (19 1) 6 C W N 163 0 I C 533 ( ) A C 19
(v) M ackjee B v I M v Ch tt jar (19 7) 5 R ng 49 105 I C 540 (7) A R 310
(w) I g uda v I bas ppa (19 7) 51 Bom 31 99 I C 8 0 ( ) A B 84
(x) Cha dulal v J sha gbh (1917) 41 Bom 40 39 I C 88
(y) Jog maya v Baidyanath (1919) 46 Cal 45 01 I C 9 4 I Jot rn ye v Pagh nath (19 4) 3 Cal at 966 8 I C 9 (5) A P 91
(z) Can s gh v J s Lal (189) 26 Cal 531
(a) Gaja an v Plash (19 6) 8 Bom L R 380 94 I C 116 (6) A B 8
(b) Phill ps v Ph ll ps (1910) 37 Cal 613 7 I C 49

Property specified —That is the property specified by the plaintiff as required by r 5 sub r (2) Such property may be within or without the jurisdiction of the Court The words in sec 483 of the Code of 1882 were property within the jurisdiction of the Court It was accordingly held by the High Courts of Madras and Bombay that the only property that could be attached *before judgment* was property *within* the jurisdiction of the Court (c) On the other hand it was held by the High Court of Calcutta and recently also by the Madras High Court that sec 483 was to be read with sec 648 [now s 136] and that the two sections read together enable the Court to attach before judgment property situate beyond the local limits of its jurisdiction (d) The omission of the words within the jurisdiction of the Court clearly shows that the Court may attach property before judgment even though it may be situated beyond the local limits of its jurisdiction (e)

Appeal —An appeal lies from an order under this rule in so far as it directs an attachment The portion of the order which demands security is not appealable (f) See O 43 r 1 cl (q)

Form —For form of attachment before judgment see App F form no 7

7 [S 486] Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree

Mode of making attachment

Mode of attachment —See O 21

8 [S 487] Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner herein before provided for the investigation of claims to property attached in execution of a decree for the payment of money

Investigation of claim to property attached before judgment

Investigation of claim —The claim is investigated as under O 21 r 58 and the property is either released from attachment or the claim disallowed The party against whom such summary order is passed may institute a suit as under O 21 r 63. Limitation is under article 120 but if the claim is preferred in execution proceedings article 11 applies (g)

9 [S 488] Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed

Removal of attachment when security furnished or suit dismissed

(c) *Krishnasami v E g l* (1893) 8 Mad 20 *I aja v Jank bai* (1903) 5 Bom L R 570
(d) *P m I erlab v M dho Rai* (190) 7 C W N _16 *Am ra v Annam la* (1908) 31 Mad 50
(e) *Ch d i v Firm D a Nath* (19 6) 8 Lah L J 1 5 93 I C 361 (_6) A L 330
(f) *e H j Moh mmuddi & Co v The Eastern J pa T ad ng Co* (19 3) 50 Cal 15 79 I C 4 (_3) A C 639 *Mengha v ha* (19 3) 3 Rang 307 90 I C 93 (23) A R 67
(g) *Ar inach lam v Perlasami* (19 1) 44 Mad 902 70 I C 439 (_1) A M 163 (F B)

O rr 9

Removal of attachment where suit dismissed—The latter part of the rule which requires that the attachment shall be removed when the suit is dismissed is no more than directory Hence even if no order is made withdrawing the attachment the attachment falls to the ground on dismissal of the suit (h) or if the suit abates the attachment dies with it (i) *A* sues *B* and obtains an attachment before judgment The suit is dismissed but the Court omits to make an order withdrawing the attachment *A* then appeals from the decree Pending the appeal *B* sells the property that was attached before judgment to *C* Thereafter the suit is decreed on appeal *A* then applies for execution of the decree by the sale of the property on the footing that the attachment before judgment subsisted and that it was not therefore necessary to re attach it *A* is not entitled to have the property sold The attachment before judgment came to an end on the dismissal of *A* s suit though no order was made withdrawing the attachment (j) Thus the reversal of the order dismissing of the suit does not revive the attachment and in this respect the rule differs from that in regard to attachment after judgment For in the case of attachment in execution a decree in a suit under O 21 r 63 setting aside a release from attachment operates to revive the attachment and a private transfer made after release from attachment under O 21 r 60 will be void under sec 64 if the right to attach is subsequently established by suit (k) See notes to O 21 r 60 Effect of order of release

10 [S 489] Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree

Attachment before judgment not to affect rights of strangers nor bar decree holder from applying for sale

Effect of order of adjudication on attachment before judgment—Attachment before judgment does not confer any priority as against the Official Assignee though the plaintiff at whose instance the attachment was made may ultimately obtain a decree in the suit *A* sues *B* and attaches *B* s property before judgment A decree is then passed for *A* Between the date of the attachment and the date of the decree *B* s property vests in the Official Assignee under a vesting order The Official Assignee applies to the Court for removal of the attachment on the ground that the property has vested in him *A* contends that the attachment being prior to the date of the vesting order his claim has a priority over that of the Official Assignee *A* s contention will not be upheld and the attachment will be removed (l) See notes to s 64 under the head Effect of order of adjudication on attachment on p 213 above

Attachment before judgment not to affect rights of persons not parties to the suit—*A* and *B* are members of a joint Hindu family *C* sues *A* and obtains an attachment before judgment of *A* s interest in the joint family property *C* then obtains a decree against *A* *A* dies after the decree On *A* s death his interest in the property passes by survivorship to *B* and *C* is not entitled to have *A* s share

(h) *Seethai Ammal* v *Na jan* (19 8) M W N 10 113 I C 63 (1 8) A M 976 Co tr *Nam g Amm l* v *Muthu l ppa* (19 8) M W N 466 111 I C 887 (28) A M 940

(i) *Jyoti h Chandra* v *Har Cha dra* (19 8) 47 Cal L J 9 109 I C 164 (28) A C 34

(j) *Abd l Rahm n* v *Amin* (1918) 45 Cal 780 44 I C 9 *Ra n Chand* v *Pitam M l* (1888) 10 All 506 *Sasirama* v *Mehe ban* (1911) 13 Cal L J 213 9 I C 918

(k) *Protapcha d* v *S at Chadra* (19 1) 25 C W N 544 6 I C 348, (-1) A C 101

(l) *Sh b Kri to* v *Muller* (1884) 10 Cal 150 *Sadajoppa* v *I oo ama* (188) 8 Mad 554 *2 rner* v *Pestonji Fardu ji* (1896) 20 Bom 403 *Krist s am j* v *Official Assignee of Madras* (1903) 6 Mad 673

sold in execution of the decree (*m*) But according to the Madras High Court attachment before judgment followed by a decree does operate to defeat the right of survivorship (*n*)

Attachment before judgment not to bar rights of other decree holders— *A* institutes a suit against *B* and obtains an attachment before judgment of *B*'s property Subsequently *C* another creditor of *B* obtains a decree against *B* *C* is entitled to have the property attached and sold in execution of this decree The attachment before judgment does not confer any right upon *A* to have his decree satisfied in priority to that of *C* (*o*)

11 [S 490] Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re attachment of the property

Property attached before judgment not to be re attached in execution of decree

Scope of the rule—The effect of this rule is merely to do away with the necessity for a re attachment of the property But it does not exempt the plaintiff when a decree follows the attachment from making the usual application for execution under O 21 r 11 (?) (*p*) This is now made clear by the substitution of the words it shall not be necessary *upon on application for execution* of such decree to apply for re attachment of the property for the words it shall not be necessary to re attach the property in execution of such decree The rule was applied when the property attached before judgment was attached and brought to sale by another decree holder the judgment debtor paid the amount of the second decree and on the sale being set aside it was held that the attachment before judgment revived and that the first decree holder could in execution bring the property to sale without a fresh attachment (*q*) The rule does not give the decree holder at whose instance the property was attached before judgment any right to preferential treatment over other decree holders who may have applied for a rateable distribution under s 73 (*r*) Again if the execution application is dismissed O 21 r 57 applies and the attachment ceases (*s*)

Whether re attachment in execution operates as a waiver—Re attachment in execution of a decree though no re attachment is necessary under this rule is not of itself a waiver or abandonment of the attachment before judgment The case is different whether there is an express or manifest abandonment (*t*)

Objection that property attached before judgment is not saleable—*The defendant's omission to object to an application for attachment before judgment* on the ground that the property is not saleable within the meaning of s 60 does not preclude him from raising that objection when an application is made for execution of the decree passed in the suit (*u*)

(*m*) *S hr o v Mah leei* (1914) 38 B m 10 1 I C 330 *S derlal v I gh adham* (19 4) 3 I t 0 83 I C 413 (24) A I 46

(*n*) *S nk r l ga v Official Receiver* (19) 49 M I L J 616 v I C 501 (6) A M 7?

(*o*) *L h kar Das v Amb ka* (1915) 37 All 5 9 I C 66

(*p*) *Palla j v Jorl n* (1888) 1 Bom 400 *Aru h llam v H ji Sheek Meera* (1911) 34 Mad 25 7 I C 8 6

(*q*) *Firm Cha t ya v Jagat Ch dra* (19 7) 44 Cal L J 553 99 I C 89 ( ) A C 40

(*r*) *Sri dat I oj v Sree Ca to* (1906) 3 Cal 639

(*s*) *M ry ppa v Ch dambaram* (19 4) 4 Mad 483 79 I C 144 (4) A M 491 o rruling *Venk ta abb ah v Venkata* (1919)) 4 Mad 1 48 I C 3

(*t*) *Sh ath v She kh* (19 9) 56 Cal 416, (?9) A C 461 ( ) D wors (19) 16 C W N 100 *M yapp v Chid mbaram* (19 3) 47 Mad 483

(*u*) *B tram v K ityayani* (1911) 38 Cal 444, 10 I C 305

O 38, rr 12-13

Agricultural produce not attachable before judgment

12 [*New*] Nothing in this order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce

Small Cause Court not to attach immovable property

13 [*New*] Nothing in this Order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immovable property

This rule was added by the Amending Act I of 1926 and as that Act was a declaratory Act the section is retrospective (v) See notes to Sec 7 above

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ORDER XXXIX

Temporary Injunctions and Interlocutory Orders

Temporary Injunctions

O 39, r 1

Cases in which temporary injunction may be granted

1 [S 402] Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders

Temporary and perpetual injunctions—Injunctions are of two kinds temporary and perpetual Temporary injunctions are regulated by rr 1 and 2 of this Order perpetual injunctions are regulated by ss 55 57 of the Specific Relief Act I of 1877 A party against whom a perpetual injunction is granted is thereby restrained *for ever* from doing the act complained of A perpetual injunction can only be granted by *final decree* made at the hearing and upon the merits of the suit A temporary or *interim* injunction on the other hand may be granted *on an interlocutory application* at any stage of the suit The injunction is called *temporary* for it endures only *until* the suit is disposed of or *until* the further order of the Court (w) Thus if *A* s neighbour commences to build on a plot of land belonging to him a house which if completed, would obstruct the access of light and air over the said plot to the windows of *A* s house in respect of which *A* claims an easement he may sue his neighbour for a *perpetual*

(v) *Muthu Krishna* v *Ayyasami* (19 8) 55 Mad L J 38 113 I C 416 (8) A M 1173

(w) Specific Relief Act 1877 s 53

sold in execution of the decree (*m*) But according to the Madras High Court attachment before judgment followed by a decree does operate to defeat the right of survivorship (*n*)

Attachment before judgment not to bar rights of other decree holders— *A* institutes a suit against *B* and obtains an attachment before judgment of *B*s property Subsequently *C* another creditor of *B* obtains a decree against *B* *C* is entitled to have the property attached and sold in execution of this decree The attachment before judgment does not confer any right upon *A* to have his decree satisfied in priority to that of *C* (*o*)

11 [S 490] Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re attachment of the property

Property attached before judgment not to be re attached in execution of decree

Scope of the rule—The effect of this rule is merely to do away with the necessity for a re attachment of the property But it does not exempt the plaintiff when a decree follows the attachment from making the usual application for execution under O 21 r 11 (2) (*p*) This is now made clear by the substitution of the words it shall not be necessary *upon on application for execution* of such decree to apply for re attachment of the property for the words it shall not be necessary to re attach the property in execution of such decree The rule was applied when the property attached before judgment was attached and brought to sale by another decree holder the judgment debtor paid the amount of the second decree and on the sale being set aside it was held that the attachment before judgment revived and that the first decree holder could in execution bring the property to sale without a fresh attachment (*q*) The rule does not give the decree holder at whose instance the property was attached before judgment any right to preferential treatment over other decree holders who may have applied for a rateable distribution under s 73 (*r*) Again if the execution application is dismissed O 21 r 57 applies and the attachment ceases (*s*)

Whether re attachment in execution operates as a waiver—Re attachment in execution of a decree though no re attachment is necessary under this rule is not of itself a waiver or abandonment of the attachment before judgment The case is different whether there is an express or manifest abandonment (*t*)

Objection that property attached before judgment is not saleable—The defendant s omission to object to an application for attachment before judgment on the ground that the property is not saleable within the meaning of s 60 does not preclude him from raising that objection when an application is made for execution of the decree passed in the suit (*u*)

(*m*) *Sut a* v *M h levi* (1914) 38 Bom 10 21 I C 330 *S derl l* v *I agh nadl* (19 4) 3 1 t 0 83 I C 413 (4) A I 46
(*n*) *S laral nga* v *Official I ceiver* (19) 49 M 1 L J 616 9 I C 504 (6) A M
(*o*) *Li he har D s* v *An bika* (1915) 37 All 575 9 I C 66
(*p*) *Palla* v *Jo d n* (1888) 1 Bom 400 *Arunachllam* v *H j Sh ek Meera* (1911) 34 M d 5 7 I C 8 6
(*q*) *Firm Ch ta ya* v *J g t Ch lra* (19 7) 44 Cal L J 553 99 I C 83 (7) A C 40
(*r*) *Seed t Roj* v *Sree Canto* (1906) 33 Cal 639
(*s*) *Meju pi* v *Chidambarram* (19 4) 4 Mad 443 79 I C 144 (4) A M 494 overr ling *I enk ta lb h* v *I e kala* (1919)) 4 Mad 1 43 I C
(*t*) *Sh n th* v *Sl kh* (19 9) 56 Cal 416 (9) A C 464 *Ca h* v *B r n* (191) 16 C W N 100 *M ppa* v *Ch d mbaram* (19 3) 47 Mad 483
(*u*) *B siram* v *Kalij yani* (1911) 38 Cal 443 10 I C 305

Effect of temporary injunction—A temporary injunction granted under this rule has not the effect of making a subsequent alienation of the property void Hence if a party against whom a temporary injunction is granted restraining him from alienating the property sells or mortgages the property pending the injunction the sale or mortgage is not void The only penalty *A* incurs by alienating the property in spite of the injunction is that prescribed by r 2 (3) namely that other property belonging to him may be attached and sold in order to award out of the sale proceeds compensation to the party on whose application the injunction was granted and he may also be detained in the civil prison In this respect a temporary injunction has a different effect from an attachment for it will be seen on referring to s 64 that when property is *attached* any private transfer of the property contrary to the attachment is *void* against all claims enforceable under the attachment (*f*)

Property in dispute in a suit—Note that the property in respect of which an injunction may be granted in the circumstances mentioned in cl (a) of this rule must be property in dispute in the suit and no other (*g*) for you cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property (*h*) Where a plaintiff who is out of possession claims possession the Court will not grant an injunction against the defendant in possession under a claim of right unless the threatened injury will be irreparable and an injunction may be granted as to the user of premises which the plaintiff has leased to the defendant (*i*) In any event the plaintiff must show a *prima facie* case in support of the title asserted by him (*j*) For this reason the Court will as a rule refuse interim injunctions to protect patents of recent origin (*k*) See notes to r 7 below

An application for an injunction restraining a party to the suit from interfering with the applicant's right to worship in and to have free access to a temple which was the subject matter of the suit pending the disposal of the suit does not fall either under cl (a) or cl (b) of this rule (*l*)

Disposal of property in fraud of creditors—The threat or intent to remove or dispose of property with a view to defraud creditors must be proved by definite evidence (*m*)

Property in danger of being wrongfully sold in execution of a decree—Certain property attached in execution of a decree obtained by *A* against *B* is notified for sale at the instance of *A* *C* alleging that the property belongs to him and not to *B* sues *A* and *B* for a declaration of his title to the property and applied for an injunction under this rule to restrain *A* from bringing the property to sale until the suit is disposed of Has the Court power to grant the injunction under this rule? Yes for the case is one in which the property in dispute in the suit is *in danger* of being wrongfully sold in execution of the decree It is immaterial that the Court in which the suit is brought is different from the Court executing the decree or so long as it has jurisdiction to entertain the suit that it is a Court of lower grade than the Court executing the decree Thus if the Court executing the decree is the Court of a District Judge and the Court in which the suit is brought is the Court of a Subordinate Judge the latter Court though a Court of inferior grade has power under this rule to stay the sale and execution proceedings pending before the District Court (*n*)

(*f*) *Delhi and London Bank* v *Ram Narain* (1887) 9 All 497 *Manohar Das* v *Ram Autar* (1903) 5 All 431 *Beli Ram* v *Ram Lal* (19) 6 Lah 380 90 I C 937 (5) A L 644
(*g*) *Joynarain* v *Shibpersad* (1866) 6 W R Mis 1
(*h*) *Sundar Singh* v *Ram Saran* (19 3) 5 Lah L J 26 81 I C 32 (23) A L 2 7
(*i*) *Robinson* v *Pickering* (1881) 16 Ch D 660
(*j*) *Kesho Prasad* v *Srinibash* (1911) 38 Cal 701 10 I C 256 *Begg Dunlop & Co* v *Satish Chandra* (1919) 46 Cal 1001 54 I C 86
(*k*) *Smith* v *Grigg Ld* (19 4) 1 K B 6 5
(*l*) *Kaori* v *Maharaj Bahadur* (1916) 1 Pat L J 560 38 I C 48
(*m*) *Kishan Singh* v *Musst Shanno* (19 4) 6 Lah L J 98 8 I C 88 (24) A L 718
(*n*) *Brojendra* v *Rup Lall* (1886) 12 Cal 515 *Amir Dulhin* v *Administrator General Bengal* (1896) 23 Cal 351 *Abdulla Khan* v *Banke Lal* (1910) 33 All 79 7 I C 183 [F.B]

Injunction against a person not a party to the suit—No injunction can be granted under this rule against a person who is not a party to the suit (o)

Appeal—An appeal lies from an order refusing as well as from one granting a temporary injunction (p) An appeal also lies from an order purporting to be made under this rule though not warranted by it (q) See O 43 r 1 cl (r)

Revision—No appeal lies to the High Court from an order made by the lower Appellate Court under this rule [s 104 sub s (2)] In two recent cases where a temporary injunction was refused by the lower Appellate Court the High Court of Calcutta without deciding whether it has power to revise the order made an order granting an injunction in the exercise of powers conferred upon High Courts by s. 15 of the Charter Act (r)

Breach—Disobedience of an injunction can be punished by the High Court as a contempt of Court (s)

Power of Chartered High Courts to restrain a party from proceeding with a suit pending in another Court—As regards Chartered High Courts it has been held that the powers of these Courts to grant an injunction are not confined to the terms of rules 1 and 2 of this Order *A* carrying on business at *D* sues *B* in the Court of the Subordinate Judge of *D* to recover from *B* a sum of Rs 1 100 as balance due to him in respect of certain goods sent by him from *D* to *B* in Calcutta for sale as commission agent *B* then sues *A* in the High Court of Calcutta to recover from *A* a sum of Rs 2 300 as balance due to him in respect of the same transactions and applies to the High Court of Calcutta for a temporary injunction to restrain *A* from proceeding with the suit in the Court at *D* until the disposal of the suit in the High Court It is clear that this case is not covered either by r 1 or r 2 of this Order Has the High Court power to grant the injunction ? It has been held by the Calcutta High Court that the powers of High Court to grant a temporary injunction are not confined to the terms of rr 1 and 2 and that these Courts have *inherent* power under their general equity jurisdiction to grant such an injunction independently of the provisions of the Code and also that such power can be exercised by a single Judge sitting on the Original Side of the High Court (t) The same view has been recently taken by the High Court of Bombay but the injunction granted in that case was rather peculiar in form namely that *A* should be restrained from proceeding with the suit in the Court of the Subordinate Judge at *D* in such a way as to delay or embarrass the trial of the suit in the High Court (u) The Calcutta decision however are not uniform as to whether this power can be exercised if *A* is not resident within the local limits of the ordinary original civil jurisdiction of the Calcutta High Court for Sale J held that the power can be exercised even if *A* did not reside within the limits of the jurisdiction (v) while Fletcher J (w) and Stephen J (x) held that it cannot be exercised unless *A* resided within those limits The point arose in a Bombay case but it was there held that as *A* had been served and had appeared in the suit without protest he must be deemed to have submitted to the jurisdiction of the Bombay Court and the Court had therefore power to grant the injunction (y) so also in a Patna case ( )

(o) *R m S nder v R m Dheyan* (1918) 3 Pat L J 456 458 46 I C ° i

(p) *La hmi v Ram Charan* (1913) 35 All 4 20 I C 653

(q) *Abd l v G napathi* (1900) °3 Mad 517

(r) *Isra l v Sh m er* (1914) 41 Cal 436 1 I C 861 *Hema la v Bara agore* (1914) 19 C W N 442, 24 I C 313

(s) *Ram Prasad Si gh v Bena es Bank* (1920) 42 All 98 54 I C 600

(t) *Mu gle Chand v Gopal R m* (1907) 34 Cal 101 *Jash B hary v Bhowa i Ch rn* (1907) 34 Cal 97

(u) *Mul h d v (ill & Co* (19°0) 44 Bom °3 53 I C 518

(v) (190) 34 C l 101 *supra*

(w) *Hulco I on Works v Bush mbker* (19°9) 36 Cal 233 1 I C 9

(x) *Jumna Das v Harcharan Das* (1911) 35 Cal 405 11 I C 416

(y) *Mul hand v G ll & Co* (19 0) 44 Bom 281 °94 53 I C 518

(z) *Kumar Ga da v Prubich d Lal* (19°°) 1 Pat 5.6 69 I C 891 (2°) A P 31

The High Court of Bombay has also held that it has inherent power to restrain b injunction a defendant in a suit in the High Court from proceeding with a suit filed b him in the Small Causes Court at Bombay referring to the same matter (a)

The next question to consider is whether the power of a Chartered High Court t restrain a party from proceeding with a suit pending in another Court is confined to sui pending in a *Court subordinate thereto* or whether it extends to suits pending in *any Cou in British India* In one of the cases cited above (b) the High Court of *Calcutta* mad an order restraining a party from proceeding with a suit pending in the Court of th Subordinate Judge of Bareilly a Court subordinate to the High Court of *Allahaba* In a recent Bombay case Macleod J expressed the opinion that though the Hig Court has power to restrain a party from proceeding with a suit pending in a Cour subordinate to it it has no such power in respect of a suit pending in a Court *not* sub ordinate to it (c) In support of the above view the learned Judge relied on the pro visions of s 56 cl (b) of the Specific Relief Act 1877 by which it is enacted that a injunction cannot be granted to stay proceedings in a Court not subordinate to tha from which the injunction is sought

A further question that arises in this connection is whether a British Indian Cour has power to restrain a party from proceeding with a suit pending in a Court of a *Nati State* It has been held by the High Court of Bombay that it has if there was a rea hardship on the party before it or something vexatious or oppressive (d) The Calcutt High Court will grant such an injunction if applied for promptly and before time an trouble has been expended in the foreign suit (e) In England an injunction is grante to stay an action commenced in a foreign jurisdiction only if the applicant proves substantial case of vexation resulting from the identity of proceedings remedies an benefits or from the existence of some motive other than a *bona fide* desire to determin disputes (f)

Appeal—No appeal lies from an order of a High Court refusing to restrain defendant from prosecuting his suit in another Court Such an order is not appealabl under the Code Nor is it a judgment within the meaning of cl 12 of th Charter (g)

Power of High Court to stay proceedings pending in a subordinat Court—The preceding paragraph refers to the power of a Chartered High Court t *restrain a party* to a suit pending before it from proceeding with a suit pending in anothe Court The question now to be considered is whether a Chartered High Court ha power in a suit pending before it to issue a *prohibition to a subordinate Court* in th mufassal from proceeding with a suit pending before the latter Court and if so whethe that power can be exercised by a single Judge sitting on the *Original* Side of the Hig Court It has been held by a Full Bench of the Bombay High Court that a Chartere High Court has power to make an order directing a Subordinate Court not to procee further with a suit pending in the latter Court but that such an order appertains to th *Appellate* and not to the *Original* Side of the High Court and that it can therefore onl be made by those Judges to whom the Appellate Side work so assigned by Rules mad under sec 13 of the Charter Act that is by a Division Court consisting of two Judge and that it cannot be made by a single Judge sitting on the Original Side of the High Court (h) In the case cited above an order was made by Macleod J in a suit pending

(a) *Ud am* v *Hyderally* (1909) 33 Bom 469 3 I C 990 distinguishing *J ramdas* v *Zamonlal* (1903) 27 Bom 357

(b) *Mungle Chand* v *Gopal R m* (1907) 34 C l 101

(c) *N ray n* v *Jank bai* (1915) 39 Bom 604 30 I C 560

(d) *N ik* v *Bal nt* (19 7) 29 Bom L R 138 100 I C 9 1 (2) A B 135 See also *Vanichand* v *Lakhmichand* (19 0) 44 Bom 27 53 I C 395 and *Lakhm ram* v *Poonam Cha d* (1921) 45 Bom 550 59 I C 444 (1) A B 128

(e) *Ticumchand* v *S nt ke Chand* (19 0) 24 C W N 735 59 I C 218

(f) *Cohen* v *Rothfield* [1919] 1 K B 410 414

(g) 44 Bom ?7 53 I C 39 *supra*

(h) *Na ay n* v *Jankibai* (1915) 39 Bom 604 30 I C 560

before him *staying a suit* pending in the Ratnagiri Court It was assumed by a majority of the Full Bench that such an order was a prohibition to the *Ratnagiri Court* and not merely to the *parties* from proceeding with the suit in that Court and it was held that Macleod J had no jurisdiction to make the order On the other hand Macleod J who was one of the Judges constituting the Full Bench declined to read his order as a *direct prohibition to the Ratnagiri Court* and held that a single Judge sitting on the Original Side was competent to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge s Court in the mufassal *and so in effect stay the proceedings* within the meaning of sec 56 cl (b) referred to above As to transfer of suits from Presidency Small Cause Courts to High Court see notes to cl 13 of the Letters Patent

This rule does not apply to probate proceedings—An injunction cannot be granted under this rule in a probate proceeding The reason is that the only question in controversy in such a proceeding is that of *representation* of the estate of the deceased there is no question of *title* in such a proceeding and it cannot therefore be said that there is any property in dispute in such a proceeding as contemplated by this rule If the Court is satisfied that the estate of the deceased is in danger of being wasted or wrongfully alienated it may appoint an administrator *pendente lite* and it may also make an order under r 7 below, but it cannot grant an injunction under this rule (i)

Form—For form of temporary injunction see App F form no 8

2 [S 493] (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right

Injunction to restrain repetition or continuance of breach

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time if the disobedience or breach continues, the property attached may be

(i) Nirod v *Chamatkar* (1914) 19 C W N 205 27 I C 617

sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto

Alterations in the rule —

1 The words of any kind after the word injury in sub r (1) are new See notes below under the head Scope of the rule

2 The words unless in the meantime the Court directs his release in sub r (3) are also new See in this connection the undermentioned case (j)

Scope of the rule—Rule 1 enables the Court to grant temporary injunctions in the cases specified in cls (a) and (b) thereof The present rule enables the Court to grant temporary injunctions to restrain a defendant from committing the breach of a contract or other injury *of any kind* The words of any kind are new They have been added to supersede an Allahabad decision where it was held that the words other injury in the old section did not include acts of trespass upon property (k) Such acts are now within this rule In a Bombay case a lessee sought to execute a decree to evict his sub lessee But at the date of the decree the term of the head lease had expired and the head lessor sued to restrain the lessee from taking pos ession Macleod C J held that neither rule 1 nor rule 2 applied (l) A Court hearing an election petition under rules framed under the Madras District Municipalities Act cannot grant a temporary injunction restraining the candidate from taking his seat (m)

Principles governing temporary injunction to restrain breach of contract—*Temporary* injunctions to restrain the breach of a contract are regulated by the present rule *Perpetual* injunctions to restrain the breach of a contract are regulated by the Specific Relief Act 1877 s 56 cl. (f) and s 57 Section 56 cl (f) of the Specific Relief Act provides that a perpetual injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced Now the performance of a contract is not specifically enforced where damages would afford adequate relief Hence no injunction can be granted where damages afford adequate relief The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs [or for breach of contracts] for which damages are the proper remedy (n) In the Bombay case of *Nusserwanji* v *Gordon* (o) Sir Charles Sargent said that the issue of a *temporary* injunction is governed by the same principles as the granting of a *permanent* injunction at the trial of a case Referring to these observations Sir Arnold White in a Madras case said Now having regard to the fact that the law with regard to the granting of a perpetual injunction is to be found in the Specific Relief Act and is laid down with great precision and that the law with regard to the granting of a temporary injunction is to be found in the Code of Civil Procedure and is declared to be a matter for *discretion* if it were necessary to consider the point I am not sure I should be prepared to go quite so far as Sir Charles Sargent (p) However that may be the following two rules seem to govern all cases on the subject now under consideration —

1 If a suit is brought for specific performance of a contract and for an injunction to restrain the defendant from committing a breach of the contract and the plaintiff applies for a temporary injunction to prevent the breach of the contract until the suit is disposed of the Court will decline to grant a temporary injunction if the plaint and

(j) *Advocate-General of Bombay* v *G ngji* (1895) 19 Bom 15

(k) *Da ab Kuar* v *Gomti Kua* (1900) 2 All 449

(l) *Nusserva j* v *Sh hj d Beg m* (19) 46 Bom 939 66 I C 764 ( ) A B 385

(m) *Venkata Subba* v *Sesha A yar* (19 4) 47 Mad 00 60 I C 664 (4) A M 797

(n) Per Lindley L J in *London and Blackwall Ry Co* v *Cross* (1886) 31 C D 354 369

(o) (188) 6 Bom 66 p 3 9

(p) *S bba* v *H ji Bad ha* (1903) 6 Mad 168 175

the affidavits filed by the parties show *on the face of them* that the case is not one for a perpetual injunction or for specific performance The refusal of the application for a temporary injunction in (1) *Bhikaji* v *Bapu Saju* (q) (2) *Haji Abdul* v *Haji Abdul* (r) (3) *Nusserwanji* v *Gordon* (s) (4) *Assur* v *Ratanbai* (t) and (5) *In the matter of Ganpat Narain* (u) may be referred to this rule In the first case the suit was by an association of artisans consisting of 57 members for an injunction against one of them to restrain him from committing the breach of a contract which provided that all the members of the association should bring the business of working and carving in wood into one shop and should divide the profits among them and *that no member should take any order on his own account* The plaintiffs applied for a temporary injunction against the defendant to prevent the breach of the contract until the disposal of the suit but the injunction was refused for the agreement being on the face of it illegal (as the association though it consisted of 57 members was not registered as a Company) no specific performance or injunction could be granted. In the second case the suit was for a perpetual injunction to prevent the breach of an *agreement* for a charter party The Court refused to grant a temporary injunction to restrain the breach on the ground that a perpetual injunction could not be granted to restrain the breach of such an agreement though a perpetual injunction might be granted to prevent the breach of an *actually completed charter party* In the third case an application for a temporary injunction was made by the agents of a company as plaintiffs to restrain the company from employing a firm of solicitors in contravention of an agreement between the company and the agents where by the plaintiff s firm were appointed agents of the company for 25 years and the agents were empowered to employ solicitors for the company during that period The Court refused the application on the ground that since a perpetual injunction could not be granted to restrain the company from employing persons other than the plaintiff s firm as agents of the company a temporary injunction should not be granted to restrain the company from employing solicitors other than those of the plaintiff s choice In the fourth case the Court refused to grant a temporary injunction to restrain a Hindu widow from adopting a son in breach of an agreement entered into by her not to adopt a son The order of refusal was based on the ground that the Court could not grant a perpetual injunction to prevent the breach of such a contract In the last of the cases cited above the parties were Hindus and the suit was brought by the plaintiff against the defendant for specific performance of a contract whereby the defendant agreed to give his minor daughter in marriage to the plaintiff The plaintiff applied for an interim injunction to restrain the defendant from giving away the girl in marriage to another person but the application was refused on the ground that the contract was not one of which specific performance could be enforced or the breach of which could be restrained by a perpetual injunction

2 The converse of rule (1) is not always true that is the Court will not grant a temporary injunction before the hearing in every case where a perpetual injunction might fitly be granted at the hearing for to justify a temporary injunction not only must the case be such that an injunction is the appropriate relief but there must be the further ingredient that unless the defendant is restrained *forthwith* by a temporary injunction irreparable injury or inconvenience may result to the plaintiff before the suit is decided upon its merits (v) But if a case is a proper one for specific performance and irreparable injury is likely to be caused to the plaintiff unless the breach of the contract is forthwith restrained the Court will grant a temporary injunction to restrain the breach of the contract. Thus where *A* sued *B* for specific performance of a contract whereby in consideration of *A* having advanced money to *B* to working certain mica mines *B* had

(q) (1877) 1 Bom 550
(r) (188) 6 Bom 5
(s) (188) 6 Bom 266
(t) (1889) 13 Bom 56
(u) (1876) 1 Cal 74
(v) See Collett s Specific R Ref Act 263 61 *Nanabhai* v *Janardhan* (1888) 1 Bom 110

agreed to deliver all the mica produced from the mines to *A and not to deliver any portion thereof to any other person* and also sued for an injunction to restrain the breach of this agreement and in the suit applied for a temporary injunction to restrain *B* from delivering any portion of the mica to another firm to whom *B* had arranged in breach of his contract to consign a portion the Court held that the case was a fit one for a temporary injunction and the injunction was granted (*w*) But if the existence of the contract itself is denied no temporary injunction can be granted (*x*)

Sub rule (3)—The powers conferred by this sub rule can only be exercised if the Court is set in motion by a party who deems himself aggrieved hence where a District Court committed a defendant to jail *of its own motion* for disobeying an injunction of the Court it was held that the order of committal was *ultra vires* Note however that a High Court has inherent power to commit a defaulting party for contempt hence a High Court can commit a defendant to jail *of its own motion* for disobeying an injunction issued by such Court (*y*) See sec 151 above

Under sub r (3) the Court can in its discretion order either arrest or attachment of property it is not bound in the first instance to make an order of attachment and then order impri onment ( ) There is no foundation for the proposition that the Court can only make an order of imprisonment after an order of attachment Persons who abet disobedience of an injunction cannot be punished under this rule (*a*)

If the application to commit was made while the suit was pending the fact that the order on the application was made after the suit was dismissed does not affect the powers of the Court to take action for disobedience to the injunction (*b*)

A Court to which the business of the Court granting the injunction is transferred can exercise powers of punishment under this sub rule (*c*)

Temporary mandatory injunction—The Courts in England have the power to grant mandatory injunctions on interlocutory applications (*d*) And so have Chartered High Courts in the exercise of their ordinary original civil jurisdiction (*e*) The same power is possessed by Courts in the mofussil (*f*)

Appeal—An appeal lies under O 43 r 1 (r) from an order declining to order arrest or attachment of property for disobedience of an interlocutory injunction granted under this rule and the Appellate Court may on appeal pass the order which the lower Court should have passed (*g*)

Before granting injunction Court to direct notice to opposite party

3 [S 494] The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party

(*w*) *S b a* v *H ji Badsha* (1903) 26 Mad 169 *M dras I j Co* v *I st* (1891) 14 Mad 18
(*x*) *Monoh* v *Jai Na ajen* (19 0) Lah L J 83 55 I C 403
(*y*) *Toct ppa* v *S chi De i* (1903) 6 Mad 494
(*z*) *Mawazz m* v *Shebash* (19 7) 51 C W N 814 10 I C 348 (7) A C 598
(*a*) *Maw zz m* v *Sl bash s pra*
(*b*) *S ppi* v *A nhi* (1916) 39 Mad 907 34 I C 588
(*c*) *Mou a Gu samy* v *She k Muhammadhu* (19) 46 Mad 83 86 I C 650 (3) A M 9
(*d*) *R b nson* v *Lord Byro* (1785) 1 Brown Ch Cas 588 *Herrey* v *Smith* (1855) 1 K and J 389 *Allport* v *S r nt Co Ltd* (1895) 7 L T 533 *Bonner* v *G eat West rn I y Co* (1883) 5 Ch D 1
(*e*) *Ch mp l* v *J na klo Mills* (1914) 16 Bom L R 566 8 I C 121
(*f*) *Kandaswami* v *Sub ama ia* (1918) 41 Mad 08 41 I C 334 [yes] *I asul Karim* v *I rubh* (1914) 38 Bom 381 4 I C 6 [Yes according to Shah J No according to B m n J] *Israil* v *Shamser* (1914) 41 Cal 436 443 445 1 I C 861 [ye]
(*g*) *Supp* v *Ku hi* (1916) 9 M d 907 34 I C 88 *D n Cha d* v *Jharia Coal Co* (19 3) 5 Lah L J 14 66 I C 9 ( ) A L 347

4 [S 496] Order for injunction may be discharged varied or set aside

Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order

Appeal —An appeal lies from an order under this rule [O 43 r 1 cl (r)]

5 [S 495] Injunction to corporation binding on its officers

An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain

Interlocutory Orders

6 Power to order interim sale

The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once

The words or which for any other just and sufficient cause it may be desirable to have sold at once have been added to as to empower the Court to order a sale of securities where the state of the market requires such a course

7 [S 499, S C R, O 50, r 3] Detention preservation inspection etc of subject matter of suit

(1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit—

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein,

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit, and

(c) for all or any of the purposes aforesaid authorize any samples to be taken or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorised to enter under this rule

The words or a to which any question may arise therein in sub r 1 cl. (a) are new

Inspection of property which is the subject matter of the suit—In a suit by *A* against *B* for damages for injury alleged to have been caused to *A* s house by the erection of *B* s house the Court may make an order on *B* s application for inspection of *A* s house to determine the alleged injury *A* s house being in such a case the subject matter of the suit (*h*)

8 [S 500] (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit

Application for such orders to be after notice

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance

9 [S 501] Where land paying revenue to Government or a tenure liable to sale, is the subject matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure,

When party may be put in immediate possession of land the subject matter of suit

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit

10 [S 502] Where the subject matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a

Deposit of money etc in Court

(*h*) *Dhoroney* v *Radha* (1897) 24 Cal 117

Order for injunction may be discharged, varied or set aside

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(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorised to enter under this rule

The words "or as to which any question may arise thereon" in sub r 1 cl (a) are new

Inspection of property which is the subject matter of the suit—In a suit by A against *B* for damages for injury alleged to have been caused to *A*'s house by the erection of *B*'s house the Court may make an order on *B*'s application for inspection of A's house to determine the alleged injury *A*'s house being in such a case the subject matter of the suit (*h*)

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and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit

10 [s 502] Where the subject matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a

Deposit of money etc in Court

(*h*) *Dhoroney* v *Radha* (1897) 24 Cal 117

a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court

Deposit of money in Court.—If *A* sues *B* to recover a sum of Rs 5 000 and *B* admits Rs 4 000 to be due to *A* and contests *A*'s claim as to the balance of Rs 1 000 this will be a proper case for *A* to apply to the Court to direct *B* to deposit Rs 4 000 in Court or to deliver the same to him

Holds—This rule applies only when the party making the admission *holds* the *property or other thing which the party in whose favour the order is made seeks to have* delivered to him (i)

Appeal—An appeal lies from an order under this rule [O 43 r 1 cl (r)]

ORDER XL

Appointment of Receivers

Appointment of Receivers

1 [S 503] (1) Where it appears to the Court to be just and convenient, the Court may by order—

(a) appoint a receiver of any property, whether before or after decree,

(b) remove any person from the possession or custody of the property,

(c) commit the same to the possession, custody or management of the receiver, and

(d) *confer upon the receiver all such powers as to* bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and *profits thereof, the application and disposal of such* rents and profits, and the execution of documents *as the owner himself has, or such of those powers as* the Court thinks fit

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove

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(i) *Rajah I rtha ... dhi v Rajah Pengiah* (1904) 27 Mad 164

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Alterations in the rule—

1 The words to be just and convenient have been substituted for the words to be necessary for the realization preservation or better custody or management of any property movable or immovable the subject of a suit or attachment The effect of this amendment is that the Court may now appoint a receiver not only in the particular cases specified in the old section but in every case in which it appears to the Court to be *just and convenient* to do so Thus a receiver may be appointed in a suit for partition (j) See notes below under the head Just and convenient As to execution of decrees by appointment of a receiver see s 51 cl (d)

2 The words whether before or after decree in cl (a) are new They give effect to the undermentioned decision under the old section (k)

3 The words subject matter of a suit which occurred in the corresponding s. 503 of the Code of 1882 have been omitted See notes below under the head Receiver in proceedings other than a suit

Receiver in proceedings other than a suit—Sec 503 of the Code of 1882 contained the words subject matter of a suit The result was that under that section a receiver could only be appointed in a suit Those words have been omitted in the present rule so that a receiver may now be appointed even in proceedings other than a suit (l) A Court has no jurisdiction to appoint a receiver in proceedings under the Succession Certificates Act (m) or in proceedings for the removal of a trustee under s 74 of the Trusts Act (n) but may appoint a receiver in a testamentary suit (o) or proceeding under the Guardian and Wards Act (p) If no suit or litigious proceeding is pending with reference to the property the Court has no jurisdiction to appoint a receiver of it A receiver therefore cannot be appointed after the suit is compromised (q)

Courts empowered under this order—Under the Code of 1882 (s 503) a receiver could only be appointed by High Courts and District Courts and not by the Courts subordinate to District Courts This bar has been now removed by the omission of s 503 A receiver may now be appointed by Subordinate Judges also

A receiver is an officer of the Court— The object and purpose of the appointment of a receiver may generally be stated to be the preservation of the subject matter of the litigation pending a judicial determination of the rights of the parties thereto (r) The receiver is appointed for the benefit of all concerned he is the representative of the Court and of all parties interested in the litigation wherein he is appointed (s) The appointment [of a receiver] is the act of the Court and made in the interests of justice [A receiver] is an officer or representative of the Court and subject to its orders His possession is the possession of the Court by its receiver and the tenants in possession when he is appointed to receive rents and profits of immovable property become virtually tenants *pro hac vice* of the Court their landlord His possession is the possession of all the parties to the proceedings according to their titles The moneys in his hands are in *custodia legis* for the person who can make a title to them (t)

(j) *Ramji Ram v S l gram* (1909) 14 Cal W N 48 5 I C 96 *G i d v I llathr a* (19 0) Bom L R 17 55 I C 8 7

(k) *Shu gam v M h* (1 85) 8 Mad 9

(l) *As dali v Mahomed* (19 6) 43 Cal 986 36 I C 177

(m) *Ka l j v K haiya Lal* (19 4) 46 All 37 9 I C 363 (4) A A 376

( ) *As d v M st Thakirbai* (19 7) S L R 146 103 I C 816 (7) A S 37

(o) *I e hu t v Sh lar* (1893) 17 Bom 388

(p) *In re Bai J mnabai* (191) 36 Bom 0 11 I C 554 *Cha d awati v Jag ath* (19 5) 7 Lah L J 81 90 I C 611 (2) A.L. 489

(q) *Chand eshw r Pra ad v Buleshwar* (19 0) 5 Pat L J 513 58 I C 40

(r) *Jag t Tar Dasi v Naba G pal* (1907) 34 Cal 30 316

(s) *Ib* p 317

(t) *Orr v M tia* (1894) 17 Mad 501 503 *Ad i t tor Gen l v Prem Lall* (189) Cal 1011 1015 I A 03 *Durg nd a v Joges* (19 4) 39 Cal L J 40 9 I C 0 (4) A C 600

, r 1 **Legal consequences arising from the fact that a receiver is an officer of the Court —**

(1) *Attachment* —Property in the hands of a receiver cannot be attached without the leave of the Court first obtained. Thus if a receiver is appointed of certain property in a suit between A and B and C obtains a decree against A or B C cannot in execution of his decree attach the property in the hands of the receiver without the leave of the Court such an attachment is an interference with the Court s possession through its officer the receiver (u) But if a receiver is appointed of certain property in a suit between A and B and the property was mortgaged by A to C before the receiver was appointed and C obtains a decree for sale of the mortgaged property C may brin the property to sale though it may be in the hands of the receiver without the leave of the Court The reason is that no attachment is necessary before sale in the case of a mortgage-decree and no attachment being necessary there cannot be any interference with the possession of the receiver (v)

(2) *Suit by or against receiver Leave of Court* —A receiver cannot sue or be sued except with the leave of the Court by which he was appointed receiver (w) A party feeling aggrieved by the conduct of a receiver may seek redress against him in the very suit in which he was appointed receiver or he may bring a separate suit against the receiver in which case he must obtain the leave of the Court (x) The application in the suit is for an examination *pro interesse suo* (y) The Court will dispose of the matter summarily in simple cases ( ) and if the applicant has shown diligence (a) But if questions of title are involved the Court will authorize a suit to be brought against the receiver (b) No appeal lies against an order granting leave to sue a receiver (c) There is no *statutory* provision which requires a party to take the leave of the Court to sue a receiver The rule has come down to us as a part of the rules of equity binding upon all Courts of Justice in this country It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interest of the litigants before it the authority of the Court is not to be obstructed by suits designed to disturb the possession of the Court The institution of such suits is in the eye of the law a contempt of the authority of the Court and therefore the party contemplating such a suit is required to take the leave of the Court so as to absolve himself from that charge The grant of such leave is made not in exercise of any power conferred by statute but in exercise of the inherent power which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority (d) By giving leave to sue its receiver the Court does not relinquish possession of the property to the Court where the claim of the third party is asserted (e) The Court in which the suit is filed has no jurisdiction to issue an injunction restraining the receiver from dealing with the property (f) nor can the third party if he obtains a decree enforce it in execution His proper course is to apply to the Court which appointed the receiver to direct the receiver to act in accordance with the decree (g) In *Pramatha Nath v Khetra Nath* (h) Bodilly J held that the leave of the Court to sue a receiver was a condition precedent to the right to sue and that if the leave was not obtained before suit it could not be granted subsequent to the

(u) *Kahn v Ali Mahomed* (189) 16 Bom 577
(v) *Jogend v Debend* (1899) 6 Cal 1
(w) *Miller v Ram Ranjan* (1884) 10 Cal 1014 *D n e v K mar Chandra* (1903) 30 Cal 503, *Ek k v C por tion of Calcutta* (1903) 3 C 1 1 L C *M g v Ab k m* (19 8) 6 R ng 88 110 I C 6 ( ) A R 1
( ) *Kam l k v S la m* (1909) 6 Mad 49
(y) *S erdha v S lmon* (19 5) 41 Cal L J 19 86 I C 6 7 ( ) A C 681
(x) *K K Nerw der v J A S Ka va* (19 3) 1 La g 134 76 I C 441 (3) A R 394
( ) (19 5) 41 Cal L J 197 86 I C 677 (3) A C 681 *supra*
(b) (19 5) 41 C l L J 197 86 I C 6 (3) A C 681 *supra*
(c) *Shri iwas v Ha* (19 0) 45 Bom 99 59 I C 4 1
(d) *Praja Bh an v Sris Chandra* (1919) 4 Pat L J 7 4 I C 719
( ) *Sheikh v Magn ram* (19 4) 3 Pat 35 4 I C 6 ( ) A I 491
(f) *J gal K hor v Jiera Prosa* (19) 7 Pat 6 110 I C 7 ( ) A P
(g) (19) Pat 6 110 I C (9) A P 3 1 *supra*
(h) (190) 3 C l 0

institution of the suit and the suit should be dismissed This decision was d[illegible] from in subsequent Calcutta cases where it was held that the leave may be granted [illegible] after the institution of the suit (i) In a recent Bombay case (j) Pratt J after [illegible] exhaustive review of the case law on the subject came to the same conclu[illegible] learned judge held that failure to obtain leave prior to the institution of the s[illegible] cured by sub equent leave As regards suits by a receiver it has been recently he[illegible] by the High Court of Calcutta that if the suit is instituted without the l[illegible] the Court the Court may grant leave after the institution of the suit to continue the [illegible] (k) So also by the Madras High Court (l)

It may here be noted that a receiver is not a necessary party to a suit for a [illegible]tion of title and possession of property of which he is appointed receiver (m) nor [illegible] be made a party to a proceeding under sec 145 of the Criminal Procedure Code [illegible] in his capacity of receiver (n) There is no right of action against a Tahsildar or [illegible] appointed by a receiver (o)

(3) *Debts incurred by receiver in business* —If a receiver is appointed of the [illegible] of a decea ed person with authority to continue the business carried on by the d[illegible] and in the course of such bu iness debts are properly incurred by the receiver the [illegible] to whom the debts have become due may proceed not only against the [illegible] personally but *also against the estate of the decea ed* for the recovery of their d[illegible] they are entitled to payment of their debts in priority to other creditors [illegible] estate The right to proceed against the estate is founded on the just and [illegible] principle that as the acts of a receiver acting within his authority are the [illegible] Court the estate cannot be permitted to enjoy the benefits of those acts with[illegible] held liable for the obligations ari ing out of them (p)

(4) *Loss occasioned by receiver s default* —If any loss is occasioned to the [illegible] by the wilful default or gross negligence of the receiver the loss is to be borne [illegible] party on who e application the receiver was appointed (for a receiver is n t [illegible] such party) but by the estate in the first instance The party damnified by t[illegible] then proceed again t the receiver (q) See r 4 below

(5) *Agreement controlling receiver s powers* —A receiver being an [illegible] Court it is contempt of Court on the part of any of the parties to enter into a[illegible] with him restricting and controlling his powers The Court alone has t[illegible] determine the powers of a receiver (r)

(6) *Remuneration* —A receiver being an officer of the Court it is f[illegible] to determine his fees or remuneration (r [illegible] below) Hence a promise by a [illegible] the remuneration of a receiver without leave of the Court is against law [illegible] ing on the promisor (s)

(7) *Criminal Procedure Code s* 145 —Where a receiver is appointed [illegible] property the subject of a suit a Magistrate has no jurisdiction under sec 14[illegible]

(i) *Ba k i Behari* v *Harendra Nath* (1910) 15 C W N 54 8 I C 1 *[illegible] t Cha dra* v *Apurba* (1911) 15 C W N 9 5 11 I C 187 [xecution pr ceeding] *M haraja of B d ra* v *Apurba* (1911) 15 C W N 87 10 I C 5 7

(j) *J msedj* v *Hi s ei bhai* (19 0) 44 Bom 903 58 I C 411

(k) *Rust mjee* v *Frederic G b le* (1919) 46 Cal 35[illegible] 51 I C 486

(l) *Ammukutty* v *Ma a ikra an* (19 0) 43 M d 793 59 I C 569

(m) *S tty* v *Colap* (1900) 5 Cal W N [illegible]7 *I odjer* v *Ashutosh* (190) 6 Cal W N 8 9 *Moos* v *Abdul H sain* (19 5) 27 Bom L R 1147 90 I [illegible] 5 3

(n) *Dunne* v *[illegible] mar Chand* [illegible]

(o) *Harihar* v *Jaharudd n* [illegible] 99 6 I C 768 (1) [illegible]

(p) *M h n Bibi* v *Shyama* [illegible] 937 *Short* v *Lickma*[illegible] 139

(q) *Orr* v *Muthia* (1894) 17 [illegible] *Orr* (1897) 0 Mad 22[illegible]

(r) *M ck Lal* v *Surat* [illegible] Cal 618

(s) *Prokash Ch nd a* v *Al*[illegible] 696

O. 40, r 1 of Criminal Procedure to interfere with him in respect of his possession of the property without the sanction of the Court his possession being the possession of the Court (t). It may here be noted that a Civil Court has no power under this rule to appoint a receiver *in supersession of* a receiver appointed by a Magistrate under sec 146 cl. (°) of the Criminal Procedure Code (u) See sub rule (2)

(8) *Prosecution of receiver* —A receiver appointed by the High Court who has under its orders taken possession of property cannot be prosecuted for criminal breach of trust in respect thereof without first obtaining the leave of the Court (v)

(9) *Attorney of party* —The attorney of a party should not be appointed receiver as such an appointment interrupts the arrangement made by the party for his defence in the suit (w)

' **Just and convenient.** —These words have been taken from the Judicature Act 1873 s 25 sub s (8) The words in that Act are just *or* convenient but they have been constructed to mean just *and* convenient (x) The words just and convenient do not mean that the Court is to appoint a receiver simply because the Court thinks it convenient they mean that the Court should appoint a receiver for the protection of rights or for the prevention of injury *according to legal principles* (y) The order is discretionary and the discretion must be exercised in accordance with the principles on which judicial discretion is exercised (z) Hence the Court should not appoint a receiver of property in the possession of the defendant who claims it by a legal title unless the plaintiff can show *prima facie* that he has a strong case and a good title to the property (a) The Court must consider whether special interference with the possession of a defendant is required there being a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the Court gives its protection (b) On the other hand where property is shown to be *in medio* i e in the enjoyment of no one the Court can hardly do wrong in appointing a receiver for it is the common interest of all parties to prevent a scramble (c) The mere circumstance that the appointment of a receiver will do no harm to any one is no ground for appointing a receiver (d) and a receiver cannot be appointed merely for the purpose of ascertaining the income of an estate in order to fix the amount of maintenance to be paid out of it (e) See notes above Alterations in the rule No 1 and notes below Cases in which a receiver may be appointed" See also Specific Relief Act 1 of 1877 s 44

Which Court may appoint a receiver.—The power to appoint a receiver rests only with the Court trying the suit in which it is sought to appoint a receiver. Hence a District Judge has no power to appoint a receiver of property which is the subject of a suit in *another* Court even though subordinate to his own (f) A Court should not appoint a receiver when another receiver has *been appointed of* the same property by another Court in another suit for such a procedure will lead to a conflict of jurisdiction (g)

(t) *Du v Kum Cha dra* (1903) 30 Cal 93
(u) *Bulsaprasad v Ashraf* (1913) 40 Cal 86 20 I C 69
(v) *Sa tok Ch d v Emperor* (1919) 46 Cal 43 46 I C 836
(w) *Joh rmull v Kelarn th* (19 8) 55 Cal 113 101 I C 337 ('27) A C 714
(x) *Beddow v Beddow* (18 8) 9 C D 89 93; *Day v Brownrigg* (18 9) 10 C D 294 307
(y) *Aslatt v Corporation of Southampton* (1880) 16 C D 143 149 *Robinson v Pickering* (18 1) 16 C D 660 661 *Holmes v Millage* [1893] 1 Q B 551 557
(z) *Binoy Krishna v t h Cha dra* (1928) 55 I A 131 55 Cal 770 109 I C 319 ('28) A PC 49
(a) *Sidh swari v Abhoy swari* (1888) 15 Cal 818 *Cha dul I v Iadm nand* (142) Cal 4 9
(b) *Benoy Kri h a v Sat h Chandra* Cal 92
(c) *Owen v Homan* (18 3) 1) H L C *Alt ma Bibi v yed Isl k* (19 3) A 1 9 W N 830 89 I C 145 ('25) A A 274
(d) *Srimati v Beni Madhab* (1 3) 5 All *Harris v Bea ch mp* [1 94] 1 Q B 1 *A han v Ma ne* (19 4) 46 Mad 1 1 133 79 I C 561 ('24) A M 162
( ) *Pajammal v Tyare* (19 5) 89 I C 913 ('25) A M 1215
(f) *Lat f I v A un* (1896) 3 Cal 517
(g) *Shridha v Muniram* (19 1) 3 Pat 35 71 I C 620 ('21) A P 491

Whether a receiver can be appointed when an executor is in possession—In England the rule is that the Court will not appoint a receiver against an executor unless gross misconduct is shown (*h*) and the same rule it is submitted applies to the case of an executor of the will of a person subject to the provisions of the Indian Succession Act This rule however does not apply in the case of an executor of the will of a Mahomedan The reason is that while in the case of persons governed by the Succession Act a testator can dispose of the *whole* of his property by his will a Mahomedan testator cannot dispose of more than one third of the property by his will (*i*)

Where a receiver is appointed of the estate of a deceased person and the estate is being administered by the Court the Court may authorize the receiver to pay out of the estate in his hands pressing claims against the estate (*j*)

Company—The Court has no jurisdiction to appoint a receiver of a company (*k*) If it is necessary to protect the assets recourse must be had to the provisions of the Companies Acts

Reference to arbitration—The Court has power to appoint a receiver even after a suit has been referred to arbitration (*l*)

Temporary injunctions and appointment of receiver—The distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed is that while in either case it must be shown that the property should be preserved from waste or alienation in the former case it is sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged while in the latter case a good *prima facie* title to the property over which the receiver is sought to be appointed has to be made out (*m*)

When receiver may be appointed—The appointment of a receiver is in the discretion of the Court The power to appoint a receiver is not to be exercised as a matter of course or for the reason that it can do no harm to appoint one A receiver should not be appointed in supersession of a bona fide possessor of the property in dispute unless there is some substantial ground for interference (*n*) The mere fact that a plaintiff in his plaint makes violent and wholesale charges of waste is no ground for the appointment of a receiver (*o*) The Court will not in a suit against trustees for the possession of land and for mesne profits appoint a receiver merely because the trustee is a poor man from whom mesne profits if awarded could not be recovered unless it is alleged and shown that he was wasting the property (*p*) The removal however under suspicious circumstances of a large amount of property by the defendant during the pendency of a suit in which the question of title to that property would be determined is a good ground for the appointment of a receiver (*q*) The anxiety of a life tenant to transfer lands to a stranger is a danger to the interests of the reversioner and it is a matter to be taken into consideration on an application for the appointment of a receiver (*r*)

Joint Hindu family—The Court will not as a general rule appoint a receiver in a partition suit between members of a joint Hindu family especially where the family property consists of immovable property To appoint a receiver in such a case special circumstances must be proved (*s*) A receiver may be appointed in a suit for partition

(*h*) *Surendra Kumar* v *Sushil Kumar* (19 8) 55 Cal 219 ? 0 109 I C 759 (8) A C 56

(*i*) *Hafiz b* v *Kazi Abdul Karim* (189) 19 Bom 83

(*j*) *Moti ahu* v *Premrahu* (189) 16 Bom 511

(*k*) *Kailash Chandra* v *Sai M if* (19 5) 5 Cal 513 88 I C 8 6 (5) A C 817

(*l*) *Surendra Kum* v *Sushil Kuma* *supra*

(*m*) *Chandi d t* v *Padmana l* (1895) Cal 459 See also *Sham Chand* v *Bhaya l am* (1900) 5 Cal W N 365

( ) *Bhupendra Nath* v *Manohar* (19 3) 8 C W N 86 77 I C 783 (4) A C 456 See also *Ma B* v *Ma Oh* (19 7) 5 Rang 0 101 I C 717 (2) A R 1 9

(*o*) *Srimati Prosonomoyi* v *B Madham* (1883) 5 All 556

(*p*) *Muhammad Askari* v *Nisa Husain* (19 1) 43 All 311 60 I C 901 (1) A A 91

(*q*) *Sia R m* v *Moh b* (1900) 27 Cal 279

( ) *Ahmed Asmal* v *Bai B bi* (19 0) 44 Bom 7 7 57 I C 553

(*s*) *G rind Na ayan* v *Vall bh ao* (19 0) 22 Bom L R 17 55 I C 8 7

1 of joint Hindu family property where there is a *prima facie* case of misappropriation by the manager of the family (*t*)

Mortgage suits —In a mortgagee s suit for foreclosure or sale where the mortgagee is entitled to enter into possession on default in payment of the mortgage moneys the mortgagee is entitled *prima facie* to an order for the appointment of a receiver (*u*) The mortgagee in possession also is entitled to the appointment of a receiver notwithstanding that he has been paid all his interest and costs out of rents received by him while in possession and that he has surplus rent in his hands It was so held in *Mason* v *Westoby* (*v*) In that case Bacon V C said It is said that the appointment of a receiver will cause great expense to the mortgagors but that cannot be helped The mortgagee acting in accordance with her strict right enters into possession because she cannot get her interest As mortgagee in possession she becomes subject to heavy responsibilities and from those responsibilities she is entitled to be relieved by the appointment of a receiver She has however while in possession received more than the amount of her interest and costs but that surplus she must pay to the receiver The appointment of a receiver will be made almost as a matter of course in the case of an English mortgage on an application of the mortgagee if the interest payable under the mortgage is in arrears and the mortgagee is entitled to sell the property for default in payment of interest (*u*) A receiver may also be appointed at the instance of an equitable mortgagee (*x*)

Testamentary suit —A receiver may be appointed in a testamentary suit (*y*)

Receiver in charity suits —A receiver may be appointed in a suit by the Advocate General under sec 92 of the Code for the administration of public religious or charitable trusts (*z*)

Partnership suits —In considering the question of the appointment of a receiver in partnership suits a distinction has to be drawn between cases in which the contest is between partners and cases in which the contest is between partners on the one hand and non partners on the other

In the first class of cases that is where one partner seeks to have a receiver appointed against his co partners it is necessary to distinguish cases in which the partnership has already been dissolved from those in which the partnership is still subsisting If the partnership is already dissolved the Court usually appoints a receiver almost as a matter of course (*a*) The jurisdiction of the Court to appoint a receiver is not ousted by an arbitration clause providing for a reference to arbitration of all matters in dispute between the parties (*b*) But if the partnership is still subsisting no receiver will be appointed unless some special grounds for the appointment can be shown There must be fraud or gross misconduct of some kind (*c*) or wilful denial of the complaining partners rights (*d*) or persistence under cover of right in conduct endangering the assets (*e*)

(*t*) *Hanumayya* v *Venkatasubbayya* (1895) 18 Mad 23

(*u*) *Pratchett* v *Drew* (1924) 1 Ch 280 *Jaikissondas* v *Zenabai* (1890) 14 Bom 431 *Chandashyam* v *Gobinda* (190) 7 Cal W N 45 *Rameshwar Singh* v *Chuni Lal* (1920) 47 Cal 418 56 I C 839

(*v*) (1886) 32 Ch D 206 See also *County of Gloucester Bank* v *Rudry Merthyr Co* (189) 1 Ch 6 3

(*w*) *Weatherall* v *Eastern Mortgage Agency Co* (1911) 13 Cal L J 495 9 I C 985 *Eastern Mortgage and Agency Co* v *Fakuruddin* (191) 17 Cal W N 16 17 I C 849

(*x*) *Ram Kumar* v *Chartered Bank of India* (1925) 41 Cal L J 203 87 I C 3 (5) A C 664 See also Kerr on Receivers 8th ed., pp 34 36

(*y*) *Yeshwant* v *Shankar* (1893) 17 Bom 388

(*z*) *Kuppuswami* v *Subramaniyam* (1921) 41 Mad L J 545 68 I C 565 (3) A M 345 *Balakrishna* v *Jagannada* (1925) 48 Mad L J 534 8 I C 194 (5) A M 870

(*a*) *Pini* v *Roncoroni* [189] 1 Ch 633 *Taylor* v *Neate* (1888) 9 Ch D 538

(*b*) *Pini* v *Roncoroni* [189] 1 Ch 633 637

(*c*) *Ex parte Broome* 1 Rose 69 *Estwick* v *Conningsby* (168) 1 Vern 118 [one partner colluding with debtors of the firm] *Smith* v *Jeyes* (1841) 4 Beav 503 [making away with partnership assets]

(*d*) *Hall* v *Hale* (1841) 4 Beav 369

(*e*) *Madgwick* v *Wimble* (1843) 6 Beav 495

In the second class of cases that is where the contest is between partners on the one hand and non partners on the other e g legal representatives of a late partner a receiver will not be granted *against a member of the firm* at the instance of the legal representatives unless some special grounds for the interference of the Court can be established But it is a matter of course to appoint a receiver where such appointment is sought by a partner *against the legal representatives* of his late co partner or where all the partners are dead and an action is pending between their representatives (*f*)

Decree for maintenance —Where a decree is passed for maintenance and a charge is created on a specified property to secure payment of the allowance it is desirable in order to facilitate execution and to avoid further litigation to appoint a receiver by the decree itself with directions in case of default of payment to take possession of the property and sell the same and out of the sale proceeds to pay the allowance (*g*)

Criminal Procedure Code sec 145 —The fact that there exists in respect of any immovable property an order of a Magistrate passed under sec 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by this rule to appoint a receiver in respect of the same property (*h*) It is however different where a receiver is appointed by a Magistrate under sec 146 cl (2) of that Code See note above Legal consequences arising from the fact that a receiver is an officer of the Court no (7)

Receiver and administrator pendente lite —A receiver may be appointed under this rule in a testamentary suit governed by the Probate Act 1881 (*i*) The Chancery Division of the High Court of England may appoint a receiver of the estate of the deceased though proceedings have been commenced by the defendant in the Probate Court and though the defendant is prepared to apply at once in that Court for an administrator *pendente lite* (*j*)

Remove any person —This refers to a person other than the receiver (*k*) The Court should inquire into any claims made by persons not parties to the suit before appointing a receiver (*l*) A usufructuary mortgagee who has obtained a decree for sale is not entitled to possession as against the receiver on an agreement made with the mortgagor (*m*)

Where security not furnished by receiver —Where the order whereby a person is appointed receiver requires him to give security so that the order is *conditional* upon his giving the security he cannot be receiver until the security is given (*n*) It is otherwise where the order is not conditional but absolute in its terms in such a case the order takes effect immediately it is made (*o*)

Receiver of future earnings of judgment debtor —The Court has no jurisdiction to enforce satisfaction of a judgment debt by appointing a receiver of the future earning of the judgment debtor Unless a man has assigned or charged his future earnings or has made a sum payable out of them they cannot be prospectively impounded by any of his creditors by any ordinary process of execution, whether legal or equitable (*p*) Similarly a receiver cannot be appointed of future allowances of maintenance payable to a judgment debtor (*q*) See notes to sec 51 above

(*f*) Lindley on Partnership Book III Chap 10 sec 6 sub sec 3 (Of receiver)

(*g*) *Hemangi e v Jumode Chander* (1899) 26 Cal 441

(*h*) *Barkat u nissa v Abdul Aziz* (1900) 2? All 14

(*i*) *Ye hwant v Shanker* (189) 1 Bom 388

(*j*) *O kes In re* (1917) 1 Ch 0

(*k*) *Ramaswami du v Ayyl* (19 4) 46 Mad L J 196 78 I C 6 5 (4) A M 614 *S pati v B hh ti* (19 6) 53 Cal 319 9 I C 940 (6) A C 593

(*l*) *H m d v J n ila* (19 1) 34 Cal L J 1 3 65 I C 837 (1) A C 98

(*m*) *Hitend a v Sir I meshir* (19 1 6 Pat L J 37 61 I C 67 (1) A P 43 on appeal (19 4) 6 Bom L P 1161 8 I C 794 (24) A I C 06 [P C] See note on this case at p 913 *ante*

(*n*) *Edu ds v Edwards* (18 6) Ch D 91 See also *Sri ivas v Kesho* (1911) 14 Cal L J 489 1? I C 745

( ) *Bh i ab v Na diram* (1919) 46 Cal 70 43 I C 804

(*p*) *H lmes v Millage* [1893] 1 Q B 551 See also *A d Al v Haidar Ali* (1911) 38 Cal 13 6 I C 8 6 *Pa e Annap rni v Swam atha* (1911) 34 Mad 7 9 6 I C 439

(*q*) *Palikandy v Krishnan* (1917) 40 Mad 30 34 I C 381

1 **Receiver in execution proceedings**—See notes to sec 51 See also notes to O 21 r 46 Procedure where garnishee denies debt

Receiver after decree—A receiver may be appointed even after a decree has been passed (r) See cl (a) of the rule

All such powers as to bringing and defending suits as the owner himself has—These words are wide enough to empower the Court to authorise a receiver to sue *in his own name* hence where a receiver is authorised in that behalf he may sue in his own name (s) And it has been held by the High Court of Calcutta that where a receiver is appointed with full powers under sub r (1) cl (d) that is *with such powers as to bringing suits as the owner him elf has* the receiver is entitled to sue in his own name though not expressly authorized to do so (t) As regards suits for *possession* it is to be noted that though ordinarily a suit to recover possession of property can only be brought by him in whom there is a present title to it yet if a receiver is appointed under this rule with such powers as to bringing suits *as the owner himself has* he is entitled to sue for possession (u) But a receiver takes such title as the owner himself had in the property and he cannot therefore sue for possession in a case in which the owner himself could not have done so (v) A receiver empowered to collect outstandings and do all things necessary for the realization and preservation of the assets of a firm has no power to mortgage the property of the firm (w) But a receiver of mortgaged properties on whom has been conferred the same powers of realization management and protection as the owners themselves have has a discretionary power of sale (x)

Realization of property—*After* the dismissal of a suit in which a receiver has been appointed the Court has no power to give the receiver any fresh power as for instance liberty to sell (y)

'All such powers as to the execution of documents which the owner himself has—*This includes* a power to the receiver to execute a conveyance *including* the share of a minor defendant (z)

Suit by or against receiver—leave of Court—See notes above under the same head

Contempt proceedings—Where a receiver is appointed of property the subject of a suit and the property is forcibly taken possession of by any person not only the parties interested in the property but also the receiver may proceed against such person for contempt There is nothing to prevent the receiver from himself applying for a rule for contempt (a)

Appointment of new receiver in place of old receiver—Where a receiver appointed under this rule institutes civil proceedings and is then replaced by another receiver *it is necessary that the new receiver should be made a party* to the proceedings (b)

Continuance of office—A Court appointing a receiver may by its order provide that the office should continue permanently after the decree when such continuance is necessary or for so long as it may be so (c)

(r) *Shunmug m v Moid n* (1885) 8 M d 2 9
(s) *Orient l B k C p ti n v Gobindoll* (1881) 10 Cal 713 73 733
(t) *F nk v Mahar j B hadu Si gh* (1899) 25 Cal 61 *J g I Tar i Dasi v ala* (pal (1907) 34 Cal 305
(u) *Haji Cas im v D tt* (1914) 19 C W N 45 7 I C 459
(v) *M hamed v Pa hapakesa* (191) 35 Mad 578 17 I C 33
(w) *Subramania v L tchman* (1923) 50 I A 77 1 Rang 66 1 I C 6 0 (3) A I C 0
(x) *S Ram kuar v H ten l a* (19 4) 6 P m L R 1153 81 I C 576 (1) A P C 2 [I C]
(y) *I b holme v Smith* (1907) 34 Cal 336
(z) *Ba Ali v H fiz* (1916) 43 Cal 1 4 30 I C 406
(a) *Grey v B oogramoh n* (1901) 3 Cal 90
(b) *Akula v Dhelli* (190) 28 Mad 157
(c) *Math sri v Math ri* (1896) 19 Mad 1 0 23 I A 3

/ sues B in the Court of a Subordinate Judge The suit is dismissed on a preli ground. A app als to the High Court and pending the appeal R is appointed ver of the property in dispute in the suit The High Court sets aside the decree of lower Court and the case is remanded to the lower Court for trial on the merits r the appeal is over T forcibly enters into possession of the property in the posses n of R as receiver R applies to the High Court that T may be committed for contempt s contended for T that the appeal being over R must be decreed to have been discharg from the office of receiver when the appellate decree was passed This contention will t prevail for though the appeal may be over R must be regarded as receiver of the perty until he is finally discharged by the Court Therefore R is entitled to make the plication to commit T for contempt (d) O 40 r 1

A receiver in a partition suit is not discharged merely by the pas ing of a preliminary cree for partition (e)

Receiver s liability to account—The Court appointing a receiver in a suit authority incidental to its juri diction to order him to account although the suit y be no longer pending (f) Although the dismissal of a suit may in some cases mean e discharge of the receiver still the Court has jurisdiction over the receiver who is an icer of the Court The Court has juri diction to require accounts from a receiver to ow parties to examine accounts and to deal with all matters connected with the ement of the receiver (g) See r 3 (b) below

Suit by subsequent against former receiver—A suit cannot be maintained a present receiver of an estate against the former receiver for the recovery money alleged to be due by the former receiver to the estate (h)

Receiver s lien—A receiver though discharged is entitled to a lien on the estate r all his just claims and allowances Hence the Court will not compel a receiver who s been discharged to make over the property in his pos ession until his lien has en satisfied or provided for by a sufficient indemnity (i)

Joint receivers—As a general rule appointment of more than one receiver whether the same or a different Court except in case of joint receiver is not allowable (j)

Appeal—An appeal lies not only from an order granting an application to appoint receiver but from an order rejecting such application (k) [O 43 r 1 cl (s)] The alcutta High Court holds that no appeal lies from an order appointing a receiver on ndition of his furnishing security until the security is furnished (l) but such an der is appealable as a judgment under the Letters Patent (m) But no appeal lies om directions given by a Court in passing receiver s accounts Such directions do ot come within any of the four clauses of sub r (1) (n) No appeal however lies to the rivy Council from an order refusing to appoint a receiver (o) An order refusing to move a receiver is not appealable (p) The Calcutta High Court has held that an appeal es under O 43 r 1 (s) from an order removing a receiver on the ground that a power to

(d) G e / v Hoogram h n (1901) 28 Cal 90
(e) Shinl D s v Behari (19) 6 Lah 41? 89 I C 93 ( ) A L 415
(f) Admi i t tor Ge r l v Prem Lall (189) Cal 1011 I A 03
(g) Cha d e l war P d v B shes war (19 0) 5 Pat L J 513 58 I C 40
(h) Per H tel r J in D tt v Shamal (1913) 41 Cal 9 24 I C 763
(i) Prem Lall v Sumbhoonath (189) 2 Cal 960 973
(j) Woodroffe on Receivers p 78
(k) I e k ta a v Sindira ma (1886) 10 M 1 179 Sang ppa v Sh basawa (1899) 24 Bom 38 Cu setji v G garam (1915) 17 Bom L R 680 30 I C 545 Bowdya Nath v Mall n Lal (1890) 17 C 1 680 I hagendra v Sha l d r (1904) 31 Cal 405 Sant Ram v I am Cha d (1901) Punj Rec no 36 p 99 6 I C 659 Cf Lachmi v I m Char (1913) 35 All 4 5 0 I C 6 3 [Injunction]
(l) Raja Shiam v Raj K (19 7) 45 Cal L J 63 100 I C 140 (7) A C 53
(m) Ar mug m v Kanappa (19 7) 5 Ran 99 101 I C 791 (7) A R 139
(n) K hobat v M rg gor (1908) 3 Cal 568 S mha tta v Bhajwari (19 0) 5 Pat L J 97 55 I C 15
(o) Ch di Dutt v Pud anund (189) Cal 9 8
(p) I a as mmi v Ayyalu (19 4) 46 Mad L J 196 78 I C 6 (4) A M 614

O. 40, r 1 appoint includes a power to remove (q) but it is difficult to see what this principle has to do with the right of appeal

It has been held by the High Courts of Calcutta (r) Bombay (s) and Allahabad (t) that an order that a receiver be appointed without appointing anybody by name as receiver and adjourning the application to a later date for nominating a receiver is not an order within the meaning of this rule and it is not therefore appealable under O 43, r 1 cl (s) The contrary has been held by a Full Bench of the Madras High Court (u), and by the Patna High Court (v) No appeal lies from an order merely expressing an intention of appointing a receiver and calling upon parties to suggest names (w)

A receiver is appointed of *B*s property in a suit by *A* against *B* *C* claims to be in possession of the property under an agreement between him and *B* and he objects to the appointment of the receiver but the objection is dismissed The order comes within this rule though *C* is not a party to the suit and is therefore appealable (x). But a stranger who is not in possession has no right to object and no appeal lies from an order dismissing his objection (y) An order appointing a receiver pending an application for the appointment of a common manager under s 93 of the Bengal Tenancy Act 8 of 1885 also falls under this rule and is therefore appealable under O 43 r 1 cl. (s) (z).

Letters Patent appeal —An order directing a receiver in a suit to advance money to a guardian *ad litem* to enable him to conduct the defence on behalf of a minor defendant is not a judgment within the meaning of cl 15 of the Letters Patent and no appeal lies therefrom (a) An order appointing a receiver is a judgment under the letters patent and appealable (b)

Revision —If a Court appoints a receiver in a case in which it has no jurisdiction to do so as for instance in a proceeding under the Succession Certificate Act 1889 the High Court may interfere in revision (c)

A receiver cannot delegate his powers to others —Where a receiver is appointed to collect the rents of an estate it is his duty to collect the rents himself or where the rents are collected by a clerk on his behalf to receive the rents and to keep proper accounts thereof If the rents received by the clerk are misappropriated the receiver is bound to make good the loss He is not justified in delegating or entrusting to another a duty entrusted to him by the Court (d)

Summary jurisdiction —Where the matter complained of rests on an agreement which has not been carried out the Court may interfere to prevent its receiver giving effect to the proposed agreement and this it may do on the mere *application* of a party to the suit (e) But where the matter has passed out of the stage of agreement as where a lease has already been granted by the receiver no summary order could be passed to set aside the lease but the party aggrieved must proceed by *suit* against the receiver (f)

When receiver should be joined as a party to a suit —It has been held by the High Court of Calcutta that where the property in the hands of a receiver is intended

(q) *Sripati* v *Bibhuti* (19 6) 53 Cal 319 9 I C 940 (6) A C 593

(r) *Upend Nath* v *Bhupendra Nath* (1911) 13 Cal L J 15 9 I C 58

( ) *Nabad* ... *ka* v *Ke* ... *ldas* (1915) 17 Bom L R 510 9 I C 504

(t) *Ramj* v *Koman* (1914) 13 All L. J 9 7 I C 616

(u) *I* ... *sappa* v *Pala sappa* (191) 40 Mad 18 40 I C 185

(v) *Gobind* ... *m* v *Ca* ... *h* ... *m* (19) 1 Pat 6 6 I C 9 ( ) A 1 577

(w) *Mahommad Askari* v *Nisa Husai* (19 0) 4 All 54 I C 520

(x) *H* ... *t* v *Morgan* (19 9) 36 C l 713 1 I C 3 6 *Agabeg* v *S* ... *d* ... *d* (1918) 3 ... L. J 5 3 48 I C 133

(y) *Jai I d a* v *Balde Si gh* (19) 5 O W N 463 110 I C 410 ( ) A O 25

(z) *A* ... *I I* v *Mahomed* (1916) 43 C l 9 6 36 I C 177

(a) *K pp samiy* v *Path avelu* (1901) ... Mad 511

(b) *Arum ga* v *Ka appa* (19) 5 Rang 9 101 I C 1 ( ) A R 1 1

( ) *Ka h ya* v *Ka h va* (19 1) 46 All 3 9 I C 363 ( ) A A 3 6

(d) *B l ji* v *Ram handra* (1 5) 19 B m 66

( ) *S* ... *en tro K hsub I oy* v *Durgasoondery* (1) 15 C l

(f) *Kri ta Cha dra Ghose* ... *K* ... *lta Sal h Ghose* (1909) 36 C l ... I C 4 0

O 40 rr 1-

affected by the result of a suit the receiver is a proper and necessary party to the by way of addition to the parties primarily responsible the reason given being that hough the appointment of a receiver does not of itself debar the creditor of the person whose estate the receiver has been appointed from suing for his claim yet if the ect of the suit is to interfere with the possession of the receiver of the jurisdiction of Court appointing the receiver leave of the Court must be obtained and the receiver de a party to the suit (g) In one of these cases (h) a receiver was appointed of the estate Hindu in a suit brought by his sons for administration of his estate One of the tors of the deceased filed a suit against the sons and joined the receiver as a party *the suit It was held that the receiver was a proper and a necessary party to the suit* d that if he were not added as a party to the suit the suit was liable to be dismissed a Bombay case (i) also a creditor of the deceased in a suit brought by him against ons of the deceased joined as a party the receiver of the estate of the deceased pointed in an administration suit brought by the sons The Small Causes Court sed a decree not only against the sons but also against the receiver In revision it held that no relief could be granted against the receiver in a suit filed in the Small uses Court and the decree passed by that Court was set aside In the course of the acleod C J said If a party makes a claim for money due by a person who is ad against his representatives then he can only get a decree against the representatives the extent of the assets in their hands and if the estate is not in their hands but in the nds of a receiver the plaintiff will have to go to the Court that appointed the receiver order to attach the property in his hands But by no possible conception could the ver be a necessary party in a suit to decide whether the plaintiff was entitled against legal representatives of the deceased to recover money which he had advanced to the eased in his life time

Form —For form of appointment of receiver see App F no 9

2 [S 503 cl (d)] The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver

Remuneration

Remuneration —See notes to r 1 above under the same head See also notes r 1 Receiver s lien It has been held that the Court has inherent jurisdiction to a plaintiff to refund to a party whom he has wrongly impleaded in a suit the ssion and charges incurred by a receiver of the property of that party when the uit as against him is dismissed and the receivership cancelled (j)

3 [S 503, 2nd part] Every receiver so appointed shall—

Duties

(a) furnish such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property ,

(b) submit his accounts at such periods and in such form as the Court directs ,

(g) *Jotindra Nath v S f aj* (1910) 14 C W N 653 6 I C 414 *Banku Behari v Harendra Nath* (1910) 15 C W N 54 8 I C 1 *Zahra Bibi v Zobed* (1910) 1 Cal L J 368 7 I C 75

(h) *Balu Behari v Hari nda Nath supra*

(i) *Moosa v Abdul Husain* (1915) 7 Bom L R 1147 90 I C 600 (25) A B 53

(j) *M S Na Ikara v Ma Aye Byu* (1923) 1 Rang 770 79 I C 4 (24) A R 181

O. 40, r 1 appoint includes a power to remove (q) but it is difficult to see what this principle has to do with the right of appeal

It has been held by the High Courts of Calcutta (r) Bombay (s) and Allahabad (t) that an order that a receiver be appointed without appointing anybody by name as receiver and adjourning the application to a later date for nominating a receiver is not an order *within the meaning of this rule and it is not therefore appealable under* O 43, r 1 cl (s) The contrary has been held by a Full Bench of the Madras High Court (u), and by the Patna High Court (v) No appeal lies from an order merely expressing an intention of appointing a receiver and calling upon parties to suggest names (w)

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(q) *Sripati* v *Bikh n* (19 6) 3 Cal 319 9 I C 940 (6) A C 593
(r) *Upend Nath* v *Bh p ira Nath* (1911) 13 Cal L J 157 9 I C 59
(s) *Narbalasha k* v *Ke ld s* (1915) 17 Bom L R 510 9 I C 404
(t) *P mj* v *Kom* (1914) 13 All L J 9 7 I C 618
(u) *Ial aj pa* v *Pala iappa* (191) 40 Mad 18 40 I C 185
(v) *Colind I m* v *Ca h Ram* (19) 1 Pat 6 5 63 I C 8 9 ( ) A I 5
(w) *M hammad Askari* v *N sa H s (* (1920) 4 All 54 I C 520
(x) *H t n* v *Morga* (19 9) 6 C I 713 1 I C 3 6 *Ag beg* v *N d* (1918) 3 I t L J 5 3 48 I C 133
(y) *Jai I dra* v *Baldeo S gh* (1903) 5 O W N 463 110 I C 410 ( ) A O 95
(z) *Azal H* v *Mohomed* (1916) 43 Cal 9 6 36 I C 177
(a) *K pp mi* v *I th acrlu* (1901) 4 Mad 311
(b) *Arum ga* v *K appa* (19) 5 Ra 8 101 I C 91 ( ) A R 139
(c) *Ka ha y* v *A ha va* (19) 46 All 5 70 I C 363 ( ) A A 3 6
(d) *Balaj* v *P m]a dra* (1895) 19 Bom 64
(e) *S end o Kebsub Roy* v *Durg mondery* (18) 15 C 1 3
(f) *Kri t Ch dra Chos* v *A i kia al ha Chow* (19) 36 C L J 1 I C 4 0

affected by the result of a suit the receiver is a proper and necessary party to the by way of addition to the parties primarily responsible the reason given being that gh the appointment of a receiver does not of it elf debar the creditor of the person r whose estate the receiver has been appointed from suing for his claim yet if the of the suit is to interfere with the possession of the receiver of the jurisdiction of Court appointing the receiver leave of the Court must be obtained and the receiver de a party to the suit (g) In one of these cases (h) a receiver was appointed of the estate d Hindu in a suit brought by his sons for administration of his estate One of the ors of the deceased filed a suit against the sons and joined the receiver as a party the suit It was held that the receiver was a proper and a necessary party to the suit that if he were not added as a party to the suit the suit was liable to be dismissed a Bombay ca e (i) al o a creditor of the decea ed in a suit brought by him against ons of the deceased joined as a party the receiver of the estate of the deceased pointed in an administration suit brought by the sons The Small Causes Court a decree not only against the sons but also against the receiver In revision it held that no relief could be granted against the receiver in a suit filed in the Small uses Court and the decree pa ed by that Court was set aside In the cour e of the Macleod C J said If a party makes a claim for money due by a person who is ad against his representatives then he can only get a decree against the representatives the extent of the assets in their hands and if the estate is not in their hands but in the nds of a receiver the plaintiff will have to go to the Court that appointed the receiver order to attach the property in his hands But by no possible conception could the eiver be a nece sary party in a suit to decide whether the plaintiff was entitled against e legal representatives of the decea ed to recover money which he had advanced to the ceased in his life time

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2 [S 503, cl (d)] The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver

Remuneration

Remuneration —See notes to r 1 above under the same head See also notes r 1 Receiver s lien It has been held that the Court has inherent jurisdiction to a plaintiff to refund to a party whom he has wrongly impleaded in a suit the mmission and charges incurred by a receiver of the property of that party when the as against him is dismissed and the receivership cancelled (j)

3 [S 503, 2nd part] Every receiver so appointed shall—

Duties

(a) furnish such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property ,

(b) submit his accounts at such periods and in such form as the Court directs ,

(g) Jotindra Nath v Sa faraj (1910) 14 C W N 636 I C 14 Ba ku Behari v Harendra Nath (1910) 15 C W N 54 8 I C 1 Zohra Bibi v Zobeda (1910) 1 Cal L J 368 7 I C 5

(h) Banku Behari v Harendra Nath supra

(i) Moos v Abd l Husa n (1905) 7 Bom L R 1147 90 I C 600 (25) A B 5 3

(j) M S Na luara v Ma Aye B u (19 3) 1 Rang 7 0 79 I C 4 (-4) A R 181

(c) pay the amount due from him as the Court directs, and

(d) be responsible for any loss occasioned to the property by his wilful default or gross negligence

Submit his accounts—The accounts should be supported by vouchers which will be admitted as evidence of payment unless reasonable ground for impeaching them is shown (*k*) Objections to the system of management adopted by the receiver cannot be heard as exceptions to the receiver's accounts but may be the subject of a scheme to be submitted for the orders of the Court (*l*) An application to take accounts against a receiver on a footing of wilful default and neglect must be made by suit and cannot be entertained when the receiver is passing his accounts (*m*) See notes to r 1 above Receiver's liability to account

Appeal—There is no right of appeal from the orders of the Court giving directions in passing a receiver's accounts (*n*)

Form—For form of bond to be given by receiver see App F form no 10

Enforcement of receiver's duties

4 [*New*] Where a receiver—

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or,

(c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver

Loss to property—The word property includes the *income* of property (*o*). See notes to r 1 above Loss occasioned by receiver's default

Removal of receiver—A receiver should not be allowed to continue in office if he fails to comply with the order of the Court to submit his accounts. Applications for removal should be made to the Court which appointed him (*p*)

The Court may direct his property to be attached—The property may be attached even after the receiver's death in the hands of his legal representatives (*q*).

Wilful default—In Calcutta when a party seeks accounts against a receiver on the basis of wilful default and neglect the practice is to proceed by a suit and not by an application (*r*)

Appeal—An appeal lies from an order under this rule [O 43 r 1 cl. (*s*)]. But no appeal lies from an order declaring a receiver liable in respect of a sum of money unless the order includes a direction for the attachment of his property (*t*) Nor does

(*k*) *T ller* v *Col m* (19 1) 40 Cal L J 24 6 I C 419 (21) A C 1063

(*l*) *I ha i Lal* v *Shankar D* (19 3) 7 Lah L J 6 56 I C 16 (23) A L 319

(*m*) *Subal Chandra* v *J I nd M ha* (19 6) 53 C 1 841 93 I C 761 ( ) A C 1 5 *Coom S tty* *I e Col pmones* (1900) 5 C W N 3

( ) *Ke hob* v *McC ep* (1904) 35 Cal 569

(*o*) *I m n* v *G pala* (1916) 39 Mad 551 39 I C 583

(*p*) (19 3) 7 Lah L J 6 56 I C 16 (23) A L 319 *supra*

(*q*) *Rama* *(pala* (1916) 39 Mad 541 39 I C 2[illegible]

( ) *al Jal dra* (19 6) 53 Cal [illegible] C I (27) A C 1 3

(*s*) *G A Lal* v *A ma* *Satya Narayan* (1919 4 Pat L J 636 44 I C [illegible]

n appeal lie from an order deciding that a receiver is liable to submit accounts (t) r to pay a sum of money into Court (u) or to pay damages (v) O rr 4

5 [S 504] Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property

When collector may be appointed receiver

ORDER XLI

Appeals from Original Decrees

1 [S 541] (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf The memorandum shall be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded O 41,

Form of appeal What to accompany memorandum

(2) The memorandum shall set forth concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and such grounds shall be numbered consecutively

Contents of memorandum

Appeal from original decree—See s 96 and notes thereto

Defective vakalatnama—A memorandum of appeal cannot be said to be properly presented if it is presented by a vakil whose name does not appear in the vakalatnama even though the omission is due to an oversight In such case the appeal should be dismissed though the objection to its validity is taken at a very late stage of the proceedings (u) A power of attorney expressly authorising presentation of the appeal is sufficient (x)

Signed—If the memorandum of appeal is signed it matters not that the grounds of appeal are set forth in an unsigned annexure (y)

Memorandum shall be accompanied by a copy of decree and judgment—*O 41 r 1* makes it an inflexible rule that in the case of appeals from ... the memorandum of appeal shall be accompanied by a copy of the decree The Court ...

(t) *S mh utta S gh v Bh gwan Si gh* (19 0) 6 Lat L J 97, 55 I C 15
(u) *P lamappa v Palamappa* (19 1) M W N 806 65 I C 403 ( ) A M 34
(v) *Arunachellam v Palu* (19 5) 3 Rang 318 9 I C 631 (5) A R 266
(w) *Muhammad v Jai Ram* (1914) 36 All 46 23 I C 461 [objection taken after ... of remand]
(x) *Kura v Udmi* (19 5) 7 Lah L J ... C 909 ( ) A L 331
(y) *Karman v Bishna* (1920) 2 Lah L J ... 55 I C 4

r 1 cannot dispense with it for the rule is imperative ( ) A copy merely of the judgment is not sufficient even if the decree has not yet been drawn up (*a*) nor will a copy of a translation suffice (*b*) If a copy of the decree is filed after the expiration of the period of limitation prescribed for the appeal the appeal is time barred this is because there is no valid appeal until a copy of the decree is filed The same rule applies where an appeal is preferred from an order in such a case the memorandum should be accompanied by a copy of the order (*c*) see O 43 r 2 When the judgment incorporated by reference an interlocutory order the omission to annex copy of that order was excused (*d*) Though the Court cannot dispense with a copy of the decree it may dispense with a copy of the judgment Where a copy of the judgment is not dispensed with all that is necessary to file is a copy of the final judgment (*e*)

Grounds of objection —The grounds of objection must be such as arise from the pleadings and evidence and are necessary for the decision of the case (*f*) The appellant must not be allowed in appeal to make out a new case (*g*) or a case incon istent with the case set up by him in the lower Court (*h*) Nor can an appellate Court make an entirely new case for a plaintiff which he never made for himself at any period of the trial (*i*)

In drawing up the grounds of appeal it should be remembered that no subsequent event such as a devolution of interest can affect the decision of a question as it stood at the time the decree appealed against was pronounced. To give effect to these some supplementary proceeding and not an appeal is the right procedure (*j*)

Grounds of objection which may be taken for the first time in appeal.— There are certain points which though not taken in the lower Court may yet be taken for the first time before the appellate Court Thus an objection to the jurisdiction of the lower Court to entertain the suit may be taken for the first time in appeal (*k*) Similarly a point of law arising out of admitted facts and which does not take the opponent by surpri e (*l*) or an objection on the score of a defect fatal to the suit may be taken for the first time in appeal e g that a person interested in the mortgaged property was not joined as a party to the suit as required by O 34 r 1 (*m*) or that a notice required to be given by a zamindar to a putnidar under s 8 of Regulation 18 of 1819 was defective in some essential particulars (*n*) But the defect in each case must appear on the face of the proceedings otherwi e the objection will not be entertained (*o*) Similarly the plea of *res judicata* may be taken for the first time in appeal provided it can be decided upon the record before the Court (*p*) But a plea of adverse possession may not be raised

(*z*) *Sunda m* v *Muthuramal gha* (19 3) 44 Mad L J 979 7° I C 308 (3) A.M 48 *Mubarak* v *Secretary of State* (19 5) 6 Lah 218 94 I C 145 (5) A L 438 *Nur Din* v *Secretary of St te* (19 6) 7 Lah 539 9 I C 18 ( ) A L 49

(*a*) *Basl (P m* v *Chi ot Municipality* (19) 4 Lah L J 193 ( ) A L 191

(*b*) *Daim* v *Hayat* (19) 4 Lah L J 331 (1) A L 266

( ) *Qas m Al* v *Bhagwanta* (1918) 40 All 1 4° I C 899

(*d*) *Lakhmi* v *Ishar* (19) 4 Lah L.J 90 ( ) A L 93 (a second appeal)

(*e*) *M mmat aban* v *Shahabal* (19 9) 10 Lah 387 11 I C 7 3 (9) A L 481

(*f*) *Nu r Ally* v *Ojoodhya am* (1866) 10 M I A 540 558

(*g*) *Ind r Chu der* v *Radhakisore* (189) 19 Cal 507 19 I A 90 *A namal y* v *Pi hu* (1905) 29 Mad 1 1 3 *I mchand* v *Rama Na d* (19 1) 3 Lah L J 39 63 I C 7 *Ba t I am* v *M hammad* (19) 4 Lah L J 93 (21) A L 3 6

(*h*) *G japathi* v *Vasudeva* (189) 15 Mad 503 19 I A 179 *Ilahi Khan* v *Sher Al* (1904) 26 All 331 *P ran Mal* v *Krani S gh* (1898) 0 All 8 10, *Copee Lall* v *Chun draol e* (187) 19 W R 1 I A 6 *R dra Devi* (19 3) vol 131 cf *Lam Das* v *Ia a Devi* (19 3) 5 Lah L J 117 84 I C 1033 (1) A L 01 (denial of marriage and plea of invalidity of marriage n t i con i tent)

(*i*) *Ir gowda* v *Seshapa* (1893) 17 Bom 7 3 *Ba a t I am* v *M hammad* (19) 4 Lah L J 93 (1) A L 3 6

(*j*) *A ndmoyee* v *Sheeb Chunder* (186) 2 W R P C 19

(*k*) *Ramayya* v *Subbarayudu* (1890) 13 Mad 25

(*l*) *Ke a S gh* v *Indar Singh* (19 4) 6 Lah. L J 454 76 I C 17 (4) A.L 345 *Secretary of State* v *Upendra* (1922) 36 Cal L J 336 71 I C 849 (3) A C 17

(*m*) *Gh lam Kadir* v *Musta Kim* (1896) 18 All 109

(*n*) *Ahsan Ulla* v *Haricharan* (1893) 20 Cal 86 19 I A 191

( ) *Ib*

(*p*) *K nahai Lal* v *S raj Kunwar* (1922) 1 A 446

for the first time in appeal (q) And where in a suit for a declaratory decree it was contended for the first time in appeal that the Court had on the facts of the particular case no power to pass a declaratory decree it was held that the objection should not be entertained Such an objection does not affect the *jurisdiction* of the Court (r)

Limitation —As to the period of limitation for appeals see Limitation Act 1908 ch I arts 151 152 and 156 S 5 of the Limitation Act provides that an appeal may be admitted after the period of limitation if the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within such period S 12 of the same Act provides that in computing the period of limitation provided for an appeal the time requisite for obtaining a copy of the decree appealed from should be excluded An appeal under s 169 of the Indian Companies Act 1882 to which the Code of Civil Procedure applies was filed as a joint appeal under the mistaken impression that the cases had been consolidated but the Lahore High Court on the ground that the mistake was one of form allowed the second appellant to put in a separate appeal (s) See notes to r 3 below Leave of Court Limitation

When appellat Court may not interfere with findings of fact —Two conflicting view points have to be reconciled namely on the one hand the undoubted duty of the Court of appeal to review the recorded evidence and to draw its own inferences and conclusions and on the other hand the unquestioned weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noting their looks and manner (t) Generally speaking it is undesirable for an appellate Court to interfere with the findings of fact of the trial judge who sees and hears the witnesses *and has an opportunity of noting their demeanour* especially in cases where the issue is simple and depends on the credit which attaches to one or other of conflicting witnesses The view of the trial judge as to the credibility of witnesses should not be put aside on a mere calculation of probabilities by the appellate Court (u)

Consolidation of appeals —The Code contains no provisions for consolidating suits or appeals Whether or not the Court has jurisdiction to consolidate appeals it will not do so unless *before* the hearing of the suits consolidation is asked for of the *suits* and unless the evidence given in the two cases is common to both of them (v) See notes to s 151 Inherent powers of Court Cl (a)

Form —For form of memorandum of appeal see App G form no 1

2 [S 542] The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule

Grounds which may be taken in appeal

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby

(q) *Lh b Lal* v *Jugdish* (19) 1 Pat 3 69 I C 185 ( ) A P 398

(r) *Bomb i B t h T ad g Co p ation* v *Smith* (1893) 17 Bom 197 ° 0 1

(s) *Dev D uamal* v *Offic l Liq dator* (19 0) 1 Lah 368 56 I C 69

(t) *Pr namavi* v *Baik ntha Nath* (19 1) 49 Cal 132 66 I C 8 ( ) A C 260

( ) *Bombay Cotton Mfg C* v *Mol l I Sh l l* (1915) 4- I A 110 39 Bom 386 29 1 C 9 *F m Pa kash Das* v *A and Das* (1916) 43 I A 73 63 43 Cal 07 - 33 I C 583 *Nand lal* v *P ncla an* (1918) 45 Cal 60 71 4 I C 481 *S d r S gh* v *Krishna Mills Co Ld* (1914) I nj Rec no 63 p 14 - I C 79 See also *Ba* v *Central Vermont l y Co* (19 1) 2 A C 41 p 415

( ) *Janardan* v *Shib Pershad* (1910) 43 Cal 9 36 I C 1 9

r 2 his had a sufficient opportunity of contesting the case on that ground

Leave of Court Limitation—The appellant cannot except by leave of the Court urge or be heard in support of any ground of objection not set forth in the memorandum of appeal Thus if the plea that the *suit* is barred by limitation is not taken in the memorandum of appeal the appellant cannot urge that plea in appeal *without the leave of the Court* The appellate Court may grant leave but it is not bound to do so Notice to the respondent does not dispense with the necessity for leave of the Court (w) But the leave should not be refused if the point of limitation arises on the face of the plaint (x) Again under the latter part of this rule the appellate Court can *of its own motion* take cognizance of the question as to whether the suit is barred by limitation though the plea of limitation has not been taken in the memorandum of appeal and rest its decision on that ground provided the opposite party is given an opportunity of being heard on the point In either case however the bar of limitation must be patent on the face of the proceedings (y) If it is not and the plea involves a fresh finding of fact the plea should not be allowed (z) The same rules apply where the plea that the *suit* is barred by limitation is raised for the first time in second appeal (a)

The case put above must be distinguished from the case contemplated by s. 3 of the Limitation Act 1908 That section provides that every suit instituted and every appeal preferred after the period of limitation shall be dismissed although limitation has not been set up as a defence This means that under s 3 it is the duty of the Court of first instance to dismiss a *suit* if it is barred by limitation *whether the plea of limitation has been taken by the defendant or not* (b) Similarly it is the duty of the appellate Court to dismiss an *appeal* before it if the appeal was barred by limitation when presented, *whether limitation has been set up as a defence or not* that is to say if it is a first appeal, the appeal should be dismissed by the first appellate Court and if it is a second appeal it should be dismissed by the second appellate Court But that section does not impose any duty upon an appellate Court to entertain the plea of limitation if the question is not whether the *appeal* before it is barred by limitation but whether the *suit* was so barred Similarly the said section does not impose any duty upon the second appellate Court to entertain the plea of limitation if the question is not whether the second appeal is barred by limitation but whether the *first appeal* was so barred It is the provisions of the present rule that apply to the two last mentioned cases and not the provisions of s 3 of the Limitation Act Hence in those cases the plea of limitation must be specifically taken in the memorandum of appeal or by leave of the Court under this rule

Proviso to the rule—The appellate Court is not precluded from basing its decision upon a ground not set forth in the memorandum of appeal nor taken by leave of the Court under this rule (c) but this power is exercised by the Court alone and neither party can claim it as of right (d) A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted when he fails upon this branch to withdraw from the position and assert the contrary before the appellate Court more especially when he thereby places his opponent at a great disadvantage In such a case the doctrine of estoppel owing to the conduct of the litigant applies (e). Further a litigant should not be allowed to take in appeal a point in the pleadings which has been

(w) *Shri ka t v Jai S h* (19 4) 3 Pat 818 81 I C 993 (23) A P 57

(x) *B la m v Mangta Das* (1907) 34 Cal 941 *Bh sa v Norendra* (19 0) 3 Cal L.J 236 60 I C 80

(y) *Ahm d Ali v Waris H sain* (1893) 15 All 1 3 *Deo Narai v Webb* (1901) 28 Cal 86 *Ve k ta v Bha kyaka lu* (1907) 5 Mad 367 29 I A 76

(z) *Wazir Chand v Nathu Ram* (19 4) 6 Lah L. J 151 80 I C 3 1 (24) A L 484

(a) *Bhadai v Shaikh M nawar* (1919) 4 Pat. L. J 645 649 650 5 I C 1 3

(b) *Ghulam Khan v M hammad Hassan* (1902) 29 Cal 167 185 9 I A 51

(c) *Thak ri v Ku dan* (1895) 17 All 90

(d) *Ba sidhar v S ta Ram* (1891) 13 All 341

(e) *Mah aja of V z anagram v Secretary of tat* (19 6) 53 I A 64 0 49 Mad 19 94 I C 501 (26) A PC 38

deliberately abandoned by a party at the trial of the suit before the lower Court (*f*) See notes to r 1 above grounds of objection which may be taken for the first time in appeal

New questions of fact.—In this connection may be noted the following observations made in the course of a judgment in a Madras case Though we may perhaps consider in appeal any *question of law* arising from facts which are either admitted or undisputed we cannot allow without any satisfactory reason new *questions of fact* to be raised for the first time in appeal (*g*)

Making a new case in appeal—A court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit (*h*)

3 [S 543] (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there

Rejection or amendment of memorandum

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment

Returned for amendment.—*When a memorandum of appeal is returned for* amendment the Court should fix a time for its return (*i*) See s 107

Appeal—A decision rejecting a memorandum of appeal on the ground that it is barred by limitation (*j*) or that it is insufficiently stamped (*k*) or that it was not duly presented (*l*) has the force of a decree within the meaning of s. 2 and is therefore appealable

Appellate Court to have same power as Courts of original jurisdiction—It is important to note at this stage the provisions of s 107 That section provides that the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed on Courts of original jurisdiction *in respect of suits instituted therein.*

4 [S 544] Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole

One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all

(*f*) *Corundrav* v *Babu* (189) 16 Bom 536
(*g*) *Narayana* v *Chengalamma* (1887) 10 Mad 1 8
(*h*) *Nathu* v *Umedmal* (1909) 33 Bom 35 1 I C 456
(*i*) *Jagan Nath* v *Lalman* (18 6) 1 All. 60
(*j*) *Gulab P* v *M gl Lal* (1885) 7 All. 4
Jagannath v *Nulu* (1885) 9 Bom 45
Gu ga Dass v *P mjoy* (1886) 12 Cal 30
(*k*) *P p S ngh* v *Mukhraj* (1885) 7 All 887
(*l*) *Ayyanna* v *Nagabhooshanam* (1893) 16 Mad 285

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(w) Sh i K i v Jai S h (19) 3 Pat 818 81 I C 93 (23) A P 67

(x) Balaram v Mangla Da (1907) 34 Cal 941 Ih san v Norendra (1920) 3 Cal L J 236 60 I C 290

(y) Abm d Ali v Waris Husain (1893) 15 All 123 Deo Narain v Webb (1901) 28 Cal 86 Venkata v Bha hyaka lu (190) 3 Mad 367 9 I A 6

(z) Wazir Chand v Nath Ram (19) 6 Lah L J 151 80 I C 3 (2) A L 4

(a) Bhad i v Shaikh M nowar (1919) 4 Pat L J 615 649-650 52 I C 1 3

(b) Ghulam Khan v M hammad Hasan (190) 29 Cal 167 1 5 29 I A 51

(c) Thakuri v K nd (1895) 17 All 240

(d) Jhaudhar v Lala I m (1891) 13 All 241

(e) Mah r ja f Vizianagaram v Secretary of State (19 6) 53 I A 64 0 49 M L J 4 94 I C 501 (26) A PC 15

deliberately abandoned by a party at the trial of the suit before the lower Court (*f*) See notes to r 1 above, grounds of objection which may be taken for the first time in appeal O XLI

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4 [S 544] One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole

(*f*) *Govindrav* v *B bu* (1892) 16 Bom 586
(*g*) *Narayana* v *Chengalamma* (1887) 10 Mad 1 8
(*h*) *Nathu* v *Umedmal* (1909) 33 Bom 35 1 I C 456
(*i*) *Jagan Nath* v *Lalman* (1876) 1 All 260
(*j*) *Gulab Rai* v *Mangli Lal* (1885) 7 All 42 *Ragh nath* v *Nulu* (1885) 9 Bom 4 *Gunga Dass* v *Ramjoy* (1886) 12 Cal 8
(*k*) *R p S gh* v *Mukhraj* (1885) 7 All 857
(*l*) *Ayyanna* v *Nagabhooshanam* (18) 16 Mad 285

decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be

Ground common to all defendants—This rule provides that where there are more defendants than one and the decree appealed from proceeds on any ground common to all the defendants any one of the defendants may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of *all* the defendants (m) The rule will not apply to different appeals on a common ground unless they have been consolidated (n) It is not necessary for the application of this rule that the decree should proceed on *every* ground common to all the plaintiffs or to all the defendants it is quite sufficient if it proceeds on *any* ground common to all the plaintiffs or to all the defendants. *A* sues *B* *C* and *D* for recovering possession of certain lands on declaration of title thereto alleging that he was dispossessed by all the defendants together in pursuance of a conspiracy between them *B* *C* and *D* file separate written statements denying *A* s title and also denying dispossession *and each claiming to hold separate par els of land from third parties* The Court of first instance finds in favour of the title and the po session of *A* and that *A* was dispossessed by *B* *C* and *D* *B* alone appeals from the decree. The appellate Court finds that *A* had failed to prove the title set up by him or that he was in possession of the land. Should the appellate Court reverse the decree of the lower Court in favour of *B* alone who appealed from the decree or should it reverse the decree of the lower Court in favour also of *C* and *D* though they did not join in the appeal? The answer is that if the decree of the lower Court proceeded on a ground common to all the three defendants the decree should be reversed under this rule not only in favour of *B* but also in favour of *C* and *D* Now the ground of defence common to all the defendants was that *A* had no title to the lands and the decree of the lower Court proceeded on the ground that *A* had a title to the lands The decree therefore proceeded on a ground common to all the defendants. The appellate Court should therefore reverse the decree not only in favour of *B* but also in favour of *C* and *D* It is quite immaterial that the defendants claimed to be interested by different titles in *separate* portions of lands It is enough if *any one ground* on which the decree appealed from proceeds is common to all the defendants (o) But the provisions of this rule do not apply unless the lower Court whose decree is appealed from has proceeded upon some ground common to all the plaintiff or all the defendants. If the *lower Court* has not proceeded upon any such ground it is not competent to the appellate Court to reverse the decree as to all the plaintiffs or all the defendants *upon a ground which the appellate Court considers to be common to all the plaintiffs or all the defendants* (p)

If in the case put above the appellate Court while reversing the decree in favour of *B* refuses to reverse it in favour also of *C* and *D* on the ground that it has no power to do so the decree of the appellate Court will be subject to revision for failure of exercise of jurisdiction (q) See s 115 cl (b) If the decree appealed from proceeds on a ground common to all the defendants the appellate Court may reverse the decree in favour of *all* the defendants even if some of the defendants suffered the decree to be passed *ex parte* against them (r)

(m) See *Somasund ram* v *Va th li ga* (1917) 40 Mad 836 867 41 I C 516 [R versio r v Allenees from widow]

( ) *Amarsangji* v *D sa Umed* (19*5) * Bom L. R 91 86 I C 31 (*5) A B 90

( ) *Ram Kamal* v *Ahmad Ali* (1903) 30 C l 4 9 *Dhattaloor* v *Paul pa iam* (19 7) 30 Mad 470 *Annamalay* v *Pichu* (1905) 23 Mad 122 *Ambika Prasad* v *Lard p Singh* (1914) 4 Cal 451 24 I C 416 *Salalud* v *Afz l Begum* (19*4) 39 Cal L. J 590 84 I C 64 (*25) A C 23

(p) *Puran Mal* v *Kr ant Singh* (1894) 20 All. 6 *Chajju* v *Umrao* (1900) 2* All 340

(q) *Seshadari* v *Krishnan* (1895) 8 Mad 19*

( ) *Ram Tahal* v *Sukeswar* (1916) 1 P t L. J 143 35 I C 347

Ground common to all the plaintiffs—*A* and his son *B* jointly sue *C* to recover Rs. 2 000 A decree is passed for the plaintiffs for Rs 500 only *A* alone appeals from the decree *C* files cross objections under r 22 below The appellate Court rejects the plaintiff s claim *in toto* and reverses the decree of the lower Court Subsequently *B* who did not join in the appeal applies for execution of the original decree against *C* *B* is not entitled to take out execution for although he was not a party to the appeal he is bound under this rule by the decree of the appellate Court (s)

See notes to r 22 below A respondent may urge cross objections against the appellant but not as a rule against a co respondent

May reverse decree in favour of all plaintiffs or defendants—The word may shows that the appellate Court is given a discretion in the matter It may therefore reverse the decree in favour of *some* only of the plaintiffs or defendants It is not bound to do so in favour of *all* of them (t)

Death of one of several appellants in cases where the decree appealed from proceeds on a ground common to all of them—See notes to O 22 r 3 This rule applies to appeals

Stay of proceedings and of execution

Stay by appellate Court

5 [S 545] (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the appellate Court may for sufficient cause order stay of execution of such decree

Stay by Court which passed the decree

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed

(3) No order for stay of execution shall be made under sub rule (1) or sub rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made,

(b) that the application has been made without unreasonable delay, and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him

(s) *Babaji v Collector of Salt Revenue* (1887) 11 Bom 596

(t) *Narain v Binaik* (1914) 36 All 510 24 I C 439

5 (4) Notwithstanding anything contained in sub rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application

Alterations in the rule—

1 The first part of sub r (1) namely An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order is new The object is to make express provision for a stay of proceedings from a decree pending an appeal from the decree Thus if a preliminary decree is passed in a suit for accounts between a principal and an agent [O 20 r 16] and an appeal is preferred from the decree the appellate Court may under this rule stay the inquiry into the accounts pending the appeal from the decree Under the Code of 1882 the Court directed a stay in cases like these in the exercise of its *inherent power* as there was no express provision in the Code in that behalf (*u*).

2 Sub r (4) is new It authorizes an *ex parte* stay The need for such an order constantly arises in practice

Stay of proceedings —Under this part of the rule the Bombay High Court in appeal suspended a sentence of imprisonment for an offence under s 43 of the Provincial Insolvency Act 1907 now Provincial Insolvency Act 1920 s 69 the provisions of the Code being applicable to such appeal (*v*) See notes above Alterations in the rule

Stay of execution —Once an appeal is preferred from a decree it is the *appellate* Court alone that is seized of the matter and an application for a stay of execution should be made to that Court Where no appeal is preferred the appellate Court has no jurisdiction not being seized of the case and cannot stay execution even on the assurance of a pleader that an appeal will be filed (*w*) The application for a stay in that case should be made to the Court *which passed the decree* but the application must not be entertained unless the decree is one from which an appeal lies and the application is made before the expiry of the time allowed by law for appealing therefrom (*x*) The application should be made to the Judge who decided the case and without unreasonable delay (*y*)

Though the appellate Court may under this rule stay proceedings in execution when an *appeal is preferred from a decree* it has no power to stay execution of a decree when an appeal is preferred from an *order* appealable under s 104 A obtains a decree *ex parte* against *B* *B* applies under O 9 r 13 to have the decree set aside but the application is rejected *B* appeals from the *order* rejecting the application under O 43 r 1 cl. (d) and applies to the appellate Court to stay execution of the *ex parte decree* against him But as no appeal has been preferred from the decree the appellate Court is not competent to stay execution (*z*) Contrast r 8 below

Where decree has been executed — An order for a stay of execution implies that the decree has not been executed Therefore where a decree has been executed no order can be made under this rule (*a*) See r 6 below

Circumstances under which stay of execution may be granted —The Court has power under this rule to make an order for a stay of execution for sufficient cause But no order should be made for a stay of execution unless the Court is sati

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(*u*) *Balkishen Sah* v *Khagnu* (1904) 31 Cal [illegible]

(*v*) *Nagindas* v *Chhotabhai* (1920) 44 Bom 6 3 61 C 419

(*w*) *Purshotam* v *Hargu* (1921) 43 All 198 60 I C 131 (21) A A 34 *Purshotam* v *Hargu* (1921) 43 All 513 63 I C 837 (21) A A 214

(*x*) *Amir Hasan* v *Ahmad Ali* (1887) 9 All 36 *Khan Chunder* v *Ashanoollah* (1884) 10 Cal 817

(*y*) *Chatarbhuj* v *Bardeo Das* (1921) 48 Cal 726, 66 I C 194 (21) A C 541

(*z*) *Bhagwat* v *Sheo Golam* (1904) 31 Cal 1041

(*a*) *Dharam Singh* v *Kishen Singh* (1883) 12 C L R 53[illegible]

fied that substantial loss may result to the party applying for a stay of execution if the execution is not stayed (b) And even if the Court is satisfied that substantial loss may result no order should be made unless the application has been made without unreasonable delay and further unless the Court is satisfied that security has been given by the applicant for the due performance of such decree as may ultimately be binding upon him [sub r (3)] The Court should not accept a security the validity of which is not free from reasonable doubt and the enforcement of which may lead to protracted litigation (c) It has been held by the High Court of Bombay that where the decree appealed from is for the payment of money execution should be stayed unless the respondent gives security for the repayment of the money in the event of the decree being reversed (d)

Notice to decree holder —It has been held by the High Court of Bombay that a final order staying execution should not be made without notice to the decree holder if it is made without notice it is illegal and it may be set aside under s 115 above (e) The High Court of Patna however differs (f) An *interim* stay however may be granted *ex parte* [see sub r (4)]

Application of the rule —*A* obtains a decree against *B* for the recovery of certain immovable property and applies for execution of the decree If *B* has preferred an appeal from the decree *B* may apply to the appellate Court for a stay of execution on the ground that if execution is not stayed and the property is delivered to *A* *A* may do away with the property which may result in substantial loss to him If the appellate Court is satisfied the substantial loss may result if the execution is not stayed and if the application has been made without unreasonable delay the appellate Court may order execution to be stayed under this rule upon security being given by *B* that if the decree of the lower Court is confirmed he will deliver possession of the property to *A* If the decree of the lower Court is confirmed and if *B* fails to deliver possession of the property to *A* *A* may proceed against the surety

Security for performance of decree —The nature and extent of the liability of a surety under this rule depends on the words of the security bond (g) Thus where the bond was to perform all orders and decrees passed in appeal it was held that the obligation under the bond extended to the final decree passed in second appeal (h) When immovable property is given by a judgment debtor as security for the due performance of a decree under sub r (3) (c) it can be realized in execution without attachment The provisions of O 34 r 14 do not apply to such a case and the matter being one relating to execution s 47 bars a separate suit (i) As to the mode of enforcing a security bond given under this rule see notes to s 145 Security for the performance of any decree

There is a conflict of opinion whether a security bond given under this rule mortgaging immovable property exceeding Rs 100 in value requires registration under the Transfer of Property Act s 59 and the Registration Act s 17 it being held in same cases that it does (j) and in some that it does not (k)

(b) *G kr S lar* v *Chandi* (1901) 5 Bom 43 *Dhera Mal* v *H dar Shah* (19 1) Lah 61 61 I C 77 (21) A L 4

(c) *Srin b h Prasad* v *Kesh Prasad* (1911) 38 Cal 754 7 5 9 I C 86

(d) *Dha jibhoy* v *Lisboa* (1889) 13 Bom 241

(e) *Mullanchand* v *Kha sedji* (1891) 15 Bom 536

(f) *M l l nd* v *Tarn Prasad* (1919) 4 P t L J 64 54 I C

(g) *Ameer Ali In the m tter of* (1870) 13 W R 403

(h) *Shi lal* v *Apaji* (1878) 2 Bom 654 3 Bom 204

(i) *Subrama ian* v *Raja of Ramnad* (1918) 41 Mad 3 7 43 I C 187 *Sh m Sundar* v *Bajp* (1903) 30 Cal 1060 *Mukta Prasad* v *M hate* (1916) 38 All 3 7 33 I C 98 *Raghubar S gh* v *Jai Indra* (1919) 46 I A 8 4 All 158 55 I C 550 *Jyoti Prala h* v *Mukt P k h* (19 4) 51 Cal 150 81 I C 734 (4) A C 485 The d cision in *Tokhan S ngh* v *Girwar S ngh* (1905) 32 C l 494 is no long r law in vi w of the alt ration in the l ngu ge of s 99 of the Tr n fer of Property Act 188 now O 34 r 14

(j) *Nagaruru* v *Tangatur* (1908) 31 Mad 330

(k) *J nappa* v *She j dd* (19 8) 5 Bom 7 10 I C 10 (8) A B 4

security for the restitution of the property to him (*B*) or for the payment of the value thereof if the appeal is decided in his favour The application may be made to the Court which passed the decree or to the appellate Court (a) If the application is made to the Court *which passed the decree* such Court *shall* on sufficient cause being shown by *B* for requiring the security direct *A* to give the security But if the application is made to the *appellate* Court that Court *may in its discretion* require security to be given.

Enforcement of security bond given under this rule—See notes to sec. 145 Security for restitution of property taken in execution of a decree

Appeal—No appeal lies from an order under this rule

Form—For form of security bond see App G form no 3

7 [S 547] No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity

No security to be required from the Government or a public officer in certain cases

8 [*New*] The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree

Exercise of powers in appeal from order made in execution of decree

Scope and object of the rule—This rule is new It has been added to meet particularly the case where the litigant does not quarrel with the decree but appeals from an *order* passed in execution of that decree In such a case the rule provides that the appellant may apply for a stay of execution of the *decree* under r 5 or for security for restitution under r 6 *A* obtains a decree against *B* and applies for execution. *B* objects to the execution but the objection is disallowed *B* prefers an appeal from the *order* disallowing his objection *B* may apply for a stay of execution of the *decree* under r 5 pending the disposal of the appeal from the order This is in accordance with the undermentioned decision under the Code of 1882 (b)

Procedure on admission of appeal

9 [S 548] (1) Where a memorandum of appeal is admitted, the appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose

Registry of memorandum of appeal

(2) Such book shall be called the Register of Appeals

Register of Appeals

(a) *Lakshmanan v. Pala Lappa* (1918) 41 Mad 813 45 I C 30

(b) *Parvpati v. ... das Lal* (1901) 23 Cal. 734.

10 [s 549] (1) The appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both **O 41**

Appellate Court may require appellant to furnish security for costs

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immovable property within British India other than the property (if any) to which the appeal relates

Where an appellant resides out of British India

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal

Scope and object of the rule—The object of the rule is to secure the respondent in an appeal from the risk of having to incur further costs which he might never recover from the appellant Under sub r (1) the appellate Court *may* in its discretion require security for costs Under the proviso to that sub rule the Court *shall* demand security for costs If no security is furnished the Court should reject the appeal whether the order for security is made under the sub rule or the proviso (*c*)

To what appeals the rule applies—This rule applies not only to appeals from substantive decree but also to appeals from interlocutory orders under sec 104 and to appeals from orders in execution under sec 47 (*d*) The Privy Council have recently decided that it applies also to appeals under cl. 15 of the Letters Patent (*e*) The Madras High Court has held that it was not so applicable because the Code dealt with appeals from one Court to another of higher grade while cl 15 of the Letters Patent dealt with a different class of appeals (*f*) This was a good reason for holding that the right of appeal under the Letters Patent was not excluded by the words "and from no other orders" occurring in sec 588 of the Code of 1882 corresponding to sec 104 of the present Code (*g*) but it does not follow that the procedure of the Court in dealing with an appeal under the Letters Patent (now expressly saved by the words "save as otherwise provided by any law" inserted in sec 104) is not regulated by the Code Where any part of the Code does not apply to High Courts specific provision is made to that effect There is no such provision in respect of this rule However a Chartered High Court is competent under sec 129 to make a rule inconsistent with O 41 r 10 and if it does the Code rule would not apply (*h*) Bombay High Court rule 736 prescribes a deposit of Rs 500 as security for respondent's costs as a condition of filing the appeal but this is not inconsistent with the present rule (*i*) Nor is rule 3_1 of the Madras High Court rules inconsistent (*j*)

(*c*) *Lekha* v *Bhauna* (1896) 18 All 101

(*d*) *Dagdu* v *Chandrabhan* (1900) 4 Bom 314

(*e*) *S b tra Thak r ni* v *Sari* (19 1) 48 I A 76 48 Cal 481 60 I C 274 (1) A.PC 80

(*f*) *Sasha Ayya* v *Naga athna* (1904) _7 Mad 121 See also *Sabhap th* v *Naray nasami* (190_) _5 Mad 555 558

(*g*) *Chappan* v *Moidinkutti* (1899) Mad 68 *Toolsee Mo ey Dassee* v *Suderi Dassee* (1899) 26 Cal 361

(*h*) *Nawab Behram Jung* v *Haji Sultanali* (1913) 37 Bom 57 17 I C 39

(*i*) *Ratanchand* v *Damji* (19 3) 25 Bom L R 468 73 I C 4 4 (_3) A B 399

(*j*) *V rupaksha* v *Ranganayak* (1925) 87 I C 346 (_5) A M 113

10 **Appeals in forma pauperis**—It has been held by the High Court of Madras (k) that this rule applies to pauper appeals, thus an appellant who has presented his appeal in forma pauperis may be called upon to give security for costs under this rule but very special grounds must be shown to support such an application. On the other hand it has been held by the High Courts of Calcutta (l) Bombay (m) and Lahore ( ) that this rule does not apply to appeals preferred in forma pauperis.

"**In its discretion**—Except in the case referred to in the proviso to sub-r (l) the power of the appellate Court to require security for costs is discretionary The mere fact that the appellant is poor or insolvent is no ground for demanding security for costs (o) Similarly mere non payment of the costs of the original suit is no ground for calling upon the appellant to furnish security under this rule unless his conduct be shown to be vexatious that is such as indicates a wilful determination on his part not to obey the order of the Court in respect of costs (p) On the other hand when the respondent had failed to recover his costs in the lower Court Macleod C J made an order for security observing that the Court s discretion was absolute and could not be fettered by cases (q) It is submitted that this was a misuse of the word absolute for the discretion is a judicial discretion to be exercised in accordance with legal principles expounded in the cases. But the Court will as a general rule demand security for costs from a poor or insolvent appellant if it is proved to the satisfaction of the Court that the appellant is not the real litigant but a mere puppet in the hands of others who are well able to furnish security (r) or if the merits of the case are plainly in favour of the respondent (s) See notes to O 25 r 1 Poverty of plaintiff

At what stage respondent should apply for security—The respondent should apply promptly or else it might be urged that he had waived his right (t)

Order for security—When an order is made under this rule for security for costs, it is not necessary that any specific sum should be named in the order It is sufficient if the order directs the appellant to furnish security for the costs of the original suit or for the costs of the appeal or for the costs of the appeal and the original suit (u) A surety for the costs of the appeal is discharged if the appeal is decided in favour of the appellant even if the appellate decree is reversed on second appeal (v) The taxing officer s decision as to the amount of the security is subject to revision by the High Court (w)

Extension of time for furnishing security—The appellate Court may under exceptional circumstances extend the time for furnishing security [see s 148]. Thus where the appellant alleged that he was unable on account of plague in Bombay to raise the money required for security within the time fixed by the Court the Court extended the time for giving security The time for giving security may be extended either before or after its expiry (x).

(k) *Se hayya a* v *Jal ulavadin* (1890) 3 M 1 66 *Sri* ... *sa* v *S bramania* (1907) 17 M I I J 583 *Said hna* v *Hart* (19 0) 43 Mad 90.. 53 I C 791

(l) *Nus eerood n* v *Ujj l* (1871) 17 W R 63 See also *Mussamat H fizan* v *Abdul K rim* (1908) 1 C W N 163 cited in the notes to O 3 r 1

(m) *Khemraj* v *Kishanala* (1918) 4 Bom 5 4 I C 6

( ) *Narim* v *Abdul H mid* (1922) 3 Lah 30 67 I C 2.6 (***) A L 187

(o) *Jiwan Al* v *F sa Mal* (1886) 8 All 203 *Henderson* v *Deas* (1894) 21 Cal 5 6 *Manekji* v *Goolbai* (1879) 3 Bom 241

(p) *Ahmed* v *Shaik F m* (18 9) 13 Bom 434 *I mai g* v *Bal bhai* (1903) 5 Bom L R 661

(q) (*labra* v *I anayak* (19 3) 3 Bom L R 19 7 I C .95 ('23) A B 261

(r) *Khaish* v *Y pmon* (183) 11 Cal 855

( ) *M A* v *Deno B da* (186) Bourke 119

(t) *Bhobo* ... v *Radha Prosad* (1910) 8 C I W N 109 *Bise* v *Jagbundoo* (1837) 7 M I A 431 *Thak r Da* v *Kishori Lal* (1887) 9 All 164

( ) *Lekha* v *Phauna* (1896) 18 All 101

( ) *Keda* v *Chandi* (1923) 34 Cal L J 19 I C 510 ('24) A C 5

(w) *I prale kwarashram* v *Sreerpenand the* (19 7) 29 Bom L R 1031 103 I C 61 (7) A B 493

(x) *L dri N rain* v *Shea Kow* (18) 17 Cal 512 17 I A 1 *Fajah A i* ... *Am* ... *Hosen* (189) 17 Cal 1 *Jumnabai* v *Fu...das* (189) 21 Bom 5 6 *S nds* v *Habib Chick* (1920) 47 All 6 5 60 I C 61

Court shall reject the appeal —The appeal should not be rejected if the order for security has been made without notice to the appellant (y)

Restoring of appeal —An appeal although it may have been rejected by the appellate Court under this rule upon failure of the appellant to furnish security may be restored on sufficient grounds at the Court's discretion ( ) It is no excuse for not furnishing security in time that the appellant is a wandering fakir for it is the duty of every litigant to keep in touch with his case (a) Where the applicant applies for extension of time and the Court after hearing him on the application refuses to extend the time and rejects the appeal the appeal should not subsequently be restored (b) No appeal lies from an order refusing to restore an appeal (c)

Appeal from order rejecting appeal under sub rule (2) —An order rejecting an appeal under this rule is not appealable as an order under O 43 for it is not one of the orders specified therein. Nor is it appealable as a decree for it does not *conclusively* determine the rights of the parties with regard to any of the matters in controversy in the appeal within the meaning of the definition of decree [s 2 cl (2)] (d)

Appeal from order dismissing application to receive security for costs —An order is made under sub rule (1) directing an appellant to furnish security for costs. The order is indefinite in that it does not fix the exact date on or before which security is to be given The appellant believing that the time for giving security has expired, applies to the Court to receive the amount fixed by the order as security The Court hold that the time for furnishing security has expired and refuses the application. The appellant is entitled to appeal from the order under cl 15 of the Letters Patent as the effect of the order would be to finally deprive the appellant of his right of prosecuting his appeal (e)

Insolvency appeal —There is a conflict of decisions as to whether this rule applies to the case of an appeal from an order passed by a Judge of the High Court exercising jurisdiction in insolvency under the Presidency towns Insolvency Act 1909 the High Court of Madras holding that it does not (f) while the High Court of Calcutta holds that it does (g)

Form —For form of security for costs of appeal see App G form No 4

11 [s 551] (1) The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader

Power to dismiss appeal without sending notice to lower Court

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear

(y) *S ralulh q v Khadim* (1883) 5 All 380 *T mmu v Deva* (1882) 5 Mad 265

(z) *Bal ant S gh v Da lat Singh* (1886) 8 All 315 13 I A 57 *Sunda v Hab b Chk* (19?0) 4_ All 6 6 60 I C 81 *Srini asam v Rukmani* (19_8) 5 Mad L J 330 ('28) A M 964

(a) *P rm v Ram P kash* (19 0) 2 Lah L J 391 68 I C 306

(b) *L To e v S 4 R M F rm* (19 9) 7 Rang 41 (9) A R 89

(c) *F o Begam v Abdul L tif* (1908) 30 All 143

(d) *Lekh v Bha na* (1896) 18 All 101 *Romes v Mon nd a* (19 1) 49 Cal 355 62 I C 751 ( ) A C 246

( ) *Vidhaypu na v Vidyanidhi* (190) 25 Mad. 6 4

(f) *Sesha Ayy r v Nagarathna* (1904) 27 Mad 121

(g) *Lakh priy v Raikishori* (1916) 43 Cal 243 3_ I C 3

11 when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred

Alteration in the rule —

1 In sub r (1) the words after sending for the record if it thinks fit to do so are new These words have been added to empower the Court to send for the record if it thinks fit to do so before summarily dismissing an appeal without giving notice to the respondent

2 The words the Court may make an order that the appeal be dismissed have been substituted for the words the appeal shall be dismissed for default to make it clear that no appeal lies from an order of dismissal for default See s 2 cl (2) sub cl. (b) Under the old section it was held that a decision dismissing an appeal for default was a decree and was therefore appealable (*h*)

Dismissal of appeal under sub rule (1) whether judgment necessary —Under the corresponding section of the Code of 1882 it was held by the High Court of Calcutta that the dismissal of an appeal under sub r (1) did not relieve the lower appellate Court from the necessity of writing a judgment in the manner prescribed by s. 574 of that Code [now r 31 of this Order] (*i*) A different view however was taken by the High Court of Allahabad (*j*) The present Order is divided into distinct parts under appropriate headings an arrangement which did not appear in the corresponding Chapter of the Code of 1882 Rule 11 comes under the heading Procedure on *admission* of appeal The next heading of the Order is Procedure on *hearing* and r 31 comes under the next following heading Judgment in appeal Relying upon this classification it was held by the High Court of Bombay in *Tanaji* v *Shankar* (*k*) that under the present Code it is not obligatory upon the lower appellate Court in dismissing an appeal under this rule to write a judgment as required by r 31 But this decision has since been overruled by a Full Bench of the same Court on the ground that it was in conflict with the previous practice of that Court which was based on a Civil Circular being Circular 51 published in 1890 under the provisions of the High Courts Act 1861 by which it is provided that when an appellate Court dismisses an appeal under s. 551 [now r 11 of this Order] a judgment should be written and a formal decree drawn up In the course of the judgment Sir Basil Scott C J said There is nothing in the new Code of Civil Procedure which introduces any change in the law except in so far as the rules commencing with rule 9 of Order XLI are headed Procedure on admission of appeal That change is not sufficient to abrogate the rule published under the High Courts Act which is quite consistent with the provisions of the Code (*l*). The result is that according to the Bombay High Court when an appeal is dismissed under this rule a judgment should be written and a formal decree drawn up The High Courts of Calcutta and Rangoon have given the same *decision* under the present Code (*m*). Even if the judgment is not pronounced in the form prescribed by rule 31 the decision is a decree (*n*)

(*h*) *Uma Sundari* v *Binode* (1897) 24 Cal 7 9

(*i*) *Tami Deka* v *Brojo Nath* (1898) 25 Cal 9

(*j*) *Sami Hasan* v *Piran* (1908) 30 All 319

(*k*) (1911) 36 Bom 116 I I C 661

(*l*) *Hemant* v *Annaji* (1913) 37 Bom 610 20 I C 966 (F B)

(*m*) *S endra Nath* v *Fatch ... Das* (19..) ... C W N 501 76 I C 10 (1923) A C ... *H ... D ...* v *Cadadar* (19 6) 43 C L J 49 96 I C 136 (1926) A C 97 ... S w v *Maw ...* (19 6) 4 Ra ... 64 9 I C 851 (1926) A R I ...

(*n*) *Altap Ali* v *J mur Ali* (1926) ... C W N 334, 93 I C 909 (1926) A C 635

Dismissal of appeal for default under sub rule (2)—Where an appeal is dismissed for default it is the decree of the lower Court alone that can be enforced in execution (o) See notes to s 36 What decrees may be executed

Review—Dismissal of an appeal under this rule bars a review of the judgment appealed against see notes under O 47 r 1 The order under this rule dismissing the appeal is itself subject to review and the practice of the Calcutta High Court is to grant a review and order the rehearing of the appeal *ex parte* (p) When a second appeal is dismissed under this rule the High Court has no power to review its judgment on the ground of the discovery of new and important matter (q) See notes to O 47 r 1 No review allowed on a question of fact after decision of second appeal

Re admission of appeal dismissed for default under sub rule (2)—An appeal dismissed under sub r (2) may be re admitted under r 19

Day for hearing appeal

12 [S 552] (1) Unless the appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day

Appellate Court to give notice to Court whose decree appealed from

13 [S 552] (1) Where the appeal is not dismissed under rule 11, the appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred

Transmission of papers to appellate Court

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the appellate Court

Copies of exhibits in Court whose decree appealed from

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made, and copies of such papers shall be made at the expense of, and given to, the applicant

Alteration in the rule—In sub rule (1) the words where the appeal is not dismissed under r 11 have been substituted for the words when the memorandum of appeal is registered

(o) *Shyam M dal* v *Satinath* (1917) 44 Cal 9 4 38 I C 493

(p) *Offi ial Tru tee* v *Penode* (19 4) 51 Cal 943 84 I C 147 (5) A C 114

(q) *Raja* v *Kali* (1914) 41 81 *S dabala* v I J 76 0 I C 408

Form —For form of intimation to lower Court of admission of appeal see Appendix G form no 5

14 [S 553] Publication and service of notice of day for hearing of appeal

(1) Notice of the day fixed under rule 12 shall be affixed in the appellate Court house, and a like notice shall be sent by the appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the appellate Court in the manner provided for the service of a defendant of a summons to appear and answer, and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice

Appellate Court may itself cause notice to be served

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to

Form —For form of notice to respondent see Appendix G form no 6

15 [S 554] Contents of notice

The notice to the respondent shall declare that, if he does not appear in the appellate Court on the day so fixed, the appeal will be heard *ex parte*

Procedure on hearing

16 [S 555] Right to begin

(1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal

(2) The Court shall then, if it does not dismiss the appeal at once hear the respondent against the appeal, and in such case the appellant shall be entitled to reply

Right to begin —The mere fact that the respondent calls in question the right of the appellant to appeal does not give the respondent the right to begin (r)

It is the duty of the appellant to satisfy the Court of appeal that the decision of the trial Court is erroneous (s) In every appeal it is incumbent upon the appellant to show some reason why the judgment appealed from should be disturbed There must be some balance in his favour to justify the alteration of the judgment as it stands (t)

(r) *Rustomji v Kessowji* (1884) 8 Bom 87

(s) *Secretary of State v Bijoy Kumar* (1924) 40 Cal L J 303 84 I C 73 (25) A C 224

(t) *Musst Fal urrissa v Moulvi Izarus* (19 1) 5 C W N 866 63 I C 898 (1) A PC. 55 (P C)

17 [S 556] (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed

Dismissal of appeal for appellant's default

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*

Hearing appeal *ex parte*

Alterations in the rule—The words the Court may make an order that the appeal be dismissed have been substituted for the words the appeal shall be dismissed for default to make it clear that no appeal lies from the order of dismissal for default (u) See sec 2 cl (2) sub cl. (b) and notes Order of dismissal for default p 11 above

Does not appear—See notes to O 9 r 9 Appearance

Dismissal of appeal on merits illegal—If the appellant does not appear the Court may if it thinks fit dismiss the appeal for default of appearance but it has no power to dismiss the appeal on the merits (v)

Re admission of appeal dismissed under this rule—See r 19 below

Order that the appeal be dismissed—See notes above Alteration in the rule

18 [S 557] Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing

The Court may make an order that the appeal be dismissed—The language of the rule clearly shows that the order of dismissal should not be made before the day fixed for the hearing of the appeal (w)

Re admission of appeal dismissed under the rule—See r 19 below

Appeal—An order under this rule is not open to appeal The proper remedy is an application under r 19 below for re admission (x)

Effect of dismissal of appeal against one or several respondents for non service of notice—A B and C obtain a decree for *joint possession* against D

(u) *Rukmin ayi* v *Paran Ch idra* (191) 3? C I 341 14 I C 8 3

(v) *Muhammad* v *Mana ikrama* (19) 45 M d. 88 *Has l v* v *Bedesh* (1) 8) 6 Rang 61 114 I C 30 (9) A R 11

(w) *Cha d a Nath* v *Kaliprasanna* (1908) 35 Cal 535

(x) *Attar Singh* v *Karm Chand* (1919) Punj Rec no 169 p 448 5? I C 179

D appeals from the decree A and B are served with the notice of appeal but C is not The appeal is thereupon dismissed as against C Is D entitled to proceed with the appeal as against A and B? No for even if the appellate Court heard the appeal and reversed the decree of the lower Court as regards A and B the decree of the lower Court not being reversed as regards C C could execute the *entire* decree (the decree being a *joint* decree) so as to nullify the decree of the appellate Court (y) See notes to O 22 r 4 Cases in which suit or appeal held to abate as a whole

19 [S 558] Where an appeal is dismissed under rule 11, sub rule (2), or rule 17 or rule 18, the appellant may apply to the appellate Court for the re admission of the appeal, and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re admit the appeal on such terms as to costs or otherwise as it thinks fit

Re admission of appeal dismissed for default

Shall re admit the appeal —These words have been substituted for the words *may* re admit the appeal The word may in the old section was construed by the High Court of Madras to mean shall ( )

Sufficient cause —*The carelessness of an advocate s* clerk does not constitute sufficient cause (a) But where the appellant s pleader appeared soon after the appeal was dismissed it was restored on the ground that the failure to appear was unintentional (b) The absence of appellant s pleader owing to an engagement in another Court has been held to be sufficient cause (c)

Appeal —An appeal lies from an order of *refusal to re admit* an appeal [O 23 r 1 cl (t)] But no appeal lies from an order *re admitting* an appeal (d)

Dismissal of appeal for failure to deposit costs of paper book or to pay court fees —Where an appeal is dismissed under the rules of a High Court for failure to deposit the costs of preparation of the paper book as required by the rules the decree may be set aside not by an order under this rule but by an order on an application for a review (e) So also if it is dismissed for failure to pay Court fees (f)

Inherent power to restore appeal dismissed for default —Although a cause may not amount to a sufficient cause within the meaning of this rule the Court has inherent power to pass an order of restoration if it considers that a case for restoration has been made out (g) According to the Bombay High Court (h) the Court has inherent power to admit an application for re admission that is time barred under Art 168 of the Limitation Act but the Lahore(i) and Madras (j) High Courts differ following *Neelarent* v *Narayana* (k) See note under O 9 r 9 Inherent power to restore suit dismissed for default

(y) *Baser* v *F zle* (1914) 19 C W N 90 23 I C 703
(z) *S mayya* v *S bb mma* (1903) 26 Mad 599 601
(a) *M ung Than* v *Zainat Bibi* (19 5) 3 Rang 488 92 I C 208 (6) A R 50 See also *Ram S khal* v *Maharajah Kesho Prasad* (1918) 3 Pat L J 18 43 I C 9
(b) *Balmukand* v *Wazir* (1923) 5 Lah L J 89 79 I C 979
(c) *Mrigendra* v *Dib la* (1926) 44 Cal L J 16 97 I C 573 (26) A C 1 31
(d) *Gulab Kunwar* v *Th kur Das* (190) 24 All 464
(e) *Fat munnissa* v *Deoki* (1897) 4 Cal 3 0 *A ant J oldar* v *M ngal Potdar* (19 5) 4 Pat 704 91 I C 483 (26) A P 7
(f) *Su ajpal Pandey* v *Utim Pandey* (19 1) 6 Pat L J 6 5 63 I C 99 (22) A P 281 *Anant* v *Mangal* (1925) 4 P t 704 91 I C 483 (26) A P 27
(g) *Gauran* v *Brij Raj* (1919) Punj Rec no 53 p 13 51 I C 607
(h) *Sonubai* v *Shivajir o* (1921) 45 Bom 648 60 I C 919 (21) A B 20
(i) *Bissamal* v *Kesar Si gh* (19 0) 1 Lah 363 58 I C 789
(j) *Krishnas mi* v *Chengalray* (19 4) 47 Mad 171 76 I C 836 (4) A M 114
(k) (19 0) 43 Mad 94 53 I C 847

Other remedy —The applicant is not confined to the remedy of restoration but may file another appeal if he is still within the period of limitation (*l*)

20 [s 559] Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent

Power to adjourn hearing and direct persons appearing interested to be made respondents

Interested in the result of the appeal —Where one of the holders of a decree has not been joined as a respondent to an appeal and the time limited for appeal has elapsed he is not interested in the result of the appeal within the meaning of this rule The rule therefore gives no jurisdiction to the appellate Court to join him (*m*) See notes to r 33 below

Limitation —A person *who was a party* to the proceeding in the Court below may be added as a respondent though the time to appeal against him has expired (*n*) But this cannot be done if the misjoinder has rendered the appeal incompetent as when an appeal is filed against some only of several joint decree holders (*o*)

Adding of parties under this rule discretionary —It is a question for the Court in its discretion to determine in each case whether or not it will make an order for the addition of a party as contemplated by this rule (*p*) A party will not be added merely in order to enable a respondent to file cross objections against him (*q*) According to the Madras High Court its powers are not limited by this rule and it can also act under O 1 r 10 (*r*) But the Allahabad High Court has held that a Court of appeal cannot add a party who was not a party to the suit (*s*) The Appellate Court has no power under this rule to add as a respondent to the appeal a person who was not a party to the original suit (*t*)

The Court will not under this rule add representatives of a deceased party to save an appeal that has abated (*u*) Nor will it add a respondent after the appeal against him is time barred (*v*)

Adding of parties in second appeal —Has the High Court power in second appeal to add a party who was a party to the suit but not a party in the first appeal? No according to the Allahabad High Court (*w*) Yes according to the Madras (*x*) Calcutta (*y*) and Patna (*z*) High Courts

(*l*) *S ajdeo Na a* v *Partap Rai* (19 3) Pat 739 7 I C 234 (23) A P 213
(*m*) *Chok lingan* v *S thei* (19 8) 5 I A 6 Ran 9 10 I C 237 (7) A PC
( ) *G ish Ch der* v *Sati Sekha e* (1906) 33 Cal 3 9 *Shahab D n* v *Mir n B ksh* (1914) Punj Rec no 79 p 27 25 I C 549 *D w n Sh b Nath* v *All nce B k of S mla Ltd* (1915) Punj Rec no 3 p 10 25 I C 4 0
(*o*) *B dri Na v n* v *East Indian R lw y* (19 6) 5 P t 755 98 I C 1003 (7) A P 23
(*p*) *Amlook Cha d* v *Sarat Chunder* (1911) 38 Cal 913 919 11 I C 943 *Midnapur Zamindary C* v *Amulya Nath* (19 6) 53 Cal 752 95 I C 619 (26) A C 893
(*q*) *Rajendra N th* v *M h Lata* (19 6) 53 Cal 270 91 I C 649 (27) A C 533
(*r*) *Bal s cami Aiyar* v *Lakshmana Aiyar* (19 1) 44 Mad 605 63 I C 374 (1) A M 17 [F B]
(*s*) *Sh m Lal* v *Dhanpat Rai* (19 5) 47 All 8 3 88 I C 493 (2) A A 768
(*t*) *Sh m Lal* v *Dha p t* (19 5) 47 All 8 3 *M j m* v *Sheth Ma ecklal* (19 J) 53 Bom 598
(*u*) *K li D y l* v *Nagendra* (1919) 24 C W N 44 54 I C 8 *Mani d a* v *Bhag bati* (19) 30 C W N 4 90 I C 986 (6) A C 335
(*v*) *Ch k l q m* v *Seethai* (19) 2 Rang 541 84 I C 5 (25) A R 108
(*w*) *Chun v Lal* *P m* (1894) 16 All 5 *Park ka ri* v *I m Khilawan* (1915) 37 All 57 26 I C 95
(*x*) *Paya* v *Ko m l* (1896) 19 Mad 151
(*y*) *D ga Ch n* v *Lakhi Narain* (1918) I C 91
(*z*) *P d th Mahton* v *Hitan Si gh* (1924) 8 I C 600 (4) A P 773

Form —For form of notice to a party to a suit not made a party to the appeal see Appendix G form no 7

21 [S 560] Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the appellate Court to re hear the appeal, and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him

Re hearing on application of respondent against whom *ex parte* decree made

See O 9 r 13 and notes thereto

Sufficient cause —Where counsel for respondent was unable to appear at the hearing as the respondent s agent had taken away the papers it was held that it was not sufficient cause for re hearing the appeal (*a*) But when the party s agent could not appear to instruct the pleader because of his daughter s illness this was considered sufficient cause (*b*)

Appeal —An appeal lies from an order of refusal to re hear an appeal [O 43 r 1 cl (t)]

22 [S 561] (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow

Upon hearing respondent may object to decree as if he had preferred separate appeal

(2) Such cross objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto

Form of objection and provisions applicable thereto

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection on such party or his pleader at the expense of the respondent

(*a*) *Baji Lal v Nawal Singh* (1917) 39 All 388 39 I C 636

(*b*) *Godhni v Shyam* (19 1) 19 All L J 517 63 I C 737 (1) A A 264

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit O 41, r

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule

Alterations in the rule —The words upon the hearing which occurred in the first paragraph of s 561 of the Code of 1882 [now sub r 1] between the words may and not only support have been omitted and sub rule (4) has been added See notes below under the head Sub rule (4) where the appeal is withdrawn or dismissed for default The words the party who may be affected by such objection in sub r (3) have been substituted for the words the appellant which occurred in s 561

Cross objections —If in a suit brought by *A* against *B* *B* sets up two defences and the Court of first instance decides both in *B* s favour and *A* appeals there is no scope for cross objections for cross objections cannot be filed as criticisms of a judgment (c) but if the Court decides in *B* s favour as to one and against him as to the other then if *A* appeals *B* may support the decree at the hearing of the appeal not only on the ground decided in his favour *but also on the ground decided against him without* filing any cross objections (*d*) In the case put above the decree was *entirely* in *B* s (respondent s) favour But if *A* s claim is decreed in part *A* may appeal from the decree alleging that the decree ought to have been for the full amount claimed by him And *B* also may appeal from the decree alleging that the suit ought to have been dismissed altogether If *A* appeals from the decree and *B* also appeals *B* s appeal is called a cross appeal. But instead of filing a cross appeal *B* may file cross objections under this rule In cross objections *B* may take any objection to the decree which he could have taken by way of appeal (*e*) If no cross objections are filed by a respondent the appellate Court has no power to grant any relief to him in a case where the granting of such relief is not necessarily incidental to the relief granted to the appellant (*f*) nor has it the power in the absence of cross objections to disturb so much of the original decree as is favourable to the appellant so as to place the appellant in a worse position (*g*) Appellate Court should not proceed to decide on a point not raised either by the appellant or respondent (*h*)

Support the decree —The respondent without filing cross objections may support the decree on grounds decided against him by the lower Court But this does not authorize the respondent to make out a case for a decree for the same amount by questioning some adjudication as to right found against him and as to which no appeal or objection has been filed The expression support the decree means support the decision and does not refer to the quantum of the decree (*i*)

(c) *Sahdeo* v *Kusum* (19) 1 Pat 258 (2) A P 4?3

(d) *L la Gauri Sanker* v *Janki Pe shad* (1890) 17 Cal 809 813-814 17 I A 57 *Bhagoji* v *B puji* (1889) 13 Bom 75 *Ram P s d* v *Musst Aj nana* (19) 44 All 577 63 I C 861 ('2) A A 280

(e) *Balak* v *Kaus l* (1882) 4 All 491

(f) *Kul ikada* v *Viswanatha* (1905) ?8 Mad 9 *Ca p z* v *Kish ri Lal* (1896) 23 Cal 9 9 9

(g) *Cheda Lal* v *B d llah* (18?9) 11 All 35 *Agil l* v *Din Nath* (1907) 34 Cal 996 *Sh les Chandra* v *Bechai* (19 4) 40 Cal L J 67 84 I C 1 4 ( ) A C 91

(h) *Sir P ody t Kumar* v *Bal Govinda* (19?5) 41 Cal L J 31 86 I C 6 ('2) A C 518

(i) *Sri Ranga* v *Srinavasa* (19 7) 50 Mad 866 104 I C 47 (7) A M 801

r 22 **Sub rule (4) where the appeal is withdrawn or has abated or is dismissed for default** —The old section commenced with the words any respondent may *upon the hearing* not only support the decree etc It was accordingly held that a respondent can be heard in support of his cross objections only *upon the hearing* of the appeal. If the appeal was withdrawn *before the hearing* the respondent it was held, had no right to be heard in support of his cross objections (j) though the Court might in such a case allow him to prefer a regular appeal from the decree (k) But if the hearing had *once commenced* the appeal it was held could not be withdrawn so as to prevent the cross objections being heard and determined (l) This distinction has now been done away with by the omission of the words upon the hearing in sub r (1) and by the addition of sub r (4) Under the present rule the *withdrawal* of an appeal is no bar to the hearing of cross objection filed by a respondent whether the appeal is withdrawn before or after the hearing Similarly the dismissal of an appeal *for default* is no bar to the hearing of cross objections This was correctly admitted in *Bhimasena* v *Venugopal* (m) a Letters Patent appeal but the reasoning so far as it proceeds on the assumption that O 41 does not apply to Letters Patent appeals seems opposed to the Privy Council decision in *Savitri* v *Savi* (n) The dismissal of an appeal upon the appellant s failure to give security for costs is a dismissal for default within the meaning of sub r (4) (o) But if the appeal has abated the respondent is not entitled to have his cross objections heard (p)

Under the old section the High Court of Allahabad held that the dismissal of an appeal as *filed out of time* was a bar to the hearing of cross objections (q) A Full Bench of the Madras High Court holds that the law is the same under the present rule (r) The Lahore High Court has held that an appeal must be properly filed before the Court in order that cross objections may be heard (s) and it has been held that where an appeal is dismissed on the ground of insufficiency of Court fee stamp the Court has no power to hear cross objections (t) The last mentioned decision is based on the ground that except in the case of the original appeal being withdrawn or dismissed for default as expressly provided for in sub r (4) the general rule that cross objections cannot b heard unless the appeal is decided on the merits is still in force But the dismissal of an appeal on the ground of *non joinder* of a party in a mortgage suit has been held not to be a bar to the hearing of cross objections the reason given being that in such a case the appeal *is* heard the question of non joinder being one that arises in the appeal itself and is not extraneous to it as would be a question as to whether it was presented in proper time or not (u)

Who may file cross objections —Cross objections under this rule can only be filed by a party who might have appealed from the decree of the Court below but has not done so It is not open to the party who has appealed and whose appeal has been dismissed subsequently to prefer cross objections under this rule *A* sues *B* for damages *A* s claim is decreed in part *A* appeals from that part of the decree which is against him *B* also appeals from that part of the decree which is against him *A* s appeal is heard and dismissed Before *B* s appeal is heard *A* files cross objections in *B* s appeal setting up the same grounds upon which in his own appeal he had asked

(j) *Jafar* v *Ranjit Singh* (1895) 17 All 518 *Ramjiwan* v *Chand Mal* (1888) 10 All 587 *Maktab Bey* v *Hasanali* (1886) 8 All 551

(k) *Hargovindas* v *Jadavahoo* (1899) 23 Bom 697

(l) *Dhondi* v *The Collector of Salt Revenue* (1885) 9 Bom 28

(m) (19 5) 48 Mad 631 88 I C 443 (25) A M 7 5

(n) (1921) 48 I A 76 48 Cal 481 60 I C 274 (21) A PC 80

(o) *Mowa Sheobaksh* v *M war Th k Deyal* (1919) 4 Pat L J 164 50 I C 7 9

(p) *Murugappa Chettiar* v *Ponnusami Pillai* (19 1) 44 Mad 828 6 I C 757 (1) A M 40 *Mulchand* v *Downi & Co Ltd* (19 9) 10 Lah. 08 110 I C 910 (8) A L 596

(q) *Ramjiwan* v *Chand Mal* (1888) 10 All 587

(r) *Alagappa* v *Chockalingam* (1918) 41 Mad 904 917 920 48 I C 203

(s) *Jai Gopal* v *M na Lal* (19 3) 4 Lah 140 73 I C 65 (4) A L 43

(t) *Dunichand* v *Aziz Khan* (1912) Punj Rec no 11 p 38 10 I C 207

(u) *Kombi Achen* v *Kochunni* (1898) 21 Mad 35

for relief *A* s cross objections should not be heard (*v*) Again *A* obtains a decree in a partnership suit which is against *B* one of the defendants as *ex parte* *B* does not apply under O 9 r 13 to set aside the *ex parte* decree *B* cannot therefore file cross objections in *A* s appeal that he should have been given a hearing (*w*) But in a case where *B* before the *ex parte* decree was passed presented a petition asking to be heard under the erroneous impression that the *ex parte* decree had already been passed it was held that he was not barred from filing cross objections on the ground that he was not heard (*x*) Cross objections as to costs in the Courts below will not be entertained in second appeal (*y*) O 41,

A respondent may urge cross objections against the appellant but not as a rule against a co respondent—It has been held by the High Courts of Calcutta Bombay and Allahabad that as a general rule the right of a respondent to urge cross objections should be limited to his urging them only against the appellant and that it is only by way of exception to this general rule that one respondent may urge cross objections as against other respondents the exception holding good in those cases in which the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co respondents (*z*) Thus in suits for dissolution of partnership and for accounts it is open to any respondent to prefer cross objections against a co respondent on any item in dispute between them The reason is that in such suits accounts are taken not between the plaintiff on the one hand and the defendants on the other but between all the partners *A* *B* and *C* constitute a partnership firm *A* sues *B* and *C* for dissolution of partnership and for accounts A decree is passed in the suit declaring the amount coming to the share of each partner on the taking of accounts *A* appeals from the decree *B* and *C* are joined as respondents to the appeal In such a case it is open to *B* to prefer cross objections against *C* in respect of an item in dispute between *B* and *C* (*a*) Similarly when the decree appealed from proceeds on a ground common to all the parties against whom it is passed and the appeal is preferred by *some* only of such parties *e g* where the suit is—*A* v *B* and *C* and a decree is passed both against *B* and *C* and the appeal is—*B* v *A* and *C* *A* who is the plaintiff respondent may prefer cross objections not only against *B* the appellant but against *C* the co respondent *A* sues *B* and *C* to recover Rs 5 000 alleged to be his share of the profits of certain lands A decree is passed for *A* for Rs 3 000 against *B* and *C* *B* appeals from the decree *C* does not join *B* in the appeal and he is therefore made a party respondent The appeal thus is—*B* v *A* and *C* In such a case it is open to *A* to prefer cross objections not only against *B* but also against *C* in respect of that portion of his claim that was disallowed by the Court of first instance namely Rs 2 000 (*b*) According to the Madras (*c*) and Lahore (*d*) High Courts a respondent may urge cross objections against a co respondent in any and every case Note in this connection the substitution in sub r (3) of the words the party who may be affected by such objection for the words the appellant which occurred in sec 561 of the Code of 1882

(*v*) *Ramji Das* v *Aj dhia* (1903) 25 All 6 8 *Parbhu* v *Mu l* (19 4) All L J 365 78 I C 667 (4) A A 867 *Soun d a* v *Nirm l* (19 8) 3_ C W N 863 (8) A C 882

(*w*) See Note on O 9 r 13

(*x*) *Ba a Lewas* v *Ammeenammal* (19 3) 45 Mad L J 805 79 I C 968 (4) A M 107

(*y*) *Madho* v *Ashhan* (19_3) 5 Lah L J 108 79 I C 977

(*z*) *Bishun Ch rn* v *Jogend a* (1899) 6 Cal 114 *Sh bi ddin* v *Deomoor t* (1903) 30 C l 655 *Kallu* v *Ma ni* (1901) 3 All 93 *Nu sey* v *Harrison* (1913) 37 Bom 511 21 I C 7 *Jad n dan* v *Deo Narain* (1911) 16 C W N 61 614 13 I C 653 *Abdul Ghani* v *Muhamm d* (1906) 8 All 95 *M th ra* v *Ram Kum* (1916) 43 Cal 790 8 8 35 I C 305 *M sleha* v *Ram Nar in* (1918) 40 All 536 51 I C 646 *Official Trustee of Bengal* v *Smith* (1920) 5 Pat L J 3 8 56 I C 6_ See also *Bh ban* v *Co-operati e Bank* (19 5) 9 C W N 784 88 I C 866 (5) A C 973

(*a*) *Balgob d* v *Pam Sarup* (1914) 36 All 50 "6 I C 83

(*b*) *Abdul Gh* v *Muhamm d* (1906) 3 All 9

(*c*) *Kulaii d* v *I ssr tha* (1905) _8 Mad 9 *Munisamy* v *Abbu* (1915) 38 Mad 0 _7 I C 3 3 [F B] *Alagappa* v *Chockal ng m* (1918) 41 Mad 904 917 48 I C 03

(*d*) *Chh jju* v *Qut b Din* (19 3) 5 Lah L J 9_ 69 I C 330 (3) A L 39

O 41, r 23 **Application for leave to file cross objections in forma pauperis**—An application for leave to file cross objections in forma pauperis may be received by the Court at any time (*e*)

Or within such further time—This rule requires that cross objections should be filed by the respondent within one month from the date of the service of notice of the appeal But the time may be extended if sufficient cause is shown (*f*)

Application of the rule—Cross objections may be filed not only in first appeal but also in second appeal (O 42) They may also be filed in appeals from orders preferred under sec 104 and O 43 [See O 43 r 2]

Second appeal—A second appeal will lie from a decree of the first appellate Court disallowing the cross objections of a respondent (*g*)

Letters Patent appeal—The Allahabad and Calcutta High Courts have held that the provision for respondents filing cross objections does not apply to Letters Patent appeals (*h*) but it is doubtful if this is correct in view of the Privy Council decision in *Sabitri* v *Savi* (*i*)

Form—As to form of memorandum of cross objections see App G form no 8

23 [S 562] Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re admit the suit under its original number in the register of civil suits, and proceed to determine the suit and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand

Remand of case by appellate Court

Alterations in the rule—The words and the evidence (if any) recorded during the original trial shall subject to all just exceptions be evidence during the trial after remand at the end of the rule are new

Scope of the rule—It is not competent to the appellate Court under this rule to remand the case for further evidence to the lower Court and to require that Court to *pass another decree* All that the appellate Court is empowered to do is to frame an issue and to send down that issue to the Court below for the return of a finding and it is the duty of the appellate Court after receiving that finding to dispose of the appeal upon the evidence before it (*j*) The appellate Court cannot after finding on facts remand the case to the lower Court to pass a decree in accordance with that finding (*k*)

Preliminary point—This rule enables the appellate Court to remand a case to the lower Court for determination on the merits if the lower Court has disposed of the suit upon a *preliminary point* and the decree of that Court is *reversed* in appeal The

(*e*) *Gobinda* v *Radha* (1910) 12 C L J 1 3 *Mussammat Ch nder* v *Mussammat Dulhin* (19 8) 7 P t 82 (28) A P 31
(*f*) *Sulleman* v *J sub* (1890) 14 Bom 111
(*g*) *Ganapati* v *Sith ma* (1887) 10 Mad 29
(*h*) *Re Mirza Himmat* (1866) B L R F B 429 *Kausalia* v *Gulab* (1899) 21 All 97 *Brojendra* v *Prosanna* (19 0) 4 C W N 1016 59 I C 489
(*i*) (19 1) 48 I A 76 48 C 1 481 60 I C 274 (1) A I C 80
(*j*) *Haradhan* v *Iswar Das* (1917) Pat L J 61 64 38 I C 797 *Hari Ram* v *Buta* (19 5) 7 Lah L J 351 (25) A L 480
(*k*) *Shiam* v *Banas* (19) 0 All L J 258 66 I C 866 (2) A A 19

expression preliminary point is not confined to such legal points only as may be pleaded in bar of a suit but comprehends all points or issues *whether of fact or of law* the determination of which has precluded the necessity for determining other points or issues which have therefore been left undetermined (*l*) A Full Bench of the Madras High Court defined it as any point whether of fact or of law the decision of which avoids the necessity for a full hearing of the suit (*m*) Thus where the lower Court dismisses the plaintiff's suit on the ground that it is barred by *limitation* or that the Court has no *jurisdiction* to hear the suit or that the *necessary leave* has not been obtained or that the plaint does not on the face of it disclose any *cause of action* (*n*) or that it is barred by the events in an earlier suit (*o*) and the appellate Court reverses the decree of the lower Court on those grounds it may remand the case to the lower Court to be proceeded with on the merits Where several issues are raised in a suit one of which is that of undue influence and the Court dismisses the suit on a finding that there was undue influence without a finding on the other issues the decision amounts to a disposal of the suit upon a preliminary point within the meaning of this rule (*p*) Similarly if *A* sues *B* to recover a sum of money on the basis of an award and four issues are framed one of which is whether the award is valid and binding and the Court after recording evidence on all the issues dismisses the suit on the ground that the award is invalid *leaving the other issues undecided* the appellate Court may if it finds that the decision of the lower Court on the issue as to the validity of the award is wrong remand the case to the lower Court to be disposed of on the merits It does not matter that evidence has been recorded *on all the issues* (*q*) But where the first Court has decided a suit on the merits of the whole ca e as where the suit is decided on all the evidence and on all the issu s the appellate Court cannot remand the case under this rule (*r*) Where the first Court heard the entire suit and *found* all issues in favour of the plaintiff except one namely whether the su t was maintainable having regard to the provisions of O 21 r 92 and dismissed the suit on the finding that the suit was not maintainable it was held by the Patna High Court that the suit was disposed of on a preliminary point within the meaning of this rule (*s*) This decision is in conflict with the decisions referred to above and it is submitted, is not good law To pass a decree in favour of the plaintiff on the strength of a plan put in by the plaintiff in a suit for possession of land is not a decision of the suit on a *preliminary* point and no remand can be made in such a case under this rule (*t*) In a Bombay ca e the appellate Court was of opinion that certain findings of facts were necessary for the disposal of the appeal and that evidence should be taken on those points and it made an order of remand under this rule It was held that the Court had no power to make the order under this rule though such an order could be made under Rule 25 below (*u*)

No order of remand can be made under this rule unless the lower Court has disposed of the *whole* suit upon a preliminary point This rule authorises a remand only where

(*l*) *Sheoambar* v *Lall* (1887) 9 All 6 note at pp 30 3? *Muhamm d Aladad* v *Muhammad* (1888) 10 All 289 *Ramachand a* v *Hazi K sim* (1893) 16 M d 07

(*m*) *Raman Nay r* v *Krish a* (19) 45 Mad 900 69 I C 8 8 (2) A M 505 [F B]

(*n*) *Kanakammal* v *Ranga harar* (1897) 0 Mad

(*o*) *Ramasami* v *Na yanasami* (19 5) 48 Mad L J 100 86 I C 548 (5) A M 483

(*p*) *Mahant Ra hu* v *M hant Ragh nath* (1917) 2 Pat L J 398 41 I C 20

(*q*) *Mata Din* v *Jamna D s* (1905) 27 All 691 *Meghan D be* v *P an S ngh* (1908) 30 All 63 *K mla* v *P bhu* (1916) 39 All 16 37 I C 383

(*r*) *R m h S gh* *Sheod n* (1890) 1 All 510 *M U l rj* v *P th ens* (1896) 19 Mad 4 9 *Abd lla Khan* v *M hamm d* (19 3) 45 All 565 74 I C 8 (3) A A 603 *Radha* v *K m l* (19) 3 Cal L J 345 0 I C 547 ('2) A C 456 *Infad Ali* v *Mohin* (19 3) 27 C W N 10 5 80 I C 6 3 (4) A C 148 *Lekhan Si gh* v *B bu Ram* (19 5) 3 All L J 880 88 I C 10 1 (6) A A 65 *Ganpat* v *Rajkumar* (19) 1 Pat 639 67 I C 494 (2) A P 57 *Kalu Dalpat* v *Na aj n* (19 7) 9 Bom L R 56 100 I C 579 (27) A B 111 *Chaudhary* v *Muth Jai* (19 7) 6 Pat 3 0 103 I C (2) A I 96 *B ka B h ri* v *B r nd a N th* (19 8) 5 Cal. 19 103 I C 864 ( ) A C 860

(*s*) *Phad* v *Sh kh Man war* (1919) 4 Pat L J 61 5 I C 1 5

(*t*) *Palani* v *R gadoss* (1909) 3 Mad 83 1 I C 746

(*u*) *Ann ji* v *Thakubai* (19 9) 53 Bom. 33 118 I C 90 (9) A B 175

r 23 the entire suit and not only a portion of it has been disposed of by the Court b low on a preliminary point (v) Assuming that the entire suit is decided on a preliminary point it is further necessary before an order of remand can be made under this rule that the appellate Court should also find that the decision on the preliminary point is wrong It is not a good ground therefore for making an order under this rule that the preliminary issue e g an issue of limitation has been decided by the Court of first instance on a wrong view of the burden of proof unless the appellate Court finds that the issue itself has been *wrongly decided* (w) Again if the lower Court decides the suit on several preliminary points the appellate Court should not remand the suit without deciding all those preliminary points (x)

Inherent power of remand Remand in case of error omission or irregularity—No order of remand can be made under the present rule except when the suit has been disposed of on a *preliminary* point There are however cases in which suits have not been disposed of on a *preliminary* point and yet the Courts have claimed the power to remand the cas professing to do so in the exercise of their *inherent* power [see s 151] These are cases in which the lower Court has committed any error omission or irregularity by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit and the party complaining of such error omission or irregularity has been materially prejudiced thereby Thus if a suit is defective for misjoinder of plaintiffs and causes of action the proper course is to return the plaint to the plaintiff for amendment and not to dismiss the suit (see notes to O 2 r 3 on p 441 above) If the lower Court dismisses the suit instead of returning the plaint for amendment the appellate Court may set aside the decree and remand the suit w th a direction to the lower Court to return the plaint to the plaintiff for amendment and to proceed with the suit after the plaint is amended (y) Similarly where a suit is brought in the name of a wrong person as plaintiff the appellate Court may direct the plaint to be amended and remand the case for re trial (z) Where time was granted to the plaintiff to produce his evidence—but neither he nor his pleader appeared on the day to which the hearing was adjourned and the lower Court instead of proceeding to dispose of the suit under O 17 r 3 dismissed the suit for default under O 17 r 2 it was held that the appellate Court had power to remand the case to be disposed of in the manner prescribed by O 17 r 3 (a) A case may also be remanded where the decision of the lower Court is given without taking the defendant s evidence (b) In a Bombay case (c) the lower Court had erroneously presumed the death of the mortgagor and decreed redemption by a person claiming to be his heir and the High Court reversed the decree and remanded the case for retrial after joining the mortgagor as a party

Sections 562 and 566 of the Code of 1882 [now rr 23 and 25 of this Order] were the only sections that provided for a remand The cases cited in the preceding paragraph did not fall under either of those sections Moreover the Code of 1882 contained a section (s 564) which prohibited the appellate Court from remanding a case except as provided by s 562 This section was found in its working to be embarrassing and to get over the difficulty presented by cases of the kind cited in the preceding paragraph the Courts resorted to their *inherent* jurisdiction That section has been omitted in this Code on the ground that it was unduly restrictive The absolute prohibition of s 564 having been removed the Court it is said is free under s 151 to make an order

(v) *Ba wan v Samman* (1889) 11 All 488 *Majiraj ba v Maga lal* (1895) 19 Bom 303 *Kanchan v B j Nath* (189) 19 C I 336
(w) *Hab b ullah v Lalta Prasad* (1912) 34 All 612 17 I C 94
(x) *Agent Bengal Nagpur Railway v Beha i Lal* (19 5) 52 C I 783 90 I C 4 6 (5) A C 716
(y) *S l ma Bibi v Sheikh Muhammad* (1896) 18 All 131 *Rajit Ram v Kalesar Nath* (1896) 18 All 396
(z) *Habib Bakhsh v B ldeo Prasad* (1901) 23 All 167 *Jadab v Anath* (1910) 37 Cal 171 5 I C 998
(a) *Badam v Nath i* (1903) 25 All 194
(b) *Perumbra v Subramanian* (1898) 23 Mad 445
(c) *Je hankar v Bai D vali* (19 0) 22 Bom L R 771 57 I C 5 5

of remand though the case may not fall either under this rule or rule 25 (*d*) It has **O 41** accordingly been held that as under the old Code so under the new Code an order of remand can be made though the suit was not disposed of on a point which can be called a preliminary point within the meaning of this rule provided such an order is necessary for the ends of justice (*e*) In *Nabin Chandra* v *Prankrishna* (*f*) however Stephen and Mullick JJ expressed the opinion that if the appellate Court had at all any inherent power to remand that power was taken away by s 107 read with O 41 rr 23 and 25 and that under s 107 an appellate Court can only remand a case subject to such limitations as may be prescribed that is prescribed by rules 23 and 25 of O 41 The view so expressed ignores entirely the specific provisions of s 151 of the Code In *Mani Mohan* v *Ramtaran* (*g*) Jenkins C J after observing that the combined effect of s 107 and O 41 r 23 was to limit the power of remand to the position described in O 41 r 23 said And this is the general rule except under special conditions which have no application in the circumstances of this case The view taken by Stephen and Mullick JJ was dissented from by a Full Bench of the Calcutta High Court in *Ghuznavi* v *The Allahabad Bank Ltd* (*h*) where it was held that the powers of the appellate Court as regards remand are not restricted to the case specified in O 41 r 23 but that the Court by reason of its inherent jurisdiction recognized and preserved in the Code [s 151] may order a remand in cases other than the case specified in O 41 r 23 if it be necessary for the ends of justice It has thus been held that an appellate Court may direct a plaint to be amended by adding parties and remand the whole case to the Court below (*i*) The High Court of Patna has followed the Full Bench ruling in *Ghuznavi s* case (*j*) So also the High Courts of Bombay (*k*) Madras (*l*) and Lahore (*m*) The Allahabad High Court treats the question as unsettled but puts a very wide construction on rule 23 (*n*) See notes to r 33 below Remand

Remand in appeal from ex parte decree —See notes to s 96 Appeal from ex parte decree

Remand in appeal from an order refusing to set aside an ex parte decree —In an appeal from an order refusing to set aside an *ex parte* decree the only case which can be remanded is the application under O 9 r 13 and not the original suit *A* obtains a decree *ex parte* against *B* *B* applies under O 9 r 13 for an order to set aside the decree on the ground that he was prevented by sufficient cause from appearing at the hearing but the application is refused *B* appeals from the order rejecting the application [O 43 r 1 cl (d)] If the order is reversed by the appellate Court the proper course for that Court is to remand the application to the lower Court to dispose of that application with due regard to the conditions of O 9 r 13 but not to remand the original suit for re trial (*o*)

(*d*) See Report of Select Committ e 1 th Febru ary 1908 *Narottam* v *M hanlal* (1913) 37 Bom 289 293 17 I C 891

(*e*) *Jambulayya* v *Raj mma* (1913) 36 Mad 49 15 I C 859 *Zohra Bibi* v *Zobed* (1910) 12 C L C J 368 7 I C 75

(*f*) (1914) 41 Cal 108 0 I C 39

(*g*) (1916) 43 Cal 148 33 I C 3 9

(*h*) (1917) 44 Cal 9 9 41 I C 598 S e also *Braj I da Si gh* v *Kansh I m* (191) 44 I A 218 2 6 45 C l 94 107 49 I C 43 *Misri S hu* v *Bish i* (1919) 9 Cal L J 419 5 I C 945 *Bhairab* v *Kali* (19 3) 37 Cal L J 491 74 I C 1038 ('23) A C 606 *J a e d a* v *I rofullananda* (19 8) 3 C W N 101 106 I C 54 (8) A C 81

(*i*) *L Al* v *Sara* (1916) 43 Cal 938 3 I C 91 *F dhakrish a* v *I enk la* (19 1) 48 Mad 713 84 I C 965 ( ) A M 2 9

(*j*) *Fagh na d n* v *Jad na dan* (1918) 3 Pat L J 53 43 I C 9 9 *Birjmohan* v *Deobh jan* (19 0) 5 Pat L J 146 58 I C 664 *Mi sst S mitra K er* v *Bam Kair* (19 0) 5 Pat L J 410 57 I C 561

(*k*) *Jeth lal* v *F jlal* (19) 46 Bom 184 63 I C 478 ( ) A B 267

(*l*) *A th ppa Chetty* v *R manathan Chetty* (1919) 37 M d L J 536 53 I C 401, criticized in *I aman N yar* v *Krishna* (19) 45 Mad 900 69 I C 8 8 ('9) A M 50 *S bba* v *Krishnam chari* (19) 45 Mad 449 69 I C 869 (2) A M 11

(*m*) *B is kh I am* v *Al l* (19 4) 6 Lah L J 153 8 I C 408 (24) A L 487 *Bhupi g* v *Premsing* (19 4) 5 Lah L J 384 76 I C 496 (' 4) A L 36 *Umm* v *Shah Mohammed* (19 4) 5 Lah L J 269 74 I C 47 (4) A L 36

(*n*) *Gokal Prasad* v *I amkumar* (1922) 44 All 176 64 I C 8 8 ( ) A A 54

(*o*) *Radha Kishan* v *Collecto of Jau pur* (1901) 3 All 220 8 I A 8

r 23 Appeal —An appeal lies under O 43 r 1 cl (u) from an order remanding a case where an appeal would lie from the decree of the appellate Court (*p*) This means that the order of remand is appealable only in cases in which an appeal would lie from the decree which would have been passed by the appellate Court had that Court decided the case without a remand (*q*) No appeal lies from a remand order in an appeal from an execution proceeding if the suit is of such a nature that by reason of s 102 no second appeal lies (*r*) If no appeal is preferred from the order of remand the party aggrieved by the order cannot afterwards dispute its correctness in an appeal from the final decree see s 105 sub s (2) and notes thereto But though an appeal lies from an order of remand it must be preferred according to the Calcutta High Court *before* the final disposal of the remanded suit otherwise it cannot be entertained The reason given is that the right of appeal given by s 104 and O 43 from orders specified therein ceases with the disposal of the suit (*s*) On the other hand it has been held by the High Court of Allahabad that the appeal may be preferred even after the decision of the remanded suit provided it is within the period of limitation The Allahabad Court proceeds on the ground that there is no provision in the Code imposing any such restriction on the right of appeal (*t*) The period of limitation for an appeal from an order of remand is 90 days from the date of the order [Limitation Act art 156]

Though an appeal lies under rule 1 of Order 43 from an order of remand no appeal will lie from the order when the order is itself made in an appeal preferred under any *other* clause of that rule Thus if an appeal is preferred under O 43 r 1 cl (a) from an order *under O 7 r 10 or under O 43 r 1 cl (j) from an order under O 21 r 92* or under O 43 r 1 cl (q) from an order under O 38 r 6 or under any other clause of Order 43 r 1 and the appellate Court allows the appeal and makes an order of remand no appeal will lie from the order of remand under O 43 r 1 cl. (u) The reason is that cl (u) of r 1 of O 43 is subject to s 104 sub s (2) which provides that no appeal shall lie from any order passed in appeal [it may be an order of remand] under that section (*u*)

Appeal from remand under the inherent power —When the order of remand is made under the inherent jurisdiction recognized in *Ghuznavi* v *The Allahabad Bank* (*v*) is it appealable ? There are several decisions against such an appeal (*w*) Mukerji J says an appeal lies because the order of remand is itself a decree (*x*) but if that were so the provisions of O 43 r 1 cl (u) would be superfluous The correct answer seems to be that rule 23 should be construed as widely as possible and that the right of appeal should not be curtailed except on very clear proof of circumstances justifying such curtailment Therefore even if the order of remand cannot be justified under the rule yet if it is in substance an order under that rule an appeal will lie (*y*) This

(*p*) *Ma Me M ja* v *Ma Mia Zan* (19 5) 3 Rang 490 9_ I C 368 (_) A R 0

(*q*) *Fai A m d* v *B da D n* (1911) Punj R c no 50 p 191 11 I C 315 *S w n S ngh* v *Mothu* (1914) Punj Rec no 85 p 299 23 I C 817 *Malap Kaur* v *Hak m S ngh* (1915) Punj Rec no 8 p 58 28 I C 441 *Waryam Singh* v *Harnam Singh* (1918) Punj Rec no 109 p 354 48 I C 379

(*r*) *Amba Prasad* v *Mu htaq Hussain* (19 0) 42 All 00 54 I C 432 *Cm* v *Sh h Muh mmad* (1922) 3 Lah 218 68 I C 849 (2) A L 1 8

(*s*) *M dhu S dan* v *Yamini Ka ta* (1905) 3 Cal 10 3

(*t*) *Cm n Yunuari* v *Jarb ndh n* (1908) 30 All 479

(*u*) *V ubat Si gh* v *B lde S ngh* (1911) 33 All 4 9 9 I C 666 *M thura* v *Nobin Chand a* (1897) 24 Cal 774 *Jhanday Lal* v *S rm n Lal* (1893) 1 All 291 *Chhubu Mian* v *Harcharon Das* (191) P R no 119 p 406 18 I C 529

(*v*) (1917) 44 Cal 9 9 41 I C 598

(*w*) *Ragh a d n* v *Jadunandan* (1918) 3 Pat L J 253 43 I C 9 9 *Sheik Muhammed Ma a ajar* v *Ra gasami* (192) 41 Mad L J 18 69 I C 8 6 (1) A M 716 *Biwakhi Ram* v *Alawal* (19 4) 6 Lah L J 153 78 I C 408 (4) A L 487 *Radha-krishna* v *Venk ta* (19 4) 48 M d 713 84 I C 965 ( ) A M 9 *Ma e Mam a* (1925) 3 Ran 490 92 I C 368 (5) A R 3 0 *Cha dhary* v *Mittu Ra* (19 7) 6 Pat 380 103 I C 2 (27) A P 36

(*x*) *Bhai ab Chandra* v *Kal K mar* (19 3) 37 Cal L J 491 4 I C 1038 (3) A C 606

(*y*) *B s m t* v *T ri sani* (19 0) 31 Cal L J 354 44 I C 416 *Prosan o* v *B udya* (19 0) 4 C W N 09 58 I C 515 *R dhakr sh a* v *Ka I m* (19) 35 C 1 L J 34 0 I C 54 ( ) A C 4 6 *Gok l Prasad* v *I i K mar* (19) 44 All 1 6 64 I C 8 8 (2) A A 54 *Bibi K lsuma issa* v *Ram Prasad* (19) 44 All 49 67 I C 713 (2) A 4 6 *Rajem Biswas* v *B had r Kh n* (1) 30 C W N 41 89 I C 44 ( ) A C 1258 *Jathari* v *Med* (19) 31 C W N 8 8 104 I C 4 ( ) A C 61

is, of course subject to the same condition that an appeal would lie from the decree of the appellate Court The Madras High Court has held that an order of remand in the inherent jurisdiction is not subject to revision (z) The Calcutta High Court says that if the order cannot be justified either under rule 23 or the inherent jurisdiction the proper remedy is to challenge its validity by revision (a)

Powers of High Court in appeal from order of remand—In an appeal from an order of remand preferred under O 43 r 1 cl. (u) the High Court is not confined to the question whether the order satisfies the requirements of the present rule but may also determine the correctness of the lower appellate Court s decision on the preliminary point on which the Court of first instance disposed of the case Thus if the Court of first instance dismisses a suit as barred by limitation and the appellate Court reverses the decree and remands the case under this rule and an appeal is preferred to the High Court from the order of remand the High Court ha the power to determine whether the point of limitation was correctly decided by the lower appellate Court (b)

Letters Patent appeal—An order of r mand made by a single Judge of the High Court in second appeal is a judgment within the meaning of cl. 15 of the Letters Patent and is appealable as such (c)

Privy Council appeal—See notes to s 109

Improper order of remand—Under the Code of 1882 an order under s 562 was appealable and a party might impeach the order of remand on appeal from the *final* decree When no appeal was preferred from the order of remand but the order was impeached on appeal from the final decree and the Court found that the order was improperly made the question arose as to whether the order should be treated as illegal or merely irregular The High Court of Allahabad held that if a remand was ordered in a case in which it ought not to have been ordered both the order of remand and all the proceedings subsequent thereto are void and illegal (d) On the other hand the Calcutta High Court held that the remand order and the sub equent proceedings are not illegal but merely irregular and the subsequent proceedings should not be set aside unless the remand had substantially affected the decision of the remanded suit on the merits and the party complaining of the irregularity was materially prejudiced thereby (e) [see s 99] The Madras High Court held that though an order of remand made in contravention of the provisions of s 562 is illegal yet the error may be cured by the consent of parties or by waiver (f) The whole difficulty has been got over in the present Code by enacting that a party who does not appeal from an order of remand in the first instance cannot afterwards dispute the correctness of the order on appeal from the final decree (g) see s 105 sub s (2)

Remand of case by consent for trial on issues not raised in appeal—The effect of an appeal is to re open the decree of the lower Court and it is competent to the appellate Court on the agreement of parties to remand the case to the lower Court for trial on issues not raised in the memorandum of appeal (h)

Trial Court—Jurisdiction to try the case remanded depends entirely upon the order of the appellate Court (i)

(z) *Mall yy v Ie a ya* (19) 6 Mad L J 90 100 I C 13 ( ) A M 135
(a) *B I B r v D tta* (1 8) 55 Cal 219 103 I C 864 ( ) A C 8 0
(b) *B l n v Imrat* (1881) 3 All 675 *Bl au v L paji* (1 90) 14 B m 14 *Ib ahim v Ib l* (1910) 17 C l 168 *Deokishen v I si* (18 0) 8 All 1 2 *S oal o Ch ina v A ppa* (1899) 21 Ma l 34
(c) *Gopi ath v Moheshwar* (1908) 35 Cal 1096 *Laldu Singh v Sanwal S ngh* (19) 3 Lah 188 67 I C 388 (8) A L 80
(d) *Rameshur v Sheodin* (1890) 12 All 510
(e) *Mohesh Chandr v J mirudd n* (1901) 28 Cal 3 4 followed in *Nab Chandra v Pran krishna* (1914) 41 Cal 108 20 I C 39
(f) *Manager of the Court of Wa ds v P ma ami* (1905) 28 Mad 437 See also *E k n ha Nath v Nawab Salim la* (1908) 1 C W N 590
(g) *M nshi Lal v I amasu* (19) 1 Pat 246 65 I C 175 ( ) A P 384 *Masih un nis a B bi v Kaniz* (19 1) 43 All 377 60 I C 975 (1) A A 2 6
(h) *Natesa v Venkatarama* (1907) 30 Mad 510
(i) Uth m n v Na na (19 3) 44 Mad L J 33 7 I C 314 (23) A M 351 But see *Raj kal v G p Nath* (19) 44 All 11 165 I C 813 ( ) A A 200

41, 25

24 [S 565] Where the evidence upon the record is sufficient to enable the appellate Court to pronounce judgment, the appellate Court may, after re settling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the appellate Court proceeds

Where evidence on record sufficient appellate Court may determine case finally

Scope of the rule —The scope of this rule is limited to cases in which the evidence upon the record is *sufficient* to enable the appellate Court to determine the suit (*j*)

This rule does not enable an appellate Court to declare a right in favour of one of the parties where no issue has been framed on the point and the right has not been set up in the lower Court (*k*)

Second appeal —See s 103 and notes thereto

25 [S 566] Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required

Where appellate Court may frame issues and refer them for trial to Court whose decree appealed from

and such Court shall proceed to try such issues, and shall return the evidence to the appellate Court, together with its findings thereon and the reasons therefor

The words and the reasons therefor in paragraph 2 are new

Scope of the rule —This rule refers to cases in which the evidence upon the record is *not sufficient* to enable the appellate Court to determine the suit

May if necessary frame issues —In framing issues under this rule the appellate Court should have regard to the provisions of O 14 r 3 which indicate the materials from which issues are to be framed The issues may be on points not taken in the grounds of appeal (*l*) See notes to O 14 rr 1 to 5

Power of Court to which issues are referred for trial under this rule —The Court to which issues are referred for trial under this rule has no power to try and decide the case but to try issues only It should then return the evidence to the appellate Court together with its findings thereon and the reasons therefor (*m*)

(*j*) *Bandi v Madalapall* (1880) 3 Mad 96
(*k*) *Official Trustee v Krishna* (1886) 12 Cal 239 I I A 166
(*l*) *Chandulal v Lakhmi Chand* (19 3) 5 Lah L J 49 85 I C 9 (I) A L 5
(*m*) *Doulal v Bisseur* (1874) W R 207 *Habib v Baldeo* (1901) 23 All 16 1 1

Nor has it the power to make an order of reference under schedule II para 3 of the Code (n)

Court by which issues should be tried —Where issues are referred for trial under this rule they are triable only by the Court which was originally seized of the case and by no other Court (o)

New issue raised before High Court — Even if it be competent to the High Court [in second appeal] to remit a case for re hearing on an issue not raised in the pleadings nor even suggested in the Courts below this ought only to be done in exceptional cases for good cause shown and on payment of all cost thrown away (p)

Appeal —No appeal lies under the Code from an order referring issues for trial under this rule (q) Nor does an appeal lie under the Letters Patent (r)

26 [S 567] (1) Such evidence and findings shall form part of the record in the suit, and either party may, within a time to be fixed by the appellate Court, present a memorandum of objections to any finding

Findings and evidence to be put on record Objections to finding

(2) After the expiration of the period so fixed for presenting such memorandum the appellate Court shall proceed to determine the appeal

Determination of appeal

Where no memorandum of objection is filed —This rule provides that either party may file a memorandum of objection to the findings by the lower Court on the issues referred to it by the appellate Court It is not to be supposed however that if no objections are filed by either party the appellate Court is absolved from hearing the appeal (s) But the Lahore High Court has held that the Court may in its discretion decline to hear objections if none have been filed (t) Sub r (2) clearly indicates that even if no objections are filed the appellate Court shall proceed to determine the appeal That is to say even if no objections are filed to the findings the appellate Court is bound to examine the correctness of the findings and to state in its judgment the reasons (r 31) for which it either accepts or rejects the findings (u) It should not accept the findings blindly without examining the evidence on which they are based (v) See notes to r 31 Shall state the reasons for the decision

Where the appellate Court has heard arguments on some of the issues and has expressed its views thereon and remitted other issues under r 25 it is not bound on the return of findings to hear the case *de novo* but may confine counsel to argument upon the findings (w)

The appellate Court shall proceed to determine the appeal —When an appellate Court has made an order referring issues for trial under r 25 the return to

(n) *Nand Ram* v *Fakir Chand* (1885) 7 All 5 3
(o) *Ali Sh Khan* v *Ahmad* (1907) 29 All 660 *Lahore Bank Limited* v *Lakhi Ram* (1913) Punj Rec no 105 p 39 19 I C 970 (no power to delegate)
(p) *Ram Chandra* v *Secretary of State for India* (1916) 43 I A 17 178 43 Cal 1104 1116 37 I C 3
(q) *Kali Kristo* v *Ram Chunder* (1881) 9 C L R 461
(r) *Bara Estate Ltd* v *An p Chandra* (1917) 2 Pat L J 663 41 I C 337
(s) *Subbaya* v *Ram* (1899) Mad 314
(t) *P rtab S gh* v *Acha Singh* (19 1) 3 Lah L J 0 67 I C 846 (21) A L
(u) *Ku hi* v *Kutti* (1897) 20 Mad 496
(v) *Akbari* v *Wuay t Al* (1880) All 908 *Umed Ali* v *S lima B bi* (1884) 6 All 383 *Mumta Begam* v *Fat h H in* (1884) 6 All 391 *Bhagwan* v *Kesu* (1893) 17 Bom 4 3 *P mchand a* v *Sono* (189) 19 Bom 551
(w) *Lachman* v *Jamna* (1888) 10 All 16

I, such order must be made to the same Court and such Court is not competent to transfer
27 the appeal for disposal to another Court (*x*)

Unnecessary reference—In the case of a unnecessary reference under r 25 can the Court disregard the findings returned? It can if the reference order is of a single Judge and the appeal is heard ultimately by a Bench of two Judges (*y*) But not otherwise for it is an interlocutory order made with jurisdiction and operative in law until set aside in review (*z*) If the findings conflict with other findings of fact in the judgment this will not embarrass a Court of first appeal where the entire evidence is examined A Court of second appeal may however be embarrassed and it is therefore preferable not to resort to the rule in second appeal (*a*) but to remand under the inherent jurisdiction (*b*)

Second appeal—The provisions of this and the preceding rule apply so far as may be by virtue of O 42 to second appeals Hence the High Court may in second appeal refer issues of *fact* for trial to the lower appellate Court but when the finding and evidence upon such issues are returned to the High Court the finding is conclusive and it cannot be challenged *upon the evidence* before the High Court as in first appeal The reason is that second appeal is not allowed on questions of *fact* The only grounds on which a second appeal is allowed are those mentioned in s 100 and these relate to errors of law or usage having the force of law or a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case on the merits The objections to the findings must therefore be restricted to the limits within which the original pleas in second appeal are confined (*c*)

Sending back case for revised finding—An appellate Court has no power to send back a case to the lower Court to submit a *revised* finding on the fact on evidence already recorded Such a course is not warranted by any one of the rules 23 to 26 of this Order (*d*) But if it does so it is mere irregularity within the meaning of s 99 and if the appellate Court on the revised finding returned to it itself *considers the evidence on which it is based the decree will not be set aside in appeal* (*e*)

Production of additional evidence in appellate Court

27 [s 598] (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause

(*x*) *Udit Nara n* v *Jhanda* (1893) 15 All 315 *Kuma sami* v *Subb aya* (1900) 23 Mad 314

(*y*) *Mubarak* v *Bihari* (1894) 16 All 306 *Jnanendra Nath* v *Surjya Kant* (1912) 17 C W N 46 15 I C 39 *East Indian Railway Co* v *Changai Khan* (1915) 4 Cal 888 8 I C 215

(*z*) *Hook* v *Adm nist ator General of Bengal* (19 1) 48 I A 187 48 Cal 499 60 I C 631 (21) A I C 11 *Kam ni Kuma Deb* v *Du ga Cha n* (19 3) 37 Cal L J 1 74 I C 39 (23) A C 5 1

(*a*) *Kamini Kuma Deb* v *Durga Charan*, supra

(*b*) *Ghaznavi* v *Allahabad Bank* (1917) 44 Cal 9 9 41 I C 593

(*c*) *Bal Kishen* v *Jasoda Kuar* (1885) 7 All 765 *Ram Mehr* v *P li I m* (19 4) 5 Lah 269 78 I C 404 (25) A L 455 See also *Gopal S ngh* v *Jhakri Rai* (1886) 1 Cal 37 *Beni Prasad* v *Nand Lal* (1897) 24 Cal 98 both cases under r 27 below

(*d*) *Venkata* v *Anantha Chariar* (1893) 16 Mad 99 (P C)

(*e*) *Mallikarj na* v *Patha eni* (1896 19 M d 479

the appellate Court may allow such evidence or document to be produced, or witness to be examined O

(2) Wherever additional evidence is allowed to be produced by an appellate Court, the Courts shall record the reason for its admission

When additional evidence may be admitted—Under this rule the admissibility of additional evidence is made to depend not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage but upon whether or not the appellate Court requires the evidence to *enable it to pronounce judgment or for any other substantial cause* (*f*) Additional evidence under this rule should not be taken until the appellate Court *has examined the evidence on the record* and has *after* such examination come to the conclusion that the evidence as it stands is inherently defective as for instance when the lower Court has omitted to take the evidence of an attesting witness to a mortgage deed (*g*) Until this is done the appellate Court has no power to admit additional evidence not even if the evidence offered be the evidence of new matter discovered after the Court of first instance had pronounced its judgment As observed by their Lordships of the Privy Council in *Kessowji Issur* v *G I P Ry* (*h*) the legitimate occasion [for the application of the present rule] is when on examining the evidence *as it stands* some inherent lacuna or defect becomes apparent not where a discovery is made outside the Court of fresh evidence and the application is made to import it This decision seemed to lend support to the view taken in the Calcutta case last quoted that the test of admissibility is the requirement of the Court itself and this construction has often been put upon this rule (*i*) But in truth sub rule (b) falls into two parts (1) the requirement of the Court and (2) any other substantial cau e *Kessowji s* case dealt with (1) only because (2) was barred by an unsuccessful application for review to the lower Court However a recent decision of the Privy Council makes it clear that the appellate Court has a discretion to admit additional evidence for substantial cause (*j*)

The power given under this rule should be exercised very sparingly by the Courts and great caution should be exercised in admitting new evidence (*k*) Additional evidence must not be admitted to enable a plaintiff to make out a fresh case in appeal If cases were remanded for the purposes of allowing parties to make out a new case or to improve their case by calling further evidence there would be no end to litigation (*l*) An appellant who has ample opportunity of giving evidence in the lower Court and elects not to do so but rests his case on the evidence as it stood ought not to be allowed to give evidence which he could have given below (*m*) Similarly the appellate Court should not take evidence which the lower Court refused to take as it was tendered after the case was closed (*n*) or admit a document tendered by a party if having the opportunity of tendering it in the Court below he omitted to do so (*o*) though as in *Sreemati* v *Secretary of State* (*p*) this may sometimes be permitted on terms as to costs Nor should it allow

(*f*) *In the goods of Premchand* (1894) 21 Cal 484 486

(*g*) *Ba k of Bengal* v *Lucas* (19 4) 54 Cal 185 81 I C 471 (4) A C 578

(*h*) (1907) 31 Bom 381 34 I A 115 *Krish namma* v *Nar simha* (1908) 31 Mad 114 *Garden Reach Spg & W g Co* v *Secret y of State* (1915) 4 Cal 675 28 I C 865

(*i*) *Bombay Sin g Co* v *Kusumgar* (19 3) 47 Bom 674 84 I C 74 (24) A B 2 7

(*j*) *I drajit* v *Am si gh* (19 3) 50 I A 183 2 I t 676 74 I C 747 (3) A PC 1 8 *Indrabhusan* v *Ja a dhan* (19 4) 8 C W N 945 82 I C 104 (4) A C 1071

(*k*) *S eemanch inder* v *Gop l h nder* (1866) 11 M I A 28 7 W R 10 *R m Pershad* v *R j der* (1866) 6 W R 26

(*l*) *Hurp shad* v *Sheo Dyal* (1876) 6 W P 3 I A 259

(*m*) *Ramdas* v *Official L q idator* (1887) 9 All 366

( ) *Vaishno* v *Hemraj* (19) 4 Lah L J 371 (1) A L 9

(*o*) *Z h ah Bhugwan* (1871) 16 W R 11 *N e dra Nath* v *Radha Charan* (1918) 46 Cal 119 128 48 I C 314

(*p*) (19 3) 50 Cal 276 70 I C 510 (3) A C 33

r 27 additional evidence to prove the genuineness of a document held by the lower Court to be a fabrication (q) It must however be noted that where additional evidence is taken by the High Court with the assent of both sides it is not open to either party to complain of it (r)

Where the lower Court has refused to admit evidence—An appellate Court should not reverse the decree of the first Court without allowing the decree holder to give evidence which he offered in the first Court and which that Court declined to take (s) The improper rejection of evidence does not justify the reversal of the decree and the appellate Court should in that case act under this rule (t)

Where the appellate Court requires any document to be produced—An appellate Court has no power under this rule to require a document to be produced unless *it is required to enable it to pronounce judgment* *Where judgment could be pronounced* in the absence of the document the appellate Court should not allow the docume t to be produced (u) The word requires means nothing more than needs or finds needful (v)

Where the appellate Court requires a witness to be examined—The appellate Court should not under cl (b) of this rule take additional evidence wh.h impeaches the testimony of a witness called in the Court below unless that witness is also called and given an opportunity to contradict or explain the additional evidence so given otherwise no witness whatever his standing would be safe from adverse judicial comment (w) Where a witness was examined and cross examined in the Court of first instance and there was no gap in the evidence nor any new matter about which it was necessary to examine him and the appellate Judge merely cross examined him on his previous evidence in order to enable him to pronounce judgment it was held that the examination of the witness by the Court was not warranted by the provisions of this rule (x)

Or for any other substantial cause —The cause referred to here need not be *ejusdem generis* with the causes stated in the earlier part of the rule (y) The expression any other substantial cause confers a wide discretion on the appellate Court to admit additional evidence *when the ends of justice require it* ( ) It ha accordingly been held that the discovery after the filing of the appeal of fresh evidence not known to and available to the appellant after due diligence during the pendency of the proceedings in the first Court is a substantial cause within the meaning of this rule justifying the admission of such evidence in appeal (a) The Privy Council have made this clear in the case of *Indrajit* v *Amar Singh* (b) The sole issue in that case was whether a grant comprised certain villages The grantor had leased them prior to the grant and claimed that they were not included in the grant The first Court decided in favour of the grantor as there was no evidence to show that any arrangement had been made by the grantor with reference to the rent payable by the lessee The grantee appealed and during the appeal discovered documents contemporaneously executed by the grantor directing the lessee to pay rents to the grantee and an under lessee to pay his rents to

(q) *Yadiar Chand* v *Chunder* (1888) 15 Cal 765
( ) *Jagarrath* v *H numan* (1909) 36 I A 2 1 36 Cal 833 3 I C 465
(s) *A jun* v *Sh nka* (1898) 22 Bom 253 *Appa* v *Vithob* (1869) 6 B.H C.A 88 *Pabitra Kunwar* v *The Maharajah of benares* (1908) 30 All 367
(t) *Raja Joyt* v *Jadu* (1921) 34 Cal L J 160 64 I C 693 (21) A C 12 *Gokul Pande* v *Baldeo* (1928) 7 Pat 90 105 I C 26 (28) A.P 113
(u) *Kal ka* v *Tul i* (1916) 1 Pat L J 435 37 I C 1008
(v) *Kessowj Issur* v *G I P Ry* (1907) 31 Bom 381 34 I A 115
(w) *Jagrani* v *Kuar Durga* (1914) 41 I.A 76 36 All 93 22 I C 103
(x) *Muhammad* v *Mahmud un-Nissa* (1928) 35 All 191 193 194 33 I C 334
(y) *Andiappa* v *Muthukumara* (1913) 36 Mad 477 479-480 14 I C 140
(z) *Ambuja* v *Appadur i* (191) 38 Mad 414 30 I C 40. *Bhairab* v *Kali* (19 3) 37 Cal L J 491 74 I C 1038 (3) A C 606
(a) *Venkatachella* v *Panga* (1915) 28 Mad LJ 334 28 I C 694
(b) (19 3) 50 I.A 183 Pat 676 74 I C 747 (23) A PC 1 8

the lessee These documents the High Court of Calcutta on its construction of *Kessowji's* case held they had no jurisdiction to admit as additional evidence But as to this the Privy Council said — **O 41,**

Both in the case of *Sree Manchunder Rey* v *Gopalchunder Chuckerbutty* (c) and *Kessowji Issur* v *Great Indian Peninsula Railway* (d) their Lordships were dealing with the power of the appellate Court to require evidence to be produced for the purpose of enabling the Court to pronounce judgment Those cases did not refer to the right of one or other of the parties to produce evidence which he considered essential to the right determination of the action Under Order 47 rule 1 which reproduces section 623 of the Code of Civil Procedure Act 14 of 1882 a party has a right to apply for a review of judgment to the Court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in rule 1 In the present case an appeal has been preferred and a review was therefore out of the question and the respondents took the only and proper course to apply to the High Court which was in possession of the case to admit the additional evidence either under general principles of law or under the specific provisions of rule 27

The reference to the general principles of law somewhat weakens the judgment but it does appear that the grounds stated in O 47 r 1 do constitute other substantial cause (e) In another case Privy Council said that the power to take additional evidence is a power which should be exercised by a Court of Appeal with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised and that such additional evidence when admitted will be evidence which if produced at the trial would have been admissible (f)

Inability to understand the legal issues involved is not substantial cause (g) nor the slackness of the party or his legal advisers (h) The Privy Council refused to allow a party an adjournment to produce the record of a former suit when the absence of this evidence was due to his own remissness (i) If the appellate Court does require a witness not called by inadvertence in the lower Court it is an error of law but one which does not justify interference in revision (j) Again if the party could have applied to the lower Court for an adjournment to call further evidence but does not do so and takes the chance of a judgment in his favour on the evidence at his disposal he will not be allowed to call it in the appellate Court (k)

Recording of reason for admission of additional evidence—The provision requiring an appellate Court to record its reason for admitting additional evidence is merely directory and not imperative Hence the omission to record the reason does not render the evidence inadmissible (l) But if one party is allowed to adduce additional evidence the opposite party should be allowed to call rebutting evidence (m) and when additional evidence was recorded and no reason stated for its admission the suit was remanded with a direction to allow the opposite party to adduce rebutting evidence (n) When the Court after the suit was adjourned for judgment recalled and examined the plaintiff without recording reasons and without giving notice to the other side it was held that it had acted without jurisdiction (o)

(c) (1866) 11 M I A 28 7 W R 10
(d) (1907) 34 I A 115 31 Bom 386
(e) *Subbaiya* v *Rang* (19 5) 48 Mad L J 3 85 I C 385 (5) A M 181 *Badri Das* v *Hoshiar* (19 5) 47 All 412, 86 I C 761 (5) A A 288
(f) *Mahomed Khaleel* v *Les Tanneries Lyonnaises* (19 6) 53 I A 84 49 Mad 435 94 I C 67 (6) A M 34
(g) *Fameshra* v *Kalpa* (19 4) 46 All 64 84 I C 84 (24) A A 638.
(h) *Wali Muhammad* v *Muhammad Buksh* (1924) 5 Lah 84, 80 I C 998 ('24) A L 444
(i) *Radhakishun* v *Khursh d Hussa n* (19 0) 47 Cal 66 47 I A 11 55 I C 939 *Muhammed Baksh* v *Shad Muhammed* (1927) 8 Lah 1 3 100 I C 60 (27) A L 272
(j) *Gaya* v *Nama* (19 0) 5 Pat L J 263 58 I C 983
(k) *Isaacs* v *Hobhouse* (1919) 1 K B 398
(l) *Gopal* v *Gh kri* (1886) 1 Cal 37
(m) *Ramzan* v *Nabi Bux* (19 4) 6 Lah L J 234 80 I C 530 (24) A L 638
(n) *Kebal* v *Laya* (19 4) 39 Cal L J 61 81 I C 999 (2) A C 98
(o) *Hansraj* v *Shiam S der* (19 1) 19 All L J 407 63 I C 4 3 ('21) A A 408.

Second appeal—Except in the case provided in s 103 the High Court is precluded in second appeal, by virtue of the provisions of s 100 from entering into questions of fact Therefore if the Court of first appeal has *admitted* additional evidence under this rule the hearing in the Court of second appeal will not for that reason be treated as a first appeal so as to entitle the parties to go into questions of fact (p)

No appeal lies from a *refusal* by the lower appellate Court to admit fresh evidence under this rule (q) Hence if the lower appellate Court refuses to admit a document as additional evidence in appeal under this rule the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the lower appellate Court (r) But in *Jetalal* v *Varajlal* (s) a case was remanded under the inherent jurisdiction to the first appellate Court with a direction to admit additional evidence

Privy Council appeal—The rejection of an application under this rule does not give a right of appeal to the Privy Council (t)

Mode of taking additional evidence

28 [S 569] Wherever additional evidence is allowed to be produced, the appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the appellate Court

It need hardly be stated that where the additional evidence taken by the Court consists of documents they should be exhibited in the case (u) The lower appellate Court resumes its functions as a Court of first appeal and can appoint under s 75 a commissioner for the examination of witnesses (v)

Points to be defined and recorded

29 [S 570] Where additional evidence is directed or allowed to be taken, the appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified

Judgment in Appeal

Judgment when and where pronounced

30 [S 571] The appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders

(p) *Ben Pershad* v *Nand Lal* (1897) 24 Cal 98 *Gopal* v *Jhakri* (1886) 12 Cal 37

(q) *Premchand in the goods of* (1894) 21 Cal 484 *Ram Piari* v *Kallu* (1901) 23 All 121 *Durga Prasad* v *Jai Narain* (1911) 33 All 379 9 I C 65

(r) *Vaithinatha* v *Kuppu* (1919) 42 Mad 737 53 I C 274 [F B]

(s) (192) 46 Bom 184 63 I C 478 (1921) A.B 26

(t) *Premchand in the goods of* (1894) 21 Cal 484

(u) *Daji* v *Sakharam* (1914) 38 Bom 665 2 I C 33

(v) *Labh Singh* v *Ram Lal* (19 4) 5 Lah 25 18 I C 589 (5) A L 39

After hearing the parties or their pleaders—This rule authorizes the Court to pronounce judgment after hearing the parties or their pleaders Hence a judgment pronounced without hearing the parties or their representatives if they are dead is unauthorized by the Code Thus where an appellate Court heard and decided an appeal without being aware of the death of the appellant the decree was held to be a nullity (w)

Contents date and signature of judgment

31 [S 574] The judgment of the appellate Court shall be in writing and shall state—

(a) the points for determination

(b) the decision thereon

(c) the reasons for the decision, and,

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled,

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein

Shall state the reasons for the decision—The judgment of the appellate Court should state the *reasons* for the decision The reason of the rule has been stated to be to afford the litigant parties an opportunity of knowing and understanding the grounds upon which the decision proceeds with a view to enable them to exercise if they see fit and are so advised the right of second appeal conferred by s 100 If an appellate Court could dispose of appeals coming before it in a judgment which does not state the reasons for the decisions the right of second appeal might altogether be neutralized (x) The reason for the decision should be stated not only when the decree of the first Court is varied or set aside but also when it is confirmed (y) If this rule is not observed the proper form of the order to be made by the High Court in second appeal is to set aside the decree of the lower appellate Court and send back the case to that Court in order that the appeal may be disposed of according to law (z) This course was adopted where the judgment was appeal dismissed with costs (a) and in another case where the judgment was appeal rejected under s 551 [now O 41 r 11] of the Civil Procedure Code (b) Where the decree of the first Court is confirmed in appeal the Judge of the appellate Court should state *his own reasons* and should not confine himself to approving of the reasons of the Court of first instance (c) This is because the judgment should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised *his own discrimination* in deciding them (d) Thus where the judgment was— To deal with the grounds of appeal would be simply to repeat the judgment of the District Munsif I concur with the decision the District Munsif has given on each point The judgment of the lower Court is confirmed *for the reasons therein set forth* and this appeal is dismissed with costs the judgment was set aside (e) In the last mentioned case the Court observed Such a general and wholesale

(w) *Janardhan* v *Ramchand a* (190) 6 Bom 31 *Na t* v *Kalu* (19 0) 2 Lah L J 144

(x) *Assan ullah* v *Hafiz* (1884) 10 Cal 932 935

(y) *Rami Deka* v *Brojo Nath* (1898) 5 Cal 97 *Babu Mahda* v *Venkatesh* (189) 16 Bom 540

(z) *Saravana Pillai* v *Stha Reddi* (1908) 31 Mad 469

(a) *Srikant* v *Hari Dass* (1882) 11 C.L.R 131

(b) *Rami Deka* v *Brojo Nath* (1898) 25 Cal 97 *Su en l* v *I gh th* (19 3) 27 C W.N 501 6 I C 105 (3) A C 558

(c) *Rohi ni* v *Zamiruddin* (1881) 8 C L.R 597 *Ki a i* v *S babhat* (1884) 8 Bom 28

(d) *Gupta* v *Behari* (1923) 1 All L.J 567 74 I C 8 7 (4) A.A 100

(e) *Sitara a* v *Surya* (1899) Mad L *Sohan n* v *Babu Na d* (1887) 9 All 6

31 adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law The same was held where the judgment was there is no *satisfactory evidence* that plaintiff was ever in possession of the land in dispute and the evidence was not discussed in the judgment (*f*)

If the reasons for the decision are not stated by the appellate Court *as fully as they ought to have been* but the High Court is satisfied upon the judgment that the Judge of the lower Court had read the evidence and meant to find upon that evidence as a whole the decree of the lower Court will not be interfered with in second appeal. The proper course to be followed in such a case is to require the Judge if still holding office to supplement his judgment by giving in greater details the reasons on which it is based (*g*)

Shall state the points for determination—The object of the legislature in making it incumbent by this rule on the appellate Court to raise *points* for determination is to clear up the pleading and focus the attention of the Court and of the parties on the specific and rival contentions of the latter (*h*) The exact questions which arise in the appeal and require determination must be stated in the judgment It is not sufficient to state the point to be determined on appeal is whether or not the decision is consistent with the merits of the case A proposition so roundly worded is no point at all (*i*)

Form of order—Where there has been a failure by the first appellate Court to comply with the requirements of this rule the proper form of the order to be made by the second appellate Court is to set aside the decree and remand the case to the first appellate Court for disposal according to law If the Judge of the Court to which the case is remanded is the Judge who heard the appeal in the first instance he need not re hear the appeal unless he is of opinion that he cannot properly dispose of the remanded case without a re hearing But where the Judge of the Court to which the case is remanded is not the Judge who heard the appeal in the first instance a re hearing is always necessary in order that there may be a compliance with the order of the second appellate Court that the case be disposed of according to law (*j*) See notes above Shall state the reasons for the decision

High Court—Where a suit was decided by a District Court and the decree was confirmed in appeal by the High Court and the High Court did not state in its judgment the reason for its decision Edge C J on an application for leave to appeal to the Privy Council on the ground that the requirements of this rule were not complied with said that the present rule was not intended to apply to cases where the High Court after hearing the judgment of the lower Court and arguments thereon comes to the conclusion that both the judgment and the reasons given by the Court below for its decision are completely satisfactory (*k*) And the opinion has been expressed by Mahmood J that this rule does not apply at all to judgments of High Courts in second appeal (*l*) See sec 122

Appeal under sec 476 Criminal Procedure Code—Appeals under sec 476 of the Criminal Procedure Code are regulated by O 41 and the judgment must comply with this rule (*m*)

Privy Council appeal—Non compliance with the requirements of this rule is not a ground of appeal to the Privy Council (*n*)

(*f*) Vingappa v Shappa (1895) 19 Bom 3 3 Ananda Pal v Maha Bal (19 6) 1 Luck 458 9 I C 9 5 (27) A O 95
(*g*) B vanath v Baidjanath (1886) 1? Cal 199 C 03
(*h*) Mhas Bha ji v Davalat (190) 7 Bom L R 174
(*i*) Soha an v Babu N nd (1887) 9 All 6 30 31
(*j*) Sara na Pillai v Seela Reddi (1908) 31 Mad 469
(*k*) Sundar Bibi v Bisheshar Nath (1887) 9 All 93
(*l*) Sohawan v Babu Nand (1887) 9 All 6 30 31 S also Tasaduq v Ka hi Ram (1903) 5 All 109 30 I A 35
(*m*) H mid Ali v Madhi (19 7) 54 Cal 355 100 I C 3 1 (7) A C 281
(*n*) Sunder Bib v Bi h har Nath (1887) 9 All 93

32 [S 577] The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the appellate Court may pass a decree or make an order accordingly O 4 rr 32,

What judgment may direct

33 [*New*] The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection

Power of Court of Appeal

Provided that the appellate Court shall not make any order under sec 35 A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order (*o*)

Illustration

A claims a sum of money as due to him from X or Y and in a suit against both obtains a decree against *X* Y appeals and *A* and *Y* are respondents The appellate Court decides in favour of *X* It has power to pass a decree against Y

Cases to which rule applies—This rule is new It is taken for the most part from O 58 r 4 of the Rules of the Supreme Court of Judicature in England The object of the rule is to empower the appellate Court to do complete justice between the parties O 41 r 4 and this rule gives the Court ample power to make the order appropriate to the ends of justice Under the former rule upon an appeal by one of the parties on a ground common to all the decree may be varied in favour of all under the latter rule the Court has power to make the proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties even though they may not have filed an appeal or objection (*p*) The illustration to the rule indicates a type of case for which provision is intended to be made The following are further instances —

(1) *A* sues *B* and *C* for contribution A decree is passed against *B* but as against *C* the suit is dismissed *B* appeals making *A* alone respondent to the appeal *A* does not appeal from the decree dismissing the suit as against *C* If the appellate Court is of opinion that *C* is liable and not *B* it may under r 20 direct that *C* be added as a respondent as being a person interested in the result of the appeal and may under the present rule alter the decree so as to make *C* liable though no appeal was preferred by *A* from the dismissal of the suit against *C* This is in accordance

(*o*) The proviso was added by Act 9 of 19

(*p*) *Debendra* v *Nagendra* (1919) 24 Cal W N 97 54 I C 636

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(*f*) *Vingappa* v *Sh vappa* (189) 19 Bom 3 3 *Ananda Pal* v *Maha Bal* (19 6) 1 Luck 4 9 9 I C 9 5 (27) A O 95
(*g*) *Bisvanath* v *Baidjan th* (1886) 12 Cal 199 0 03
(*h*) *Mha i Bhauji* v *D t lal* (1905) 7 Bom L R 174
(*i*) *S ha n* v *Babu Nand* (1887) 9 All 6 30 31
(*j*) *S ana P ll i* v *Sesha I edd* (1908) 31 Mad 469
(*k*) *S indar B bi* v *Busheshar Nath* (1887) 9 All 93
(*l*) *Sohawan* v *Babu Nand* (1887) 9 All 6 30-31 S also *Tasaduq* v *Kashi Ram* (1903) 5 All 109 30 I A 35
(*m*) *Hamid Al* v *M ihi* (19) 54 Cal 3 5 100 I C 3 1 (7) A C 281
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A claims a sum of money as due to him from *X* or *Y* and in a suit against both obtains a decree against *X* *X* appeals and *A* and *Y* are respondents The appellate Court decides in favour of *X* It has power to pass a decree against *Y*

Cases to which rule applies —This rule is new It is taken for the most part from O 58 r 4 of the Rules of the Supreme Court of Judicature in England The object of the rule is to empower the appellate Court to do complete justice between the parties O 41 r 4 and this rule gives the Court ample power to make the order appropriate to the ends of justice Under the former rule upon an appeal by one of the parties on a ground common to all the decree may be varied in favour of all under the latter rule the Court has power to make the proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties even though they may not have filed an appeal or objection (*p*) The illustration to the rule indicates a type of case for which provision is intended to be made The following are further instances —

(1) *A* sues *B* and *C* for contribution A decree is passed against *B* but as against *C* the suit is dismissed *B* appeals making *A* alone respondent to the appeal *A* does not appeal from the decree dismissing the suit as against *C* If the appellate Court is of opinion that *C* is liable and not *B* it may under r 20 direct that *C* be added as a respondent as being a person interested in the result of the appeal and may under the present rule alter the decree so as to make *C* liable though no appeal was preferred by *A* from the dismissal of the suit against *C* This is in accordance

(*o*) The proviso was added by Act 9 of 19

(*p*) *Debendra* v *Nagendra* (1919) 24 Cal W N 97 54 I C 636

33 with the Calcutta ruling under the Code of 1882 (*q*) According to the Allahabad rulings under that Code *C* could neither be added as a respondent nor even if he were joined as a respondent from the first could any decree be passed against him no appeal having been preferred against him (*r*) The Allahabad ruling that *C* could not be added as a respondent (under r 20) was followed by the Madras High Court (*s*) The present rule gives effect to the Calcutta rulings and supersedes the Allahabad and Madras rulings But *C* cannot be added as a respondent if limitation for filing an appeal against him has expired (*t*)

(2) A suit is brought on behalf of the public for (1) a declaration that the public are entitled to use certain locks on a certain river without payment of tolls and (2) a declaration that the defendant is under an obligation to keep the locks in repair A decree is passed for the plaintiff awarding the relief as to the use of the locks without payment of tolls but declaring that the defendant is under no obligation to repair the locks The defendant appeals The plaintiff neither files a cross appeal nor objections The appellate Court finds that the public are not entitled to use the locks without payment of tolls to the defendant At the same time it finds that the defendant is under an obligation to keep the locks in repair The appellate Court has power while declaring by its decree that the public are liable to pay tolls also to declare that the defendant is liable to keep the locks in repair notwithstanding that no appeal or objection was taken to that part of the decree by the plaintiff (*u*)

(3) Plaintiff sued for ejectment of tenants in possession of land that he had purchased and in the alternative for compensation against his vendor The first Court dismissed the suit against the tenants and awarded compensation against the vendor The plaintiff did not appeal but the vendor appealed and established that he had conveyed a good title to the plaintiff The Court of appeal reversed the decree for compensation and gave the plaintiff a decree for possession and mesne profits against the tenants (*v*)

It does constantly occur where some persons appeal and others do not that the Court is put in a position of having to make impossible or contradictory or unworkable orders Accordingly it has been given power to make a decree in favour of persons who have not even approached it This power may be exercised by the Court in favour of any of the parties who may not have filed any appeal or objection (*w*) The appellate Court may under this rule to vary the decree of the lower Court though the variation may benefit a defendent who has not appealed from the decree (*x*) Thus when plaintiff's claim was decreed partly against *A* and partly against *B* and *A* appealed and *B* did not the appellate Court under this rule made a decree exempting *B* and making *A* liable for the whole amount (*y*) The power is however discretionary In a recent Allahabad case (*z*) a mother and son sued as legal representatives of a reversionary heir to recover property and the suit was decreed in favour of the son but dismissed as regards the mother The mother did not appeal as she was satisfied

(*q*) *Upendra Lal* v *Girindra Nath* (1898) 25 Cal 56 *Hudson* v *Basdeo* (1899) 26 C l 109 *Rup Jaun Bibee* v *Abdul Kadir* (1904) 31 Cal 643

(*r*) *Atma Ram* v *Balkishen* (1883) 5 All 266 *Fa z d Al* v *Bismillah Beggam* (1905) 27 All 23 *Lohre* v *Deo Hans* (1908) 30 All 48 *Hamuddin* v *Abdul Aziz* (1909) 31 All 5 1 2 I C 55

(*s*) *Subramanian* v *Veer b d an* (1908) 31 Mad 44?

(*t*) *Chokalingam* v *S garam* (192) 3 Rang 546 84 I C 8 4 (25) A R 155

(*u*) *Attorney General* v *Simpson* (1901) 2 Ch 671

( ) *Ch ru Bala* v *Nih r Kuma* (19 7) 46 Cal L J 47 105 I C 600 (27) A C 831

(*w*) *Ab nash Cha d a* v *Dasar th* (19 9) 6 C l 598 605 606 114 I C 84 (9) A C 1 3

(*x*) *Tricomdas* v *Gopinath* (1917) 44 I A 65 71 44 Cal 759 769 39 I C 156 (no reference was made in the judgm nt to the present rul) *M n Han* v *R M A L F rm* (19 6) 4 Rang 110 97 I C 186 ('26) A R 172, *Maksud Ali* v *Firm Sheikh Abd llah* (19 8) 50 All 218 108 I C 728 (8) A A 77

(*y*) *Jawahir Bano* v *Shuj at Husain* (19'1) 43 All 85 58 I C 114 (1) A A 367, see also *K nji Mall* *Durga Prasad* (19 5) 47 All 697 88 I C 439 ('25) A A 555

(*z*) *Puk a* v *Me ra Lal* (19 8) 21 All 63 111 I C 751 (8) A A 46 do ibted I *Ma dan Lal* v *Gajendrapal* (19 9) 51 All 675 116 I C 436 (9) A A 43

with a decree in favour of the son On appeal to the High Court the son s suit was dismissed on the ground that he was a son by a former marriage The effect of the decision was that the mother was entitled but the Court refused to exercise its power under this rule The Allahabad High Court has held that when there is a common defence a Court of appeal may dismiss a suit as against a defendant who has not appealed (a) but not if there is no common ground of defence (b) In a Patna Case (c) the plaintiff obtained a decree in the first Court against A B and C for contribution A alone appealed and the High Court under this rule dismissed the suit not only against A but against B and C as well The plaintiff appealed and the Privy Council restored the decree of the first Court In execution proceedings it was contended that this had not the effect of reviving the decree against B and C which had become time barred But it was held that as O 41 r 33 enables an appellate Court to deal with the entire decree although the appeal may be as to part only the entire decree becomes the subject matter of the appeal even when the appeal is from part of the decree and by some only of the parties so that the final decree for purposes of limitation under Article 182 (2) was the decree of the Privy Council and that the application for execution was therefore within time Similarly the appellate Court has power under this rule to make an order for extension of time for making an award in a matter governed by the Indian Arbitration Act 1899 (d)

Cases to which rule does not apply—A sues B to recover rent Rs 295 A decree is passed in favour of A for Rs 95 only A appeals against the disallowance of the balance of the amount claimed B neither files a cross appeal nor objections against the decree The appellate Court finds that nothing is due to A from B The appellate Court has no power to dismiss A s claim in toto If B was aggrieved by the decree against him for Rs 95 he ought to have appealed or filed objections (e) Again the rule does not apply when the decree is really a combination of several decrees against several defendants (f) Mukerji J on a review of all the ca es aid the rule should be cautiously applied and only in cases where but for recourse to it the ends of justice would be defeated (g) The High Court of Allahabad has held that the Court has no power under this rule to pass a decree against a person who is not a party to the appeal (h)

Privy Council appeal—In an appeal to Privy Council relief will not be given under this rule to a party who has not appealed to the High Court A sued B and B s agent C for damages for breach of two contracts The first Court passed a decree against B in respect of both contracts and as against C made an order for co ts only A did not appeal against the di mis al of the suit as against C but both B and C appealed The High Court modified the decree making B liable only as to one contract and allowed C s appeal A appealed to Privy Council making both B and C respondents and contended that C was liable as regards the contract as to which the High Court had exonerated B But their Lordships said that the appeal against C was an appeal direct from the trial Judge which was not allowable (i)

(a) *Mohsham Al* v *M h* (19 6) 48 All 5 1 94 I C 347 (27) A A 37

(b) *M awar Al* v *Jagm lan Ram* (19 7) 99 I C 80 (7) A A 177

(c) *Som Singh* v *I remd I uer* (19 4) 3 Pat 3 7, 9 I C 91 (5) A P 47

(d) *T ip l* v *Nathmull & Co* (1919) 46 Cal 1059 54 I C 668

( ) *R g m Lal* v *Jha d* (191) 34 All 32 11 I C 610 *Ilahi* v *Jawinda* (19 0) 1 Lah 396 54 I C 971 *K sho Prasad Singh* v *Nar y Dayal* (19 5) 4 Pat 37 8 I C 984 (5) A 1 235 *S jua* v *S rya Rao* (19 5) 48 Ma 1 I J 577 88 I C 99 (5) A M 771 *M k nd* v *Shanta am* (19 6) 8 Bom I R 6 7 98 I C 383 (27) A B 1 8 *Lam h gam* v *S b ahma ia* (19 7) 50 Mad 614 103 I C 394 (7) A M 6 0 *Punjab National B nk* v *Uma D tt* (1928) 9 Lah 291 112 I C 4 5 (8) A L 599

(f) *Gy n Singh* v *Ata Husain* (19 1) 43 All 3 0 60 I C 817 (21) A A 56 *Cf Ama singj* v *De ai Um d* 19 5) 2 Bom L R 91 86 I C 31 (5) A B 90 *Mahend a Nath* v *Khet a Moha* (19 9) Cal 1193 109 I C 24 (28) A C 593

(g) *Sh bch ndra* v *Dulchen* (1918) 8 Cal L J 123 48 I C 8 *I Pya* v *Mewa Lal* (19 9) 51 All 63 111 I C 51 (8) A A 46

(h) *Manda Lal* v *G je l pal* (19 9) 51 All 5 3 116 I C 436 (9) A A 243

(i) *Mahomed Kh l l* v *Les Tanneries Lyonnaises* (19 6) 53 I A 84 49 Mad 435 94 I C 767 (6) A PC 34

O. 41, R. 33-35 Such other decree as the case may require —The power of the appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the date of its judgment it may pass such decree as is in accordance with any later enactment which came into operation subsequent to such date (j)

Remand —A sues B for three sums of money X Y and Z A's claim is allowed as to items X and Y but disallowed as to item Z A appeals from the decree as to item Z B appeals from the decree as to items X and Y The appellate Court dismisses A's appeal, and allows B's appeal as to item X only with the result that item Y is decreed in A's favour A then appeals to the High Court as to items X and Z The High Court has power under this rule to remand the whole case for determination on the merits The effect of such an order is to empower the lower Court to reopen the case even as to item Y which was decided by the lower appellate Court in favour of A and from which decision B had not preferred an appeal to the High Court (k)

Proviso —The proviso was added by Act 9 of 1922 Its effect is that the appellate Court cannot allow a claim for compensatory costs which has been disallowed by the original Court

34 [S 576] Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same

Dissent to be recorded

Decree in Appeal

35 [S 579] (1) The decree of the appellate Court shall bear date the day on which the judgment was pronounced

Date and contents of decree

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom or out of what property, and in what proportions such costs and the costs in the suit are to be paid

(4) The decree shall be signed and dated by the Judge or Judges who passed it

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree

Judge dissenting from judgment need not sign decree

(j) G r da v D dan (1910) 0 Mad L J 5-8 7 I C 74 K nakayya v J a dha a (1913) 36 Mad 439 444 8 I C 736 (F B) M th sw m v Kalyani (191) 40 Mad 818 8?? 38 I C 22

(k) Sa ada S ndari v Ga gakari (1919) 46 Cal 7 8 5 I C 801

Costs —Where a decree is confirmed in appeal upon grounds wholly different from those relied on in the lower Court the proper course is to dismiss the appeal without costs (*l*)

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their appellate jurisdiction [O 49 r 3]

Form —For form of decree in appeal see App B form no 9

36 [S 580] Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the appellate Court and at their expense

Copies of judgment and decree to be furnished to parties

37 [S 581] A copy of the judgment and of the decree, certified by the appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the appellate Court shall be made in the register of civil suits

Certified copy of decree to be sent to Court whose decree appealed from

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ORDER XLII

Appeals from Appellate Decrees

1 [S 587] The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees

Procedure

See s 108 cl (a)

Rules relating to first appeals to apply so far as may be to second appeals —The following rules have been applied in the reported decisions Rr 1 and 2 of Order 41 which require a memorandum of appeal in first appeals have been held to apply to second appeals (*m*) R 22 which relates to cross objections has been held to apply to second appeals (*n*) Rr 25 and 26 which empower the Court of first appeal to frame and refer issues for trial to the lower Court and to determine the appeal after return of findings on such issues apply to second appeals to the extent indicated in the notes to r 26 under the head Second appeal Rr 27 and 28 which relate to additional evidence in first appeal apply to second appeals to the extent mentioned in the notes to r 27 under the head Second appeal The Allahabad High Court has held that the Court cannot on second appeal dispense with copy of the judgment of the Court of first instance (*o*) But omission to annex copy of an interlocutory order incorporated by reference in the judgment may be excused (*p*) As to the applicability to second appeals of r 31 which relates to the contents of judgment of the first appellate Court see notes to that rule under the head High Court

(*l*) *Fu her* v *K mala \a cker* (1860) 8 M I A 170
(*m*) *Ahmad Al* v *Barns Hus n* (1893) 15 All 123 127
(*n*) *Kaus lia* v *Gulab Kur* (1899) 21 All 297
(*o*) *Bh ron* v *P ma Aut r* (19 1) 43 All 660 63 I C 338 ('21) A A 23
(*p*) *Lakshmi* v *Ishar* (19) 4 Lah L J 0 ('22) A L 93

r 1 **Inherent power of High Court to remand in second appeal**—Where the Court of first instance declined to record oral evidence rendered by the plaintiff on the ground that the documentary evidence produced by him was sufficient and the decree in favour of the plaintiff was reversed in appeal but the appellate Court declined to allow the plaintiff respondent to produce oral evidence before it it was held by the High Court in second appeal that though there was no provision in the Code strictly applicable to the case the High Court was warranted *ex debito justitiae* in setting aside the proceedings of both the Courts below and in directing the first Court to retry the case (q) See notes to r 33 Remand.

ORDER XLIII

Appeals from Orders

1 **1** [*S* 588] An appeal shall lie from the following orders under the provisions of section 104, namely —

Appeal from orders

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court,

(b) an order under rule 10 of Order VIII pronouncing judgment against a party,

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit,

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*,

(e) an order under rule 4 of Order X pronouncing judgment against a party,

(f) an order under rule 21 of Order XI,

(g) an order under rule 10 of Order XVI for the attachment of property,

(h) an order under rule 20 of Order XVI pronouncing judgment against a party,

(i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement,

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(q) *D rga D hal* v *Anoraji* (189) 17 All 9 See also *Kelal* v *I j ni* (19 4) 39 Cal L J 251 81 I C 909 ( ) A C 98 *Jeshanker* v *Bai Divali* (1920) 2 Bom L R 771 57 I C 5 5

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale, O 4

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit,

(l) an order under rule 10 of Order XXII giving or refusing to give leave,

(m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction,

(n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit,

(o) an order under rule 2, 4 or 7 of Order XXXIV refusing to extend the time for the payment of mortgage money,

(p) orders in interpleader suits under rule 3, rule 4, or rule 6 of Order XXXV,

(q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII,

(r) an order under rule 1, rule 2, rule 4, or rule 10 of Order XXXIX,

(s) an order under rule 1 or rule 4 of Order XL,

(t) an order of refusal under rule 19 of Order XLI to re admit, or under rule 21 of Order XLI to re hear an appeal,

(u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the appellate Court,

(v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV,

(w) an order under rule 4 of Order XLVII granting an application for review

Section 104—This rule forms part of s 104 [see s. 104 sub s (1) cl. (i)]. The result is that no second appeal lies from an order passed in an appeal preferred under this rule (r)

(r) Naubat Singh v *Baldeo S gh* (1911) 33 All 479 9 I C 866 [O 43 r 1 cl (e)]

O. 43, r. 2

Clause (a) Order returning plaint to be presented to the proper Court.—Where an order is made by the first Court of appeal returning a *plaint* under O 7 r 10 by virtue of the powers conferred on it by s 107 the order is appealable under this clause (s) and an appeal will lie to the High Court under s 100 (t) But no appeal lies from an order of an appellate Court returning a *memorandum of appeal* to be presented to the proper Court The terms of cl (a) of this rule do not cover such a case nor can the reading of O 7 r 10 with s 107 justify the interpolation of the words memorandum of appeal after the word plaint in cl (a) of the present rule (u)

Clause (o).—This clause is amended by the Transfer of Property (Amendment) Supplementary Act 1930 by substituting the word and figures 2 4 or 7 for 4 or 7

Clause (u) Order of remand.—Under s 104 and O 43 an appeal lies only if an order of remand has been passed under O 41 r 23 above (t)

Other clauses.—These have already been considered in their proper places

Procedure

2 [S 590] The rules of Order XLI shall apply, so far as may be, to appeals from orders

See s 108 cl. (b).

ORDER XLIV

Pauper Appeals

r 1

Who may appeal as pauper

1 [S 592] Any person entitled to prefer an appeal who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable

Procedure on application for admission of appeal

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust

Alteration in the rule.—The words in all matters including the presentation of such application in the first paragraph are new See notes below under those words.

Unable to pay the fee.—In a Madras case (w) the petitioner had obtained a decree for maintenance and sought to appeal in *forma pauperis* for higher maintenance but the defendant paid Rs 571 arrears of maintenance into Court to her credit and the

(s) *Venk ta asu* v *Kolayya* (19 6) 51 Mad L J 119 97 I C. 790 (26) A M 900

(t) See O 7 r 10 Notes Appeal

( ) *R ghunath* v *Shamo Koeri* (1904) 31 Cal 344 *Na ar Husain* v *Kes i Mal* (1890) 1[?] All 581 *\ ud D n* v *Pran Kuhar* (1918) 40 All 659 47 I C 16

(v) *Ba ka B ha i* v *B end a Nath* (19[?]) 4[?] Cal 19 103 I C 864 ( ) A C 830

(w) *Mahalak hmi I e* (19 6) 50 Mad L J 114 94 I C 337 (26) A M 567

petition was dismissed on the ground that she had sufficient means to pay the Court fee on the memorandum of appeal See however note under O 33 r 1 Subject matter of the suit

In all matters including the presentation of such application —The present rule provides that the provision relating to *suits* by paupers shall apply so far as may be to *appeals* by paupers Therefore the application referred to in this rule for leave to *appeal* as a pauper must be *presented by the applicant in person* just as an application for leave to *sue* as a pauper [See O 33 r 3] This is now made clear by the addition of the words in all matters including the *presentation* of such application. In the absence of these words in the old section it was held by the Madras High Court that the rule as to the *presentation* of a pauper s petition (now contained in O 33 r 3) did not apply to pauper appeals (*x*) The Madras decision is no longer law

Subject to the provision relating to suits by paupers —*A* sues *B* to recover certain properties as the heir of her deceased husband The suit is dismissed *A* applies for leave to appeal as a pauper It is found on inquiry that *A* had before instituting the suit entered into an agreement falling within the terms of O 33 r 5 (d) which would have dis entitled *A* to sue to as a pauper The appellate Court should under these circumstances refuse leave to *A* to appeal as a pauper (*y*)

Application and memorandum of appeal —This rule requires two separate documents to be presented —a memorandum of appeal and an application for leave to appeal as a pauper When the Judge disposes of the pauper application he does not thereby necessarily dispose of the appeal He may still treat it as an existing appeal if the appellant desires to pay the full court fees on the appeal and to continue it as an ordinary appeal The Judge is under no legal obligation to dismiss the appeal when he refuses the appellant leave to appeal as a pauper (*z*) Following this reasoning it has been held by the High Court of Madras that where an application for leave to sue as a pauper is rejected owing to the memorandum of appeal which accompanied it being unstamped the rejection of the application does not carry with it the rejection of the memorandum of appeal The result is that if the pauper applies for time to pay the court fee and time is granted to him [149] and the court fee is paid within the time fixed by the Court the appeal must be held to be in time though the court fee may have been paid after the expiration of the period of limitation prescribed for filing the appeal (*a*)

Proviso to the rule —The proviso is mandatory (*b*) and is a necessary safeguard introduced by the legislature for the benefit of litigants who find themselves opposed by paupers To provide a safeguard against the proviso being overlooked the Judge admitting a pauper appeal should express and record briefly the reasons on which the leave proceeds (*c*) The proviso is of course not applicable unless the appeal is *in forma pauperis* (*d*) After issue of notice to the respondent and the Government Pleader it is no longer open to the Court to examine the question whether the decree is contrary to law or some usage having the force of law or is otherwise unjust or erroneous (*e*)

Appeal —No appeal lies under the Code from an order refusing leave to appeal as a pauper It was held in a Madras case that no appeal lies from such an order under

(*x*) *M illi* v *S mapp* (1903) 6 Mad 369

(*y*) *H I* v *H p S dd i* (1907) 30 M 1 547

(*z*) *B I D M h* (1898) 2 I m 849 11 8 6 8 7 *M h* v *I ah i Ali* (1918) 40 All 381 45 I C 9

(*a*) *Ach I m I a* v *N gari* (1914) 38 Bom 41 1 I C 337 *N H I* v *Sw ra* (1917) 40 M 1 687 39 I C 617 *M I D y I* v *Mah S I* (19) 3 Lah 3 6 I C 741 ( ) A L *S yad Al* v *Jagm han* (19 6) 9 I C 71 (6) A O 13

(*b*) *I I* (*p I* (19) 4 Pat 6 91 I C 814 ( ) A I 44 *I I I* v *J D I* (19) 7 Lah L J 14 83 I C 9 ( ) A L 391

( ) *S k la* v *(I* (1914) 3 Bom 451

(*d*) *I J J* (19 4) J L J 0 80 I C 6 9 ( ) A L 536

(*e*) *I th M I mpiari* (19 7) 6 Pat 68 103 I C 61 ( ) A I 118

44, 1, 2 cl 15 of the Letters Patent (*f*) but that decision has been dissented from by a Full Bench of the same High Court in a recent case (*g*) There is an Allahabad case in which it was held that no appeal lies under the Letters Patent from an order refusing leave to appeal as a pauper (*h*) That decision however proceeded on grounds no longer tenable and it cannot therefore be treated as a precedent See notes to s 104 Letters Patent Appeal p 311 above

Limitation—The period of limitation for leave to appeal as a pauper is 30 days from the date of the decree appealed from (*i*) See Limitation Act 1908 sch I art. 170

Form—For form of application to appeal *in forma pauperis* see App G form no 10 For form of notice of appeal *in forma pauperis* see App G form no 11

Inquiry into pauperism

2 [s 593] The inquiry into the pauperism of the applicant may be made either by the appellate Court or under the orders of the appellate Court by the Court from whose decision the appeal is preferred

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the appellate Court sees cause to direct such inquiry

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ORDER XLV

Appeals to the King in Council

45, 1, 2

Decree defined

1 [s 594] In this Order, unless there is something repugnant in the subject or context, the expression "decree" shall include a final order

When appeals lie to King in Council—See ss 109 and 110

Application to Court whose decree complained of

2 [s 598] Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of

In forma pauperis—When a person applies for leave to appeal to His Majesty in Council *in forma pauperis* he must present an application for that purpose to the High Court and a separate application to His Majesty in Council (*j*)

(*f*) *Appasami* v *Somasundara* (1903) 6 Mad 437

(*g*) *Tulja am* v *Alagappa* (1912) 35 Mad 1 9 17 8 I C 310

(*h*) *Ba no* v *Mehdi Husain* (1899) 11 All 375

(*i*) See *Mahadev* v *Lakshman* (1895) 19 Bom 48

(*j*) *Mu nt Ram* v *Sheo Churn* (1816) 4 M I A 114

Power of High Court to grant leave to appeal to His Majesty in Council in forma pauperis—It has recently been held by the High Courts of Calcutta (*k*) Patna (*l*) and Madras (*m*) that O 44 r 1 does not apply to appeals to His Majesty in Council and that the High Court has no power to grant leave to appeal *in forma pauperis* to His Majesty in Council The point arose in an earlier Calcutta case but it was not decided (*n*) In a still earlier case it was said that the usual security for costs must be given (*o*)

Limitation—See notes to s 109 above

3 [S 600] (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council

Certificate as to value or fitness

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted

Alteration in the rule—In sub rule (2) the word shall has been substituted for the word may

Petition—A petition for a certificate which was dropped when the judgment complained of was reversed on review was treated as revived when the review was held incompetent by the Privy Council (*p*)

Certificate—The certificate of leave to appeal and not the order for such certificate is the document which the Judicial Committee are bound to consider and act upon in determining whether leave to appeal has been properly granted or not and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave they ought to hold that leave has not properly been given (*q*) The certificate must make plain upon the face of it that the discretion conferred upon the High Court was invoked and exercised (*r*) The assent of the respondent to the issue of a certificate will not make it effective if the conditions on which it should be issued are not complied with (*s*)

Certificate as to fitness—Where a case fulfils the requirements of s 110 the petitioner is entitled to a certificate *as of right* in the ordinary course of procedure When it does not that is where the matter is under the appealable value or is not measurable by money the granting of the certificate is entirely *in the discretion* of the Court (*t*) *In the former case* the High Court should certify the sufficiency of the amount for appeal to the Privy Council and should also certify when the decision of the lower Court is affirmed that the appeal involves a question of law The Judicial Committee will not interfere with any question of valuation unless it can be shown that some item has

(*k*) *Jagadamba v Pr ye d a* (1913) 17 Cal L J 381 18 I C 1 9

(*l*) *Ramkishan Lal v Munna Kumari* (1918) 3 Pat L J 1 9 44 I C 731

(*m*) *Amba v Srinivasa* (1919) 4 Mad 3 47 I C 616

(*n*) *Thompson v Calcutta Tramways Co* (1894) 1 Cal 5 3 t p 5

(*o*) *G Surn D ss In re* (1873) 19 W R 30

(*p*) *Vekt v Chh ju* (19 3) 4 Lab 445 77 I C 869 (24) A L 2 5

(*q*) *Radha Krishna Das v Rai Krishn Chand* (1901) 3 All 415 28 I A 18

(*r*) *Radha Krishna v Swaminatha* (19 1) 48 I A 31 44 Mad 93 60 I C 8 (1) A Pt

(*s*) *Ba r Prasad v Kashi Krishna* (1901) 3 All 2 7 8 I A 11

(*t*) *B P ad v K hi Krishna* (1901) 23 All 2 7 231 8 I A 11

been improperly valued or excluded or that there is some fundamental principle which renders the valuation unsound. On the mere question of the value of admitted items the Committee will not interfere, nor will they allow a party to contend that the valuation has been arrived at on an erroneous principle unless he has raised that contention by his printed case (*u*). *In the latter case* it is enough if the certificate states that the case is a fit one for appeal to His Majesty in Council (*v*). Before coming to the *Judicial Committee for special leave to appeal in a matter which is under the appealable* value or not measurable by money the party should first apply to the Court below for a certificate under this rule and s. 109 cl. (g) that the case is otherwise a fit one for appeal to His Majesty in Council; otherwise special leave to appeal will not be granted by the Committee except in special cases (*w*). See notes to s. 109 "Certificate as to fitness" and notes to s. 110 under sub head "Where the matter is under the appealable value or is not capable of valuation".

Procedure.—If the petitioner does not prosecute his petition it may be struck off for non prosecution (*x*).

Appeal.—An order granting a certificate that the case is a fit one for appeal to the Privy Council is not a "judgment" within the meaning of cl. 15 of the Letters Patent and no appeal lies from such an order (*y*). Nor does an appeal lie under that clause from an order refusing an application for leave to the Privy Council where the refusal is based on the ground that the case did not fulfil the requirements of s. 110 above ( ).

Form.—For form of notice under sub r. (2) see App. G form no. 1[illegible].

4. [*New.*] For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated; but suits decided by separate judgment shall not be consolidated, notwithstanding that they involve substantially the same question for determination.

Consolidation of suits.

Consolidation of suits.—This rule is new. In the absence of any such rule in the Code of 1882 it was held by the High Court of Allahabad that suits involving substantially the same questions for determination could be consolidated for the purpose of reaching the pecuniary limit necessary for an appeal if the property affected by the suits was the same notwithstanding that the suits were decided by separate judgments (*a*). According to the Calcutta decisions however such consolidation is not permissible unless the suits, besides involving the same question for determination, were decided by the same judgment (*b*). The Bombay High Court has allowed consolidation of suits decided by separate judgments when the point involved was the same and the parties had agreed that the evidence in one suit should be treated as evidence in the others and the reasons in the judgments in the main suit were adopted in the others (*c*). The present rule gives effect to the Calcutta rulings (*d*). It need hardly

(*u*) *Ch[illegible] v. Ami[illegible] ha* (19[illegible]0) 4[illegible] I A [illegible] 48 C [illegible] 110, 57 I C 606.
(*v*) *B[illegible] v. M[illegible]rph[illegible]n* (1904) 31 Cal. 7[illegible]0, [illegible] I A [illegible] 8; *Am[illegible] Ch[illegible] v. Sh[illegible]b[illegible]* (1904) 31 Cal. [illegible]0.
(*w*) *Moti Ch[illegible]d v. Ga[illegible] Prasad* (190[illegible]) [illegible] All 174, [illegible] I A 40.
(*x*) *Moo[illegible] v. [illegible]* (18[illegible]6) [illegible] C [illegible] 6[illegible].
(*y*) *L[illegible] v. Asgur [illegible]a* (1890) 17 Cal. [illegible].
(*z*) *Ma[illegible]ly v. Patterson* (1881) 7 Cal. 3[illegible]9.
(*a*) *I[illegible] M[illegible]hamm[illegible]d In the [illegible]* (189[illegible]) 18 All. 196.
(*b*) *[illegible] Company v. Abhoy Comar* (1901) 5 Cal W N 41; *M[illegible]hammad Moo[illegible]* (1866) [illegible]; *[illegible] v. C[illegible]ham* (18[illegible]) 11 C [illegible] 740.
(*c*) *J[illegible] v. [illegible]* (19[illegible]6) [illegible] Bom. [illegible] 100, I C 143 ([illegible]7) A [illegible] 19.
(*d*) See *[illegible] v. [illegible]* (1925) 44 Mad L J 4[illegible], [illegible] I C 17 ([illegible]) [illegible] 60.

be observed that suits that can be consolidated for the purposes of pecuniary valuation must be suits actually instituted and not merely suits *in gremio futuri* (e)

Judgment—The judgment referred to in this rule is the judgment appealed against and not the judgment of the lower Court (*f*)

Inherent power to consolidate cases—This rule provides for consolidation of cases for the purposes of pecuniary valuation The High Court of Patna has held that the High Court has inherent powers to permit consolidation of cases on grounds other than those specified in this rule Accordingly where two appeals to His Majesty in Council were in substance one the two were ordered to be consolidated and tried together the Court observing that in the interest of justice and to save unnecessary expense the appeals ought to be consolidated (*g*)

Reference of dispute to Court of first instance

5 [*New*] In the event of any dispute arising between the parties as to the amount or value of the subject matter of the suit in the Court of first instance or as to the amount or value of the subject matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance which last mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made

Dispute as to value of subject matter—This rule is new It gives legislative recognition to the practice followed under the Code of 1882 in cases where there was a dispute as to the value of the subject matter of the suit This practice is referred to in the undermentioned Calcutta case (*h*) where it was held that a plaintiff in a suit for damages cannot ensure an appeal to the Privy Council by merely placing his damage at a sufficiently high figure *A* claims Rs 10 000 as damages for an alleged defamation The suit is dismissed on the ground that the libel was privileged and the decision is affirmed in appeal *A* applies for leave to appeal to the Privy Council The mere fact that *A* claimed Rs 10 000 as damages is not sufficient proof that the amount of the matter in dispute is Rs 10 000 Therefore if the other party dispute the correctness of the amount *A* must show that the amount of the matter in dispute is Rs 10 000 When there is a contest as to the true value of the matter in dispute it has been the invariable practice—a practice sanctioned by the Judicial Committee—to ascertain by evidence and enquiry what the true value is But where an inquiry has already been made at the trial of the suit by the Court of first instance as to the value of the subject matter of the suit and the finding as to the value has been acquiesced in by the applicant the High Court need not direct a fresh inquiry under this rule (*i*) Where a reference is made under this rule to the Court of first instance the inquiry should be held by that Court the Court of first instance has no power to remit the investigation to some other officer (*j*)

(e) *H a I I v Phag H* (100) I All 36 *Abd I I r n v All h B Khsh* (1913) I R no 90 p 3 0 I I C 6 I

(*f*) *Deoki d v Nar g* (19 1) 6 Pat L J 9 (8) I C 17 (1) A I 97

(*g*) *Ch dry Har I rasid v Brij I ish r D s* (1918) 3 Pat L J 446 45 I C 5 1

(*h*) *Pai Am da N th v Abh y Ch a* (1905) 9 C W N 3 0

(*i*) *A I v P mela I a* (1919) 4 Bom 609 46 I C 4 *I m I c* *H I car* (19) 45 Cal L J 101 I C 901 ( ) A C 418

(*j*) *Ha st n v E h j* (1916) 43 Cal 5 34 I C 03

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Effect of refusal of certificate

6 [S 601] Where such certificate is refused, the petition shall be dismissed

Costs—Where the petition is made to the High Court and it is dismissed with costs the proper Court to execute the order is the lower Court (l)

Appeal—An appeal lies from an order made by any Court other than a High Court refusing the grant of a certificate under this rule [O 43 r 1 cl (v)]

Security and deposit required on grant of certificate

7 [S 602] (1) Where the certificate is granted, the applicant shall, within *ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow*, from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(a) furnish security *in cash or in Government securities* for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being,

(2) papers which the parties agree to exclude,

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included, and

(4) such other documents as the High Court may direct to be excluded

Provided that the Court at the time granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security

(l) *Jogendra v. Bazid usa* (1907) 34 Cal 860

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also within the time mentioned in sub rule (1) deposit the amount required to defray the expense of printing such copy **O 45,**

Rule amended—The italicized words were added into this rule by Act 26 of 1920 In sub rule (1) the words originally were within six months The period is now reduced to 90 days See notes below Extension of time The provisoes were also added by the same Act

Date of the decree—This means the date on which the decree is pronounced not that on which it is signed (*l*)

Extension of time—It has been held by the Judicial Committee of the Privy Council that the High Court may extend the time allowed for giving the security and making the deposit provided there are cogent reasons for doing so (*m*) According to the Madras High Court the cogent reasons must be such as would lead the Court to believe that the party was deligent in due time to be prepared to lodge the deposit within the limited period and that he was prevented from doing so not owing to the absenc and difficulty of getting funds but owing to some circumstances accidental or otherwise over which he had no control or owing to mistake which the Court would consider not unreasonable or caused by negligence (*n*) On the other hand it has been held by the Chief Court of the Punjab that poverty is a cogent reason for extending the time if the amount required is large and the applicant has deposited a substantial portion of the amount within the time originally allowed (*o*) Prior to Act 26 of 1920 it was the uniform practice to extend time on good cause shown But the object of the amending Act was to expedite Privy Council appeals and the restrictive words used limit the Court s discretion so that the Court can in no case grant an extension of more than sixty days (*p*) The Allahabad High Court has held that the shorter period allowed by the amending Act does not apply when the decree was passed before the Act came into force (*q*) The Bombay High Court has however held that under rule 9 of the Privy Council Rules 1920 an extension can be granted (*r*)

Security in case of consolidated appeal—Where two or more appeals are consolidated for purposes of pecuniary valuation the security required by this rule is the whole security which the appellants together have to furnish and not only a part of it. Therefore if two or more appeals are consolidated and some sets of appellants furnish the security required from them but others do not the consolidated appeal cannot be admitted under r 8 below (*s*)

Records—The Privy Council have strongly condemned the inclusion in the record of unnecessary papers and disallowed the costs occasioned thereby (*t*)

Delay—If delay in the preparation of the record is due to the inaction of the appellant it seems that the appeal may be certified as not effectually prosecuted (*u*)

Appeal—No appeal lies under cl 15 of the Charter from an order refusing to extend the time for furnishing security for costs and directing the appeal to be struck off (*v*)

(*l*) *Har d a* v *Hari D s* (1909) 14 Cal W N 4 0 5 I C 844 Cf O 0 r 7

(*m*) *Bu j e* v *Bhag na* (1883) 11 I A 7 10 10 Cal 557 *Fazul un Nissa* v *Mulo* (1884) 6 All 250

(*n*) *Panaasayi* v *Mahalakshmamma* (1890) 14 Mad 331

(*o*) *Bajga* v *Sal hon* (1910) Punj Rec no 44 p 138 6 I C 7 3

(*p*) *Ram Dhan* v *Pran Na ain* (19) 44 All 16 65 I C 340 ( ) A.A 43 *S* v *T S Ch ttyar* (19 6) 4 Ra g 65 98 I C 417 (27) A R 0

(*q*) *Debi P* v *Prahlad Das* (19) 44 All 65 I C 340 ( ) A.A 87

(*r*) *Nilkant* v *Vidya Narasimha* (19 7) 51 Bom 430 101 I C 555 (7) A B 17

(*s*) *E b Nabi* v *Rai Ba j ath* (1919) 4 Pat L J 199 50 I C 511

(*t*) *G p l Chandra* v *R jan Ka ta* (1920) 47 Cal 415 46 I A 299 76 I C 737 [P C]

(*u*) *S klat* v *Bella* (19 4) Rang 91 80 I C 744 (24) A R 217

(*v*) *Kish n Pershad* v *T luckdhari* (1891) 18 Cal 18

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8 [S 603] *Admission of appeal and procedure thereon* Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

(a) declare the appeal admitted,

(b) give notice thereof to the respondent,

(c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and

(d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them

Such security —See notes to r 7 above Security in case of consolidated appeal

Notice—For form of notice under cl (b) of this rule see App G form no 10 The accidental omission of notice is not a sufficient ground for rehearing provided the respondents knew that the appeal had been admitted (*u*)

9 [S 604] *Revocation of acceptance of security* At any time before the admission of the appeal the Court may, upon cause shown, revoke the acceptance of any such security and make further directions thereon

9-A *Power to dispense with notices in case of deceased parties* Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court

Provided that notices under sub rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct

This rule was added by Act 26 of 1920

(*u*) *Hardit Singh v Gurmukh Singh* (1920) Bom L R 5 0 59 I C 7 [P C]

Power to order further security or payment

10 [S 605] Where at any time after the admission of an appeal but before the transmission of the copy of the record except as aforesaid to His Majesty in Council, such security appears inadequate,

or further payment is required for the purpose of translating transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish within a time to be fixed by the Court, other and sufficient security, or to make, within like time the required payment

Effect of failure to comply with order

11 [S 606] Where the appellant fails to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime execution of the decree appealed from shall not be stayed

Refund of balance deposit

12 [S 607] When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7

Powers of Court pending appeal

13 [S 608] (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs

(2) The Court may, if it thinks fit on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(a) impound any movable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

13 (c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise

Alterations in the rule —

1 The words admitting the appeal which occurred in the first paragraph of the old section after the word Court have been omitted Those words gave rise to a conflict of decisions on the question whether the Court had power under the old section to stay the execution of the decree appealed from after a petition had been presented for leave to appeal but before the appeal was admitted It was held by the High Court of Bombay that the Court had the power (x) On other hand it was held by the High Court of Calcutta that the Court had no such power the decision being based on the ground that the words the Court *admitting the appeal* indicated that no stay could be granted *until the appeal was admitted* (y) The words admitting the appeal have been omitted to make it clear that the power conferred by this rule may be exercised at any time after the presenting of the petition and even before the grant of a certificate for the admission of the appeal

Another result of the omission of the words admitting the appeal after the word Court is to invest the High Court with power to stay execution notwithstanding that an appeal has been admitted by special leave of His Majesty in Council ( ) Under the Code of 1882 it was held that since the powers conferred by the corresponding s 608 could only be exercised by the *Court admitting the appeal* the High Court had no power to stay execution where the appeal was admitted by special leave of His Majesty in Council (a)

It seems unnecessary to add that a District Court cannot stay execution and that O 41 does not apply (b)

2 The words by the appointment of a receiver or otherwise at the end of cl. (d) are new

The Court —The Court referred to in this rule and r 14 is the High Court (c)

Stay of execution before grant of certificate —See notes above Alterations in the rule No 1

Stay of execution in view of an application for special leave to appeal — The High Court has an inherent power to make an order for stay of execution in view of an application by the judgment debtor to the Judicial Committee for special leave to appeal to His Majesty in Council (d)

(x) *Dame Ja bai v Sale Mahomed* (189) 19 Bom 10

(y) *Ja ao Kumari v Gopl Ch nd* (1900) 5 C W N 56

(z) *Nityamo i D i v Madhu Sudan* (1911) 38 Cal 335 38 I A 74 11 I C 384

(a) *Mohesh h dra v Satrughan* (1900) 27 Cal 1 6 I A 281

(b) *Mau g Po Shain v Ma g Po K n* (19) 3 Rang 158 88 I C 99 ( ) A R 54

(c) *P m B had r v J dha Krishen* (1919) 3 Pat L J 40 4 I C 835

(d) *Na da Kishore v Ram Golam* (1913 40 Cal 955 18 I C 207

Clause (b)—The respondent decree holder's failure to give security will not deprive him of the benefit of s 15 of the Limitation Act (*e*) O rr

Clause (c)—If the Court fixes a time for furnishing security as a condition of stay of execution it is advisable that the time for tender of security should be specified with further directions for the inquiry as to its sufficiency (*f*) Proceedings for final decree for partition after a preliminary decree has been passed are not execution proceedings which can be stayed under this rule (*g*)

Security after execution—The Court has power to require *security* to be given under this rule even after the decree has been executed wholly or in part (*h*) It has also the power to *stay* further execution after the decree has been partially executed (*i*)

Stay of execution where appeal admitted by special leave—See notes above Alterations in the rule No 1 second paragraph

Appointment of receiver where appeal admitted by special leave—The High Court has power to appoint a receiver under cl (d) notwithstanding that the appeal was admitted by special leave of His Majesty in Council (*j*)

Practice—Applications of the character mentioned in this rule ought always to be made in the first instance at any rate to the Court in India which has ample power to deal with the matter according to the circumstances of the peculiar case and has knowledge of details which the Judicial Committee cannot possess on an interlocutory application (*k*) If the application is refused by the High Court and the Judicial Committee is of opinion that the application ought to have been granted it may grant a stay of execution But more than this it will not do for instance it will not appoint a receiver of the property under attachment nor take the security referred to in cls (b) and (c) of sub rule (2) In such cases the Judicial Committee will grant leave to the applicant to apply to the High Court with an intimation of its opinion As the order is that of the King in Council the High Court is bound to take notice of it and to govern itself accordingly (*l*)

Appeal—No appeal lies under cl 15 of the Letters Patent from an order refusing to stay execution pending appeal to the Privy Council (*m*)

14 [S 609] Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security

Increase of security found inadequate

(*e*) *Fa da i S ldeo* v *Srimati Padhey* (19 0) 5 Pat L J 39 53 I C 9

(*f*) *Kedarnath* v *Matil l* (19 0) 4 C W N 6 57 I C 39

(*g*) *F m Nara n* v *Hernam Das* (19 0) 4 All 1 0 54 I C 561

(*h*) *Jan lool Bi lool* v *Hoseinee Beg m* (1865) 10 M I A 196 *Inder K mari* v *J pal Ki mari* (1887) 14 Cal 290 295 14 I A 1 *Naray nan* v *Arunachellam* (1896) 19 Mad 140 14 *Kh shaldas* *Chim lal* (19 6) 50 Bom 453 96 I C 245 ('26) A B 4 5

Ashanulla v *K roonamoy* (1879) 4 C L R 1 5

(*j*) *F j Wa ir* v *Fa i Jagadamba* (1919) 4 Pat L J 48 5 I C 407

(*k*) *Vasud a* v *Shadagopa* (1906) 9 Mad 379 33 I A 13

(*l*) *Ja u lool Butool* v *Hos ee Begum* (186) 10 M I A 196 20 (where the application was made by the appellant after e ecution of the decr e requiring the respondent to gi e security an l the Court thought it had no pow r to demand security after execution of the de ree) *Chat ap t S gh* v *D arkan th* (1895) 2 Cal 1 1 I A 170 (where the application was made by the respo dent for a stay of execution and the Jud es of the High Court had differed in opinion as to the propriety of staying xecutio) *Vas deva* v *Sh dagopa* (1906) 29 Mad 379 33 I A 13? (wh re the appli cati n was ma le by the respo dent for a stay of execution and the High Court granted a t y for three months only hold in it ha l no power to grant a stay until the disposal of the appeal to the Privy Council)

(*m*) *Mohabi Pros d* v *Adhikari* (1894) 1 Cal 473

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent execute the decree appealed from as if the appellant had furnished no such security,

(b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject matter of the appeal as it thinks fit

The Court —See notes under the same head to r 13 above

Procedure to enforce orders of King in Council

15 [S 610] (1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same, and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty s Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments

(4) Unless His Majesty in Council is pleased otherwise to direct no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place O 45,

Alterations in the rule —Paragraphs 3 and 4 of the old section which related to the enforcement of the liability of a surety for the costs of the respondents have been omitted in view of the general rule now laid down in s 145 Para 4 was added by Act 26 of 1920 in order to prevent delays in the disposal of Privy Council appeals

Jurisdiction of Patna High Court —The Patna High Court has no jurisdiction to execute an order of His Majesty in Council passed in an appeal from a decree of the Calcutta High Court on appeal from a subordinate Court in Behar The application for execution of such an order should be made to the Calcutta High Court (n)

Whoever desires to obtain execution —It may be that where a decree has been passed in favour of a number of persons *jointly* an application under this rule by one or more of them would be sufficient to entitle all of them to apply for execution in the Court below But it is not so where several persons are by a decree declared entitled to *separate specific shares* say of an ijmali share in which case each person obtains by the decree a right to a separate share In such a case no single plaintiff is entitled to execute the decree on behalf of all the plaintiffs from which it follows that an application under sub r (1) by some of the plaintiffs does not entitle all of them to apply under sub r (2) for execution to the Court to which the order of His Majesty in Council is sent for execution under that sub rule (o)

Functions of the High Court under this rule —The act of the High Court in receiving and filing orders of His Majesty in Council under this rule is a purely ministerial function The High Court therefore has no power under this rule to discuss the effect of the order of His Majesty in Council on an application to file the order If the order is impeached as erroneous the proper course for the party aggrieved by the order is to apply *to His Majesty in Council to make the necessary alteration or* modification in the order (p)

Execution. —The word execution includes restitution as described in s 144 A person therefore who desires to obtain execution though it be by way of restitution must apply in the first instance to the Court indicated by this rule (q) The provisions of this rule are mandatory so that if the petition is presented to a different Court the execution application is liable to be dismissed (r)

Application for execution of order of His Majesty in Council by assignee of order —Where an order of His Majesty in Council is transmitted by the High Court for execution under sub r (2) to the Court which passed the first decree

(n) *Lalji v B[illegible] [illegible]ath* (191[illegible]) Pat L J 6[illegible]4 43 I C 457
(o) *Mal raj [illegible] [illegible] v Pa[illegible] Baij[illegible]ath* (1917) Pat L J 496 40 I C 508
(p) *Prem Lall v Su[illegible] [illegible]* (1895) Cal 960 971 9
(q) *D[illegible] v Lirj Lal* (1915) 37 All 6 30 I C
(r) *Bl[illegible] v Zan[illegible]* (19[illegible]) 3 Pat [illegible] 78 I C 66 ([illegible]4) A P 576

15 appealed from the latter Court is not in the position of a Court to which a decree is transferred for execution and it is not therefore precluded from entertaining an application for execution of the order by an *assignee* of the order (*s*) See O 21 r 16 and notes thereto Application for execution by a transferee should be made to the Court which passed the decree

Enforcement of liability of surety—*A* obtains a decree against *B* in a High Court for possession of certain immovable property *B* appeals to the Privy Council and *C* stands surety for *A*'s costs of the appeal [r 7 sub r 1 cl (a)] If the appeal is dismissed with costs *A* may proceed against *C* for costs by an *application for execution* [s 145]

Assuming in the case put above that *A* applies for execution of the decree and that possession of the property is delivered to him on *D* standing surety for re delivery of the property to *B* and for the payment of mesne profits in the event of *B*'s appeal being successful [r 13 sub r (2) cl (b)] and that the Privy Council allows *B*'s appeal and reverses the decree of the High Court in that event if *A* fails to re deliver the property or to pay the mesne profits to *B* *B* may proceed against *D* by an *application for execution* [s 145] (*t*)

Restitution—*A* obtains a decree against *B* for possession of certain immovable property Possession of the property is delivered to him in execution The decree is then set aside in appeal to the Privy Council Pending the appeal to the Privy Council the property is sold in execution of a decree obtained by *C* against *A* and it is purchased by *P* *B* is entitled on reversal of the decree by the Privy Council to restitution of the property as against *P* the latter being a representative of *A* within the meaning of s 47 (*u*) The Patna High Court considers that proceedings for restitution are not proceedings in execution and so in Patna applications for restitution consequent on a Privy Council decree are not made under this rule to the High Court but to the trial Court (*v*) The Allahabad High Court treats such an application as one to enforce an Order in Council and as subject as regards limitation to art 183 of the Limitation Act (*w*) See note under s 144 Against whom restitution may be claimed and whether a proceeding under this section is a proceeding in execution

Mesne profits—Where a party is dispossessed of land in pursuance of a decree of the High Court and the decree is reversed in appeal to the Privy Council he is entitled not only to restoration of the land, but to mesne profits during the period of dispossession though the order of His Majesty in Council may be silent as to such profits (*x*) See s 144

Rate of exchange—The Court have differed on the question whether the words for the time being refer to the rate of exchange at the date of the passing of the order or to that current when the amount is realised. The former view is held by the Calcutta High Court (*y*) the latter by the Allahabad High Court (*z*)

Interest on costs—Where interest on costs is not allowed in the order of His Majesty in Council such interest cannot be given by any Court in this country (*a*)

(*s*) *Krishna Bhoopathi* v *Raja of Vizianagram* (1915) 38 Mad 83 [illegible]

(*t*) *Arunachelam* v *Arunachellam* (189) 15 Mad 203 is no longer law

(*u*) *Garudh Prasad* v *Raj Mal* (1906) 28 All 337

(*v*) *J[illegible] Kishore* v *H[illegible] Singh* (19) [illegible]

(*w*) *Soban* v *Baijnath* (19) [illegible] All [illegible]

(*x*) *Arunachellam* v *Arunachellam* (189) 15 Mad 203

(*y*) *Dakhina* v *Saroda* (1896) 23 Cal 35 *Mahomed* v *Gujraj* (189) 25 Cal [illegible]

(*z*) *Param Sukh* v *Ram Dayal* (1886) 8 All 630

(*a*) *Dakhina* v *Saroda* (1896) 23 Cal 35 *Forester* v *Secretary of State* (15 7) [illegible] 137 3 Cal 161

Letters Patent appeal—An appeal lies under cl 1ʋ of the Letters Patent from an order of a single Judge of a High Court *refusing* to transmit for execution the order of His Majesty in Council as provided by sub rule (2) of this rule (b)

Limitation—An application for execution under this rule is governed by Art 183 of the Limitation Act 1908 (c)

Dismissal of appeal for want of prosecution—Where an appeal is preferred to the Privy Council from the decree of a High Court but the appeal s *dismissed for want of prosecution* the order of His Majesty in Council does not amount to a decree at all for purposes of limitation or for any other purpose Such an order *does not deal judicially* with the matter of the suit but merely recognizes authoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that therefore he is in the same position as if he had not appealed at all (d)

16 [S 611] The orders made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees

Appeal from order relating to execution

Appeal—See notes to r 15 above Letters Patent appeal

ORDER XLVI

Reference

1 [S 617] Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court

Reference of question to High Court

Alterations in the rule—

1 The words is not subject to appeal have been substituted for the word final as the expression final decree is now used in this Code in contradistinction to a preliminary decree

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(b) *Hurrish Chunder* v *Kali Sunderi* (188) 9 Cal 48 10 I A 4 In appeal from *Kali Soonderi Dabia in re* (1881) 6 Cal 594 See also *Lilanand* v *Luckimpur* (18 0) 5 Beng L R 605 608 13 M I A 490

(c) See *Tribikram* v *Badri* (1916) 1 Pat L J 383 36 I C 633 *Chutterpat Singh* v *Saila* (1917) 43 Cal 903 36 I C 60?

(d) *Abd l Maj d* v *Jawahir Lal* (1914) 36 All 350 3 I C 649 [P C] *Bai k Nath* v *M s Dei* (1914) 36 All I A 104 3 I C 644

r 1 2 The words "or the construction of a document which construction may affect the merits" which occurred in the old section after the words "having the force of law" have been omitted as they are sufficiently covered by the power to refer any question of law

Hearing of a suit or appeal—A reference can be made to the High Court under this rule only in a *suit* or an *appeal in a suit* and not in every matter before the Court in which a point arises on which the Court entertains reasonable doubt (e) Thus where a pleader was fined Rs 25 by a Subordinate Judge for refusing to act on behalf of his client after receipt of retaining fee and on appeal the District Judge referred the matter to the High Court under this rule it was held that no reference could properly be made under this rule as there was no *suit* or *appeal in a suit* (f) Nor can any reference be made in a proceeding other than a *suit* or an *appeal in a suit* even by virtue of the provisions of s 141 above (g) See notes to s 141 "The procedure provided in this Code etc"

Decree not subject to appeal—This rule does not authorize a reference to the High Court except in a suit or appeal in which the decree is not subject to appeal. Therefore no reference can be made to the High Court in a matter in which an appeal lies for in appealable cases a remedy to correct possible error is provided by the appeal It is only when a decree is not subject to appeal that a reference can be made under this rule (h) In *Pamphul v Durga* (i) a Munsif being of opinion that he had no jurisdiction to entertain a particular suit returned the plaint to be presented to the proper Court On appeal the District Judge referred the matter to the High Court The High Court held that the order of the Munsif returning the plaint being an appealable order [O 43 r 1 cl (a)] the High Court had no jurisdiction to entertain the reference On the same ground it is held that there could be no reference under this rule in a matter of probate and that an order made by a District Judge on an application for probate being *appealable it cannot be referred for the opinion of the High Court* under this rule though when referred the High Court may deal with the case as a Court of concurrent jurisdiction under s 264 of the Indian Succession Act (j)

Jurisdiction—A Judge who has no jurisdiction to hear a suit or an appeal has no jurisdiction to make a reference before or at the hearing of such suit or appeal (k)

Reasonable doubt—A reference under this rule can only be made when a Judge entertains a reasonable doubt on a question of law or usage having the force of law A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court to which he is subordinate unless the authority of the decision can be questioned by virtue of anything said or decided in the Privy Council (l) If the Court has no reasonable doubt it should not make a reference merely because it is asked to make one (m)

Reference by Presidency Small Cause Court—See Presidency Small Cause Court 1882 s 69

(e) M h d v *Ahmadkha* (1901) 5 Bom 3

(f) I t v *De S a* (1898) 1? Bom 8

(g) *D m dara v I llaya* (1911) 36 Mal 16 10 I C 8 9 *T in e l v Mull k* (19) 9 C W N 591 84 I C 543 ( ) A C 391

(h) *Pangy v L a j* (188) 11 B m 57 *I rish a v I amk* (1880) 7 C L R 144 *S cret f tate v Pa l* (1891) 18 Cal 31 *O e l Lo n 4s Ltd v Hatch* (1893) 17 Bom 73 *M n t v Cl da sai a* 1888) 1 Bom 0 *N az Ali v M hammad* (1916) Punj Rec no 130 I 407 37 I C 7

(i) (188) 7 All 81

(j) *M h Mookerj e in the m tter of* (1880) 5 Cal 7 6

(k) *G ng S gh v K nsh Ram* (1913) Punj 1 no 61 p 233 18 I C 314

(l) *Bhanaji D B to* (1906) 0 Bom 6 *I ll gh r v D n* (1914) Punj Rec no 8 p 0 I C 193

(m) *Da o djee v M p l ty of R ngoon* (19 3) 1 Rang 2 0 76 I C 519 (3) A R 193

2 [S 618] The Court may either stay the proceedings or proceed in the case notwithstanding such reference and may pass a decree or make an order contingent upon the decision of the High Court on the point referred,

Court may pass decree contingent upon decision of High Court

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference

3 [S 619] The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment under the signature of the Registrar, to the Court by which the reference was made, and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court

Judgment of High Court to be transmitted and case disposed of accordingly

Such Court shall proceed to dispose of the case in conformity with the decision of the High Court —In *Yule & Co* v *Mahomed Hossein* (n) the Small Cause Court passed a decree for the plaintiffs contingent on the opinion of the High Court The High Court held that upon the case presented by the plaintiffs they could not recover The judgment of the High Court was transmitted to the Small Cause Court and the Small Cause Court Judge instead of entering judgment for the defendants allowed the suit to be withdrawn by the plaintiffs with liberty to bring a fresh suit [O 23 r 1] Upon a petition for revision it was held by the High Court that the Small Cause Court was bound on receipt of the decision of the High Court to dispose of the case in conformity with that decision and to enter judgment for the defendants and that the order allowing the plaintiffs to withdraw from the suit [illegible]

4 [S 620] The costs (if any) consequent on a reference for the decision of the High Court shall be costs in [illegible]

Costs of reference to High Court

5 [S 621] Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose and make such orders as it thinks fit

Power to alter etc decree of Court making reference

6 [S 646A] (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes [illegible]

Power to refer to High Court questions as to jurisdiction in small causes

(n) (1897) 24 Cal 129

16, 6, 7 cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit

At any time before judgment —A reference under this rule can only be made *before* judgment (o)

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes

7 [S 646 B] (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule the High Court may make such order as in the circumstance appears to it to be just and proper

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule

Provincial Small Cause Courts Act 9 of 1887 sec 16 —Section 16 of the Provincial Small Cause Courts Act runs as follows Save as expressly provided by this Act or by any other enactment for the time being in force a suit cognizable by a Court of Small Causes *shall not be tried* by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable

If required by a party shall —It has been held by the High Courts of Madras and Calcutta that a District Court is bound to make a reference under this rule if one of the parties requires it to do so (p) On the other hand the Allahabad High Court has held that the word shall is not mandatory but merely directory

(o) *D wal ba* v *Sadashi ada* (1900) 24 Bom 310
(p) *Sims n* v *McMaster* (1890) 13 Mad 344 | *S sh Chu der* v *Kristo Ra gini* (1894) 21 Cal 919 2 1

and that a District Court should not make a reference under this rule unless it is satisfied that a Court subordinate thereto has come to an erroneous finding on a point of jurisdiction in regard to the particular suit before it (q) **O 46**

Statement of reasons —Where a reference is made to the High Courts under this rule the District Court which makes the reference should state its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous (r)

Powers of High Court under this rule —There is a conflict of decisions as to the powers of the High Court under this rule as will be seen from the cases considered below —

Illustration

A suit cognizable by a Small Cause Court is tried by a District Munsif on the original side without objection to his jurisdiction and a decree is passed for the plaintiff The defendant appeals to the District Court making no reference to the question of jurisdiction in his grounds of appeal. The District Court reverses the decree passed by the Munsif The plaintiff applies to the High Court under s 115 for a revision of the decision of the District Court It is clear that the suit being one of a nature cognizable by a Small Cause Court the District Munsif had no jurisdiction to entertain it under his ordinary jurisdiction having regard to the provisions of section 16 of the Provincial Small Cause Courts Act set forth above Nor had the District Court jurisdiction to entertain the appeal from the decree in such a suit What order should the High Court make assuming of course that the suit was one of a nature cognisable by a Small Cause Court and which of the following courses should it adopt ?—

(1) Should the High Court set aside the decrees of both the Courts below and return the plaint for presentation to the proper Court ?

(2) Or has it power to consider the case on the merits and to decline to interfere in the matter even though in strict law the suit should have been tried under a different procedure ?

(3) Or should it not set aside the decree of the District Court as having been made without jurisdiction and *then* dispose of the case on its merits leaving the decree passed by the Munsif to stand or not as may in its discretion appear best ?

The first course was adopted by White C J in a Madras case where the learned Judge observed that there was no alternative but to adopt that course (s)

The second course was adopted by the High Court of Calcutta in the undermentioned cases (t) where the Court declined to interfere on the ground that they had a complete discretion in the matter

The third course was adopted in a recent case by a Full Bench of the Madras High Court (u) The full Bench held dissenting from the Calcutta decisions cited above and overruling an earlier Madras case (v) in which the Calcutta decision was followed that the decree of the District Judge should be set aside as having been passed without jurisdiction That decree was accordingly set aside and the decree passed by the Munsif was restored The same course was adopted in a Bombay case (w)

As regards the Allahabad High Court it declined to interfere in one case on the ground that the present rule did not apply unless there was an *erroneous holding* as to jurisdiction and that could not occur if no objection to jurisdiction was taken by either

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(q) *Madan Gopal* v *Bhagwan Dass* (1889) 11 All 304

(r) *Chhotu* v *Jawahir* (1906) 28 All 293

(s) *Ramasamy* v *Orr* (1903) 26 Mad 176

(t) *Suresh Chunder* v *Kristo Pa gi i* (1894) 1 Cal 49 [case of second appeal] *Ramesh war* v *Jag t* (1914) 19 C W N 900 27 I C 97

(u) *Kollipara* v *Krishnapat* (1910) 33 Mad 3 3 11 I C 543

(v) *Parameshwaran* v *Vishnu* (1904) 7 Mad 479

(w) *Shankarbhai* v *Soonabhai* (1901) 25 Bom 417

7 party in the Courts below (x) In a later case it followed the Full Bench ruling of the Madras Courts and set aside the decree of the District Court and restored the decree passed by the Munsif (y)

ORDER XLVII

Review

1 Application for review of judgment

1 [S 623] (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes

and who, from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when being respondent, he can present to the appellate Court the case on which he applies for the review

Review under the Code of 1859 and the Code of 1877—Under the Code of 1859 s 376 an application for review could be entertained on the ground of discovery of new matter or evidence which was not within his [applicant s] knowledge or could not be adduced by him at the time when such decree was passed or for any other good and sufficient reason Under the Code of 1877, s 623 an application for review could be entertained on the ground of discovery of new and important matter or evidence which after the exercise of due diligence was not within his [applicant s] knowledge or could not be produced by him at the time when the decree was passed or order made *or on account of some mistake or error apparent on the face of the record* or for any other sufficient reason Sec 623 of the Code of 1882 is in this respect the same as s 623 of the Code of 1877 The present rule is a reproduction of s 623 of the Code of 1882

(x) *Ram Lal* v *Kabul Singh* (1903) All 13

(y) *Abdul Majid* v *Bedy dha* (1917) 39 All 101 37 I C 9

In what cases a party may apply for a review —A party aggrieved by a decree or a decision specified in clause (a) (b) or (c) of sub rule (1) [see s 114] may apply for a review in any of the following cases —

I on the ground of the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made *or*

II on account of some mistake or error apparent on the face of the record

III for any other sufficient reason

Ex parte decree or order —A party aggrieved may apply for a review of an ex parte decree or order ( ) and if the case falls within this rule it is no objection that an application under O 9 r 13 could have been made and that it is barred by limitation (*a*) See notes under O 9 r 13 and O 41 r 19 The Court has jurisdiction to review an ex parte order for issue of writ for delivery of possession and to recall the writ (*b*)

Miscellaneous proceedings —The provisions of the Code as to review apply to proceedings under the Indian Succession Act and an order granting letters of administration is open to review (*c*)

Order on application —Where a party aggrieved by a decree applies for review the application may either be granted or rejected (r 4 below)

If the application is rejected the case ends there and the parties are relegated to the old decree The order rejecting the application is final and no appeal lies therefrom (r 7) but the party aggrieved may appeal from the old decree

If the application is admitted the case is re heard and it may result *in a repetition* of the decree or in some *variation* of it In *either* case the whole matter having been re opened there is a *fresh* decree (*d*) until that fresh decree is passed the old decree remains in suspense (*e*)

I Discovery of new and important matter or evidence —When a review is sought on the ground of the discovery of new evidence the evidence must be (1) relevant and (2) of such a character that if it had been given in the suit it might possibly have altered the judgment (*f*) As stated by Lord Loreburn L C in *Brown* v *Dean* (*g*) It [new evidence] must at least be such as is presumably to be believed and if believed would be conclusive Applications on this ground must be treated with great caution and as required by r 4 (2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged (*h*) It is not only the discovery of new and important *evidence* that entitles a party to apply for a review but the discovery of any new and important *matter* which was not within the knowledge of the party when the decree was made *A* sued *B* to recover a sum of money alleged to be due under a certain agreement and obtained a decree *B* appealed to the Privy Council Pending the appeal *A* brought another suit against *B* to recover another sum of money alleged to have become due under the *same* agreement and obtained a decree *on the strength of the former decree* Their Lordships of the Privy Council reversed the first decree *B* then applies for a review of the second decree and the application was allowed on the ground that in the circumstances of the

(*z*) *B b M llo* v *Ilahi B gam* (1884) 6 All 65 But see now *Mahad o* v *Lak hm Naraj n* (19) 49 Bom 839 90 I C 610 (5) A B 1

(*a*) *Ch kl I gam Chetty* v *Lak hma an* (19 0) 38 M d L J 4 55 I C 444 But see now *M jh l S gh* v *Hakim H m d* (19 3) 1 All L J 416 74 I C 5 8 (3) A A 576

(*b*) *I ash Beha i* v *Hem nt* (19 5) 41 Cal L J 349 88 I C 9 1 (5) A C 10 3

(*c*) *I yo e Ho e* v *Ky i Soon* (19 5) 3 R ng 1 91 I C 509 (5) A R 314

(*d*) *Vad l l* v *Fulcha d* (1906) 30 Bom 56

(*e*) *4 hy t* v *Tap ba* (19 4) 48 Bom 210 9 I C 7 3 (4) A B 310

(*f*) *Appa I* In re (188) 10 M d 73 7 13 I A 155 *Na l l* v *I nchanan* (1918) 45 Cal 60 67 68 4 I C 484

(*g*) (1910) A C at p 374

(*h*) *Chira jil l* v *Tuls am* (1920) 47 Cal 568 56 I C 734

1 case the Privy Council decision was new and important *matter* on which to apply for a review of the second decree (i) This decision stands on the special facts of the case In *Amrit Lal* v *Madho Das* (j) it was held that where a decree is based upon a decision of a Divisional Bench of the High Court and that decision is subsequently overruled by the Full Bench the reversal is no ground for a review of the decree Nor is the production of a new ruling or authority which if brought to the notice of the Jud e at the first hearing might have altered the judgment new and important matter within the meaning of this rule (k) An alteration of the law by subsequent legislation is not discovery of new matter justifying a review (l)

It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgment The provision relating to review contemplates grounds which would *alter or cancel the decree* Thus if a suit is dismissed on two grounds namely (1) that no notice of suit was given and (2) that the plaintiff was illegitimate and the plaintiff applies for a review on the ground of discovery of new evidence on the question of legitimacy it is a good ground for rejecting the application that even if the Court held on the reception of new evidence that the plaintiff was legitimate it would not lead to the modification or setting aside of the original decree as the want of notice was fatal to the suit (m)

II **Mistake or error apparent on the face of the record**—A review may be granted whether on any ground urged at the original hearing of the suit or not whenever the Court considers that it is necessary to correct an *evident* error or omission (n) Thus a review was granted where an error on a point of law was apparent on the face of the judgment (o) *e g* failure to apply the law of limitation to the facts found by the Court (p) Similarly a review was granted when the provisions of the second paragraph of s 57 of the Code of 1882 [now s 98 sub s (?)] were wrongly applied (q) A review may also be granted where there is an error of procedure apparent on the face of the record *e.g* where judgment is delivered without previous notice to the pa ties (r) But it is no ground for review that the judgment proceeds on an incorrect exposition of the law (s) or on a ruling which has subsequently been modified (t) or reversed (u) See s 152

III **For any other sufficient reason** —These words mean that the reason must be one sufficient to the Court to which the application for review is made and they cannot be held to be limited to the discovery of new and important matter or evidence or the occurring of a mistake or error apparent on the record (v) Thus in *Ghansham* v *Lal Singh* (w) a reference to a Full Bench was disposed of in the absence of the respondent The respondent proved that his absence at the hearing was due to the fact that notice of the reference was not served upon him It was held that this

(i) *W agh la* v *Masl din* (1889) 13 Bom 330 *W aman* v *Hari* (1907) 31 Bom 1 8 *Ram Lal* v *Falka P asad* (1911) 33 All 566 10 I C 44 *Maung I y w* v *F Aye* (19) 5 Rang 261 103 I C 8 (7) A R 189 I C 2 9 (4) A C 10 4 (Suit dismissed though p rt of cl im admitted) *Surty* v *F S Ch ttjar F* (19 6) 4 Ra g 28 98 I C 417 ( ) A R 20 *Ma Hta Yi* v *Ma Pwa Hn t* (19) 5 Rang 610 105 I C 710 (8) A R 1

(j) (1884) 6 All 9

(k) *Ellen* v *Basheer* (1876) 1 Cal 184 *Abdul S diq* v *Abdul Az* (1899) 1 All 152 153

(l) *Gy aji* v *N g ppa* (19 8) 5 Bom 434 111 I C 633 (8) A B 408

(m) *U h bi* v *Collector of Allahabad* (1914) 36 All 277 21 I C 14

(n) *K lu* v *I tshr m* (18 7) 1 Bom 543 *Ch n t m* v *Py ri* (18 0) 6 B L R 126 But se *Sheo R t n* v *Lappu Kuar* (1883 5 All 14

(o) *Sh rup Cha d* v *Pat Da see* (1887) 14 Cal 6 7 *Jat a Moh n* v *Akhl l Chandra* (1897) 24 C l 334 336 *M r i R o* v *B lr th D k hit* (19 3) 46 Mad 9 5 76 I C 34 (24) A M 98 *Probh K m r* v *Nithar L l* (19 4) 8 C W N 9 8 84

(p) *D b Sahai* v *Basheshar Lal* (19 9) 10 Lah 184 11 I C 540 (8) A L 919

(q) *Hus i i B g m* v *Coll tor of Muz farn gir* (1 89) 11 All 1 6

(r) *Mau g Sein* v *Ma ng T n* (19 9) 6 Rang 794 114 I C 687 (9) A R 0

(s) *Chh jj t R i* v *Nek* (19) 49 I A 144 3 Lah 1 7 72 I C 566 ( ) A PC 11

(t) *G r b l* v *S raja Nar* (19 4) 3 Pat 34 5 I C 17 (24) A P 50 Co tra *Bri daba* v *Da od r* (19) 9 C W N 143 8 I C 65 (5) A C 304

(u) *Ve kamm* v *R g no* (19) 43 Mad L J 33 0 I C 741 ( ) A M

(v) *Am r H a Ah d Al* (188) 9 All 36 C 1 *R t* v *Hat e Abdoollah* (18 6) 131 3 I A 1

(w) (188) 9 All 61

constituted a sufficient reason for granting a review In *Suleman* v *The New Oriental Bank Corporation Ltd* (x) a review was granted on the ground that the question that had arisen at the hearing was one of great general commercial importance In *Gopal* v *Solomon* (y) all the parties counsel on both sides and the Judge were at the trial of the suit under a misapprehension as to the contents of a document It was held that this was a sufficient reason for granting a review In a Patna case where an auction purchaser applied for an order for delivery of possession and the order was made it was held that it was sufficient ground for reviewing the order that the application was on the face of it barred by limitation (z) But a party who not only had an opportunity of raising a question but who did raise it and on argument abandoned it cannot under ordinary circumstances be allowed to agitate the question in review (a) Nor is it a sufficient reason for granting a review that if another opportunity was given to the applicant he would satisfy the Court that its previous order was wrong (b) Omission to raise a point of law is not sufficient (c)

The ground of review must be something which existed at the date of the decree and the rule does not authorize the review of a decree which was right when it was made on the ground of the happening of some *subsequent event* (d) But when a decree fixed a period for the performance of a condition and a railway strike made timely performance impossible the High Court of Allahabad held that it had jurisdiction to extend the time in review (e)

In 1922 the Privy Council reviewed the case law in the case of *Chhajju Ram* v *Neki* (f) in which their Lordships said there was no little inconsistency (due partly to the fact that prior to the Code of 1877 the ground for review was not so restrictive) and laid down the rule that any other sufficient reason means a reason sufficient on grounds at least *analogous* to those specified immediately previously The case was one in which the Punjab Chief Court had granted a review on the ground that the judgment had proceeded on an incorrect exposition of the law This was held by the *Privy Council not to be analogous and therefore not a sufficient reason* *The actual* decision of the Privy Council is not open to criticism but the general rule laid down by their Lordships has not escaped criticism Mukerjee J in *Gopika Ram* v *Mahar Ali* (g) referring to *Chhajju s case* said Whether any analogy can be discovered between the two grounds specified, namely the discovery of new and important matter or evidence and some mistake or error apparent on the face of the record need not be discussed But whether a particular reason is analogous to either one or other of these two grounds may obviously lead to very refined if not subtle arguments Again in *Narain Das* v *Chiranji Lal* (h) the Allahabad High Court described the rule in *Chhajju s case* as technical and said in our opinion the words in O 47 r 1 for any other sufficient reason are not only very wide in themselves but are intentionally so made by the Legislature because of the possibility of exceptional cases arising in which obvious injustice would be worked by a strict adherence to the terms of the decree There is much force in these criticisms for as Mukerjee J pointed out in *Probhas Kumar* v *Nithar Lal* (i) the powers exercisable under s 151 and under O 47 r 1 are not mutually exclusive and there are several cases where it was held to be immaterial whether the review was granted under O 47 or under the inherent jurisdiction e g where a suit was by mistake dismissed for default though a plaintiff was present in person (j)

(x) (1891) 15 Bom 26

(y) (1886) 13 Cal 6

(z) *Dh der D v B l l i* (1918) 3 Pat L J 5 1 48 I C 129

(a) *S bap thi S b y* (18 8) 2 Mad 58

(b) *Bi da l r ad R gh b* (1916) 3 All 440 9 I C 994

(c) *Kalma I rasad* v *K j Behari* (19 0) 5 Pat L J 344 6 I C 11

(d) *Fotagh ri l e k ia v l ell nl l e latar ma* (1901) 24 Mad 1 97 I A 19

(e) *Na ain Da* v *Chiranj Lal* (19 5) 47 All 361 86 I C 168 (5) A A 364

(f) (19) 49 I A 144 3 Lah 1 7 I C 566 ( ) A PC 11

(g) (19 4) 30 Cal L J 4 81 I C 38 (4) A C 8

(h) (19 5) 4 All 361 86 I C 168 ( ) A A 364

(i) (19 4) 28 C W N 9 8 84 I C 78 (24) A C 10 4

(j) *B sant Kumar* v *Abhoy* (19 3) 3 Cal L J 99 3 I C 306 (3) A C 450

1 or where a suit was dismissed for failure to make up the deficit of Court fee and it was found that the Court fee had been embezzled by a pleader s clerk (*k*) or where important evidence was produced just after judgment was signed (*l*) Mukerjee J s anticipation of refined and subtle arguments was realized in a Rangoon case (*m*) where a Judge held that a reason that was not *ejusdem generis* might still be a reason that was at least analogous

Chhajju s case however is the law and has been followed (*n*) But there are some inconsistencies in the cases which follow it and these serve to illustrate the difficulty of applying the rule Thus though *Chhajju s* case decided that an incorrect exposition of the law was not a sufficient reason yet in *Murari Rao* v *Balwant Dikshit* (*o*) an error as to the Hindu law of succession was held to be an error patent on the face of the record and again in *Brindaban* v *Damodar* (*p*) the Calcutta High Court reviewed its judgment because it construed a leading case in Hindu law in a sense different to that adopted in a subsequent Privy Council decision Anoth r similar case is *Garibani* v *Suraja* (*q*) In that case a landlord had obtained a decree for rent against tenants of a 12 anna share of a holding and advertised the whole holding for sale The tenants of the 4 anna share sued to restrain the sale alleging fraud and collusion The Judge dismis ed the suit and then granted a review as a case on which he had relied had been sub equently overruled In appeal Dawson Miller C J admitted that if review was on the ground of error patent on the face of the record no appeal lay under rule 7 but said that in view of *Chhajju s* case it could not be contended that review had proceeded on this ground He held that the review was on the ground of discovery of new matter and that in this view the condition of rule 4 (2) (b) was not fulfilled as the subsequent overrulin deci ion had been published before the trial and accordingly reversed the order for review Of other cases decided on the rule in *Chhajju s* case to deserve special notice *Bindubashini* v *Secretary of State* (*r*) arose out of a motion by the Collector to hold an inquiry under s 19 H of the Court Fees Act into the value of an estate The Government pleader applied for an adjournment to call his evidence but the Judge refu ed and gave judgment The Judge then granted a review as the Government pleader was under the impression that the case would not be taken up This was reversed in revision by Rankin J as the case was not analogous to excusable failure to bring before the Court new and important matter or evidence and as there was an element of ne li gence in the case for the Judge had not found that there was any justification for the Government pleader s erroneous impression The other case *Mahadeo* v *Lakshmi Narayan* (*s*) decides that since *Chhajju s* case a plaintiff whose suit has been dismis ed under O 9 r 8 has no remedy by way of review

An execution application that has been dismissed cannot be restored by way of review (*t*)

When a compromise has been entered into a decree the Court cannot review its order on the sole ground that the compromise has been entered into under undue influence or coercion (*u*) Nor is review a minor s remedy for setting aside a decree passed through the negligence of his guardian (*v*) Where a suit is contested by the defendant but on the date fixed for the last hearing his agent admits the plaintiff s claim

(*k*) *Ad t Pr d* v *Ramla kh* (19) 4 P t 180 91 I C 213 (2) A I 43
(*l*) *R meshwa Dur la P d* (19 4) 3 P t 78 84 I C 320 (5) A P 36
(*m*) *F K K S A P* v *Ma q Ky* (19) Ra L 675 107 I C 161 (28) A R 31
(*n*) *P ol* v *M t* (19 3) 2 Pat 6 8 I C 0? (25) A I 258 *The appl atio of Dur la D h* (19 4) 46 All 4 8 I C 10 (4) A A 398
(*o*) (19 3) 46 M d 95 6 I C 34 (4) A M 98
(*p*) (19) 29 C W N 148 8 I C 6 (2) A C 304
(*q*) (19 4) 3 Pat 134 5 I C 1 7 (4) A P 0
(*r*) (19 4) 1 Cal 0 79 I C 745 (4) A C 7 4
(*s*) (19) 49 Bom 839 90 I C 610 ( ) A B 1 See I as to appeal *Ma ph l* v *Hakim* (19 3) 21 All L J 416 4 I C 528 (23) A A 5 6
(*t*) *N aj* v *M thu* (19) 50 M d 6 9 I C 1008 (6) A M 980
(*u*) *Alam l* v *Ram* (19) 43 M d I J 230 0 I C 42 (22) A M 446 *N th L l* v *R gh b r S gh* (19 6) 48 All 160 89 I C 946 (6) A A 50
(*v*) *Moola u* v *T tiayya* (19 6) 51 Mad LJ 389 98 I C 87 (26) A M 10 9

in collusion with the plaintiff the ca e is not one of a review of judgment the remedy of the aggrieved party lies in filing a suit to set aside the decree (*w*) Where the Court dismi ed a suit for default of appearance of the plaintiff on a date which the Court under a mistake supposed to have been fixed for the hearing of the suit and also under a mistake that notice of the hearing on that date was given to the plaintiff it was held by the Pangoon High Court that an application for review would lie (*x*)

Review granted on particular ground—Where a review is granted on a particular ground it is in the discretion of the Court to re hear the whole case or only the particular point on which the review has been granted (*y*) If the review was granted for additional evidence to be taken that evidence should be taken and any relevant evidence in rebuttal and al o any other evidence which the party tendering was prevented from adducing by some cause for which he was not responsible or which it was not reason able or necessary to call in the absence of that additional evidence Otherwise neither party will be allowed to adduce evidence which was available and which with reasonable diligence could have been produced at the trial (*z*)

Where an appeal dismissed summarily under O 38 r 11 is admitted on an applica tion for review the appeal is not restricted to the single ground which was made the basis of the application for review (*a*)

Order—An order under O 33 r 7 refusing leave to sue as a pauper is open to review under this rule (*b*) And so is an order as to costs (*c*) and an order rejecting an application for leave to appeal to His Majesty in Council (*d*) But an order under s 39 (h) of the Guardians and Wards Act 1890 is not open to review (*e*)

Where an appeal has been preferred before application for review—After an appeal has been preferred from a decree no application can be made for a review of that decree This clearly appears from cl (a) of sub r (1) An appeal is not the less preferred within the meaning of this rule though it may be dismissed sum marily under O 41 r 11 Hence a party against whom a decree has been passed is precluded after dismissal of his appeal under O 41 r 11 from applying for a review (*f*) If an appeal is dismissed for default and an application under O 41 r 19 has become time barred review is incompetent (*g*) So also if an appeal to Privy Council has been dismissed by the High Court for want of prosecution (*h*) But if the appeal is withdrawn it is as though no appeal had been preferred and hence it is open to the party to apply for a review (*i*) See notes to O 41 r 27 under the head Or for any other substantial cause

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(*w*) *Bhagwan Dut* v *Ram Dut* (19 9) 4 Luck 6 (28) A O 418

(*x*) *A T K P L M Muthu* v *Lakshm naray n* (19 8) 6 Rang 54 111 I C 80 (8) A R 1 7

(*y*) *Hu bans* v *Thakoor Pi sh d* (1883) 9 Cal 20

(*z*) *Bha n am* v *Ai bica Ch ran* (19 6) 53 Cal 8 6 97 I C 31 (7) A C 31

(*a*) *Janak Nath* v *Pr bhas* (1916) 43 Cal 178 185 30 I C 398

(*b*) *Ada ji* v *Manekji* (1880) 4 Bom 414

(*c*) *Braj* v *J gan ath* (19 1) 6 P t L J 84 63 I C 68 ( ) A P 1

(*d*) *Nand K hor* v *I m Gulam* (1912) 39 Cal 1037 17 I C 1

(*e*) *Ialla* v *M gla* (191) Punj Rec No 116 p 400 15 I C 140

(*f*) *F mappa* v *Bharma* (1906) 30 Bom 6 5 *Hari Ganu* v *Hari G u* (19 9) 31 Bom L R. 436

(*g*) *M phul Si gh* v *Hakim H mid* (19 3) 21 All L J 416 4 I C 5 9 (3) A A 576

(*h*) *R ta cha d* v *Damji* (19 7) 29 Bom L R 391 101 I C 766 (7) A B 23

(*i*) *P l* v *Devj* (1883) 7 Bom 97 *Ra n Pra s d* v *Asa Ram* (19 1) 43 All 288 61 I C 334 (21) A A 197 *Mariamun-nissa* v *Bab i R m* (19 3) 45 All 458 73 I C 1016 (3) A A 541 *Ram Baran* v *Bhagwati* (1925) 47 All 751 89 I C 295 (25) A A 804 *Madhori* v *Parbati* (19 5) 47 All 881 88 I C 6 3 (25) A A 55

(*j*) *Che a Redd* v *Peddaobi Redd* (1909) 32 Mad 416 2 I C 807 [F B] *Narayan* v *Laxmibai* (1914) 38 Bom 416 3 I C 513 *Pyari Mohan* v *Kalu Khan* (1917) 44 Cal 1011 41 I C 497

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(*k*) *Adit Pr* d v *Ramlarakh* (19) 4 Pat 180 91 I C 213 ( ) A I 43

(*l*) *Rameshwar* v *Dwa ka Pr* d (19 4) 3 Pat 8 84 I C 3 0 ( ) A P 36

(*m*) *F m K A* 4 *R* v *M* *q Kya* (19) 5 Rang 6 10 I C 161 (8) A R 31

(*n*) *Ragl* v *Mah* t (19 3) 2 Pat 65 8 I C 0 ( ) A T 2 8 *The appl cat o J Dwarka D h* (19 4) 46 All 245 8 I C 10 (24) A A 3 8

(*o*) (19 3) 46 Mad 95 6 I C 34 (24) A M 98

(*p*) (19 5) 9 C W N 149 8 I C 6 (2) A C 304

(*q*) (19 4) 3 Pat 134 I C 177 (24) A P 0

( ) (19 4) 51 Cal 0 9 I C 745 (4) A C

(*s*) (19 5) 49 Bom 839 90 I C 610 ( ) B 5 1 See also as to appeals *Ma ph I Hak a* (19 3) 21 All L J 416 4 I C 728 (23) A A 576

(*t*) *Naray* v *M th* (19 7) 50 Mad 6 97 I C 1008 (6) A M 940

(*u*) *Alamelu* v *R ma* (19) 43 Mad L J 90 70 I C 4 (2) A M 446 *Lal* v *Raghub r S gh* (19 6) 48 All 160 8 I C 946 (26) A A 0

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(w) *Bhagwan Dut* v *Ram Dut* (19 9) 4 Luck 76 (28) A O 418

(x) *A T K P L M Muthu* v *Lakshminarayan* (19 8) 6 Rang 254 111 I C 80 (8) A. R 1 7

(y) *H rba s* v *Thakoor Pr shad* (1883) 9 Cal 20

(z) *Bhai ram* v *Ambica Char* (19 6) 53 Cal 856 97 I C 731 (7) A C 31

(a) *J n ki Nath* v *Pr bhas i* (1916) 43 Cal 178 185 30 I C 398

(b) *Ada j* v *M nilji* (1880) 4 Bom 414

(c) *Braja* v *J gan th* (19 1) 6 Pat L J 284 63 I C 68 ( ) A P 1

(d) *Nand Kisho e* v *Ram Gulam* (1912) 39 Cal 1037 17 I C 2 1

(e) *Ralla* v *Ma glan* (191) Punj Rec No 116 p 400 15 I C 140

(f) *Ramappa* v *Bharma* (1906) 30 Bom 6 5 *Hari Ga u* v *Hari Ganu* (1909) 31 Bom L R. 436

(g) *Ma phul Singh* v *Hakim Hamid* (19 3) 21 All L J 416 4 I C 5 8 (3) A A 575

(h) *Tara chand* v *Damji* (19 7) 29 Bom L R 391 101 I C 766 (7) A B 23

(i) *Pandu* v *Devji* (1883) 7 Bom 87 *Ram Prasad* v *Asa Ram* (19 1) 43 All 288 61 I C 334 (1) A A 197 *Mariamun nissa* v *Babu R m* (19 3) 45 All 458 73 I C 1016 (3) A A 541 *Ram Baran* v *Bhagwati* (19 5) 47 All 7 1 89 I C 295 (5) A A 804 *Madh ri* v *Parbati* (19 5) 47 All 681 88 I C 633 ('25) A A 55

(j) *Chen a Reddi* v *Peddaob Redd* (1909) 32 Mad 416 I C 60 [F B] *Narayan* v *Laxmibai* (1914) 38 Bom 416 3 I C 513 *Pyari Mohan* v *Kalu Khan* (1917) 44 Cal 1011 41 I C 497

7, is not heard because once the appeal is heard the decree on appeal is the final decree
,2 in the case and the application for review of judgment of the Court of first instance can no longer be proceeded with (*k*) And this is so even if the appeal is dismissed under O 41 r 11 (*l*) On the other hand, if the application for review is granted and a new decree is passed the appeal cannot be heard and it must be dismissed, for the decree appealed from is superseded by the new decree (*m*)

No review allowed on a question of fact after decision of second appeal —The High Court cannot in second appeal allow an application for a review of judgment on the ground of discovery of *new evidence after* the appeal is disposed of by that Court The reason is that the High Court is bound in second appeal by the *findings of fact* of the lower appellate Court But if the application is made *before* the disposal of the appeal it may be a ground for allowing the appellant to withdraw the appeal to enable him to apply to the lower appellate Court for a review of its judgment on the ground of discovery of new evidence (*n*)

Application to set aside order made by another Judge —One Judge of a High Court cannot set aside an order made by another Judge of that Court even though the order be wrong The remedy lies in review on the grounds mentioned in this rule (*o*)

Review of judgment passed in appeals preferred under cl. 15 of the Letters Patent —It is competent to the High Court to review judgments passed in appeals preferred under cl 15 of the Letters Patent The words decree or order include a judgment (*p*)

Commissioner —A commissioner for taking accounts has no power of review under this order but before his report is submitted he may reopen the inquiry into any item on grounds analogous to those of this rule (*q*)

To whom applications for review may be made

2 [S 624] An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed, but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub rule (2), proviso (a) be disposed of by his successor

(*k*) *Pyar Mohan* v *Kali Khan* (191) 44 Cal 1011 1015 1016 41 I C 497 *Gor* v *Nuladl b* (19) 6 C L J 84 3 I C 34 (3) A C 113 *Q* as to cases coming under O 4 r 1 (2)?

(*l*) *Shiappa* v *Ram dra* (19) 46 Bom 1 63 I C 910 (2) A B 130

(*m*) *Kanhaiya Lal* v *B ld o I as d* (1906) 8 All 240 *Brijbasi Lal* v *S I P m* (191) 34 All 28 14 I C 4 *P M* v *K l Kha* (191) 44 Cal 1011 41 I C 49 *Basl sha Nath* v *Ram Kislen D* (1919) Punj P c No 140 p 361 54 I C 966 *M lawa Ram* v *Madan Gop l* (1919) Punj Rec No 166 p 443 55 I C 63 *Shidramappa* v *Gurushantappa* (19 9) 31 Bom L.R 137 116 I C 2 7 (9) A B 183

(*n*) *N d Kishore* *n the* *tter of the p tu* of (1910) 32 All 1 4 I C 809 *Paru k tt* v *U mad* (189) 18 Mad 480 *Panchanan* v *Radhanath* (18 0) 4 B L R A C 13 *P j* v *Ka* (1914) 41 Cal 80 6 I C 81 *Som Saila Bala* v *Galal ar* (1 3) 7 C W N 918 0 I C 40 ( ) A C 165 *Hari Ganu* v *Ha Go u* (19) 31 Bom L.R 436

(*o*) *Basanta K m* v *Kusum K mari* (1917) 44 Cal 28 33 I C 34

(*p*) *Ve kata Subb r jad* *Sri Rajah Krishna* (1917) 40 Mad 651 I C 8 3 *Rua hand* v *D* (19 7) 29 Bom. L. R 391 101 I C 66 (7) A B 3

(*q*) *Fernandez* v *lrigues* (19 3) 47 Bom 93, 8 I C 93 (4) A B 31

To whom application for review may be made—This is s 624 recast with proviso (c) to s 626 superadded to it The alteration of language does not involve any alteration of law

Rule 1 sub r (1) provide that the application for review of a decree or order should be made to the Court which passed the decree or order sought to be reviewed That rule read with the present rule leads to the following propositions —

I Where a decree is passed by a *High Court Judge* the application for review of the decree may be made to that Judge *or to his successor in office whatever be the ground on which the review is sought*

II (1) Where a decree is passed by a *Judge other than a High Court Judge* the application for review of the decree may be made to the Judge who delivered the judgment *or to his successor in office provided* the review is sought on the ground of—

(a) the discovery of new and important matter or evidence *or*

(b) some clerical or arithmetical mistake or error apparent on the face of the decree

(2) Where a decree is passed by a *Judge other than a High Court Judge* and the review is sought not upon the grounds mentioned above but *upon other grounds* the application *shall* be made to the very Judge who passed the decree it cannot be made to his successor in office (*r*) Thus if a review is sought of a decree passed by a Judge other than a High Court Judge on the ground of a supposed error of judgment (*s*) or if a review is sought of an order made by such a Judge on the ground that the order was made in the absence of the applicant and without giving him notice of the hearing (*t*) the application for review *shall be made* only to the Judge who passed the decree or made the order Such an application however *may be disposed of* by the *successor* of the Judge who passed the decree provided that the Judge who passed the decree has ordered notice to issue under rule 4 sub rule (2) proviso (a) It is not necessary that the application should also be *disposed of* by the Judge who passed the decree (*u*)

Rule 5 provides for the *hearing* of applications for review

3 [S 625] The provisions as to the form of preferring appeals shall apply, *mutatis mutandis*, to applications for review

Form of applications for review

This rule relates to form and does not enlarge the right It does not make O 43 r 1 (t) applicable to a refusal to restore an application for review (*v*)

4 [S 626] (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application

Application where rejected

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same

Application where granted

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him

(*r*) S g pa v Na y asami (158) 5 Mad 667 Moh S gh v B gal Govern me t (1850) 7 M A I 283 Ram B ran Chaube v Bh grati (19 5) 47 All 51 83 I C 9 ( ) A A 804

(*s*) B hari Lall v M ngol nath (1880) [illegible]

(*t*) Khema v Dha ji (1890) 14 B m 1[illegible]

(*u*) C npat v Jiva (189) 16 B [illegible]

(*v*) Girdharilal v Zo r S gh (19 80 I C 649 (5) A A 7

r 4 to appear and be heard in support of the decree or order, a review of which is applied for and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation

Alterations in the rule—The words and the Judge shall record with his order his reason for such opinion which occurred in the old section after the words it shall grant the same in sub r (2) have been omitted. Those words were construed by the Privy Council as being no more than a direction to the Judge how to act when he had decided to grant the application (*w*)

No such application shall be granted without previous notice to the opposite party—The expression opposite party means the party interested to support the order sought to be vacated or modified upon the application for review When an appeal is summarily dismissed under O 41 r 11 the order of dismissal may be set aside on an ex parte application for review without notice to the respondent. The respondent in such a case cannot be said to be the opposite party within the meaning of cl. (a) of this rule (*x*)

New matter or evidence—The effect of this expression is the same as if the words were new and important matter or evidence as in rule 1 above (*y*)

Strict proof—As to the meaning of the words strict proof in sub r (2) cl. (b) see notes to r 7 below Sub rule (1) cl. (b) application in contravention of provisions of rule (4)

Form.—As to form of notice required by sub r 2 (a) see App G form no 14.

Second application for review—See notes under the same head to r 7 below

Death of party pending review—The order granting a review only holds the judgment in suspense The death of a party does not therefore cause the suit or appeal to abate (*z*)

Appeal—It is provided in general terms by O 43 r 1 cl (w) that an appeal lies from an order under this rule granting an application for review The High Courts of Calcutta Patna Rangoon and Lahore have held that cl (w) is to be read with and subject to rule 7 (1) below so that an appeal lies only on the grounds mentioned in that rule (*a*) The Bombay High Court held in one case (*b*) that the appeal is against the order granting the review quite irrespective of the limitation contained in rule 7 Subsequent to this decision the Bombay High Court deleted cl (w) from the rule so that there is no appeal now except on the grounds mentioned in rule 7 below (*c*) See notes to r 7 under the head Appeal

(*w*) *Shankar Baksh* v *Balwant Singh* (1900) 7 Cal 333 .. I A 79

(*x*) *Janaki Nath* v *Prabhasini* (1916) 43 Cal 1 8, 30 I C 898 dissenting from *Abdul Hakim* v *Hem Chandra* (1915) 42 Cal 433 30 I C 16 *Official Trustee of Bengal* v *Benode Bihar* (1924) 51 Cal 943 84 I C 147 (25) A C 114 But see *Varajana* v *Muthu* (19 7) 50 Mad 6 97 I C 1008 (6) A M 980

(*y*) *Ch anj Lal* v *Tuls m* (19 0) 4 Cal 568 56 I C 734 [F B]

(*z*) *Achyut* v *Tapibai* (19 4) 48 Bom 10 9 I C 753 (4) A B 310

(*a*) *Hari Charan* v *B an Khan* (1914) 41 Cal 746 25 I C 903 *Abid* v *Mehend a Lal* (1915) 42 Cal 830 9 I C 3 *Nandalal* v *Pa chan n* (1918) 45 Cal 60 3 4 I C 484 *Sundar Mall* v *Upendra Nath* (1916) 1 Pat L J 193 35 I C 15 *A T K P L M Muthu* v *Lakshm narayan* (1928) 6 Rang 54 111 I C 80 (8) A R 177 *Lan Jin* v *Ma Mya* (19 9) 7 Rang 15 118 I C 1 0 (9) A R 105 *Sikandar* v *Baland* (19) 8 Lah 617

(*b*) *Daso* v *Karbasappa* (19) 2 Bom L R 1446 94 I C 31 (6) A B 1 1

(*c*) *Kunverji* v *Pitamberdas* (19) 9 Bom L R 1355 *Shidramappa* v *Gurushantappa* (19 9) 31 Bom L R 13 116 I C (29) A B 153

5 [S 627] Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same

Application for review in Court consisting of two or more Judges

6 [S 628] (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected

Application where rejected

(2) Where there is a majority, the decision shall be according to the opinion of the majority

7 [S 629] (1) An order of the Court rejecting the application shall not be appealable, but an order granting an application may be objected to on the ground that the application was—

Order of rejection not appealable Objections to order granting application

(a) in contravention of the provisions of rule 2,

(b) in contravention of the provisions of rule 4, or

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit

(2) Where the application has been rejected in consequence of the failure of the applicant to appear he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for hearing the same

O 47 r 7 (3) No order shall be made under sub rule (2) unless notice of the application has been served on the opposite party

Alterations in the rule —

1 The words "shall not be appealable" have been substituted for the word "final" This is merely a verbal alteration

2 The words "the Court *shall* order it to be restored" in sub r (2) have been substituted for the words "the Court *may* order it to be restored."

3 The last paragraph of the old section has been transferred to r 9

Appeal—

(i) *Order rejecting application for review*—No appeal lies under the Code from an order *rejecting* an application for review Nor does an appeal lie from such an order under cl 15 of the Letters Patent for that clause is controlled by the express provisions of this rule which says that such an order "shall not be appealable" and even if it is not so controlled an order rejecting an application for review is not a "judgment" within the meaning of that clause (*d*) Nor is the order open to revision under s 115 of the Code for even if it is wrong it is no more than an erroneous exercise of discretion (*e*) But where there is no exercise of discretion at all as where the Court rejects the application not after considering whether there are sufficient grounds for review [r 4 sub r 1] but on the erroneous view that it has no jurisdiction to entertain the application, the order is open to revision, for it is then a case of failure to exercise a jurisdiction vested in the Court by law (*f*)

(ii) *Order granting application for review*—An appeal lies from an order *granting* an application for review O 43 r 1 cl. (w) But as provided by sub-r 1 it lies only in the three cases mentioned therein, for otherwise the provisions of sub-r (1) so far as they relate to appeal would be quite superfluous [see notes to r 4 above "Appeal."] In cases other than those specified in the rule no appeal lies from an order granting a review either under this rule or under cl 15 of the Letters Patent (*g*) Thus if an appeal is preferred from an order admitting an application for review on the ground that the alleged "sufficient reason" for which the application was admitted did not constitute "sufficient reason" within the meaning of r 1 of this Order the appeal should not be entertained (*h*) Nor is the order appealable solely on the ground that the application for review was time barred (*i*) There must be an error both as to limitation *and* in the application of the rule as to "sufficient reason" If the appeal is entertained the order of the appellate Court will be set aside in revision under s 115 on the ground of "material irregularity" (*j*)

(*d*) *Achaya* v *Rat avelu* (1886) 9 Mad . 3 *Tirmal* v *Kanha ya* (19 3) 45 All 53 84 I C 58. (3) A A 3 6

(*e*) *F m L l* v *Ratan Lal* (1904) 26 All 572 *Lakshm n* v *M ruti* (19 4) 6 Bom L R 284 80 I C 267 (24) A B 344

(*f*) *Akb r Kh n* v *Muhammad Ali Khan* (1909) 31 All 610 4 I C 23

(*g*) *Bomb y a d Per ia Steam Navigation Co* v *Zuari* (1888) 12 Bom 171 *Munn Ram* v *Bishen Perkash* (1897) 4 Cal 8 8 *Darya Bibi* v *Bad Prasad* (1896) 18 All. 44 *Aubhoy Ch rn* v *Shamont* (1889) 16 Cal 88 *Khurshed Alam Khan* v *R hmat llal Kh n* (1919) 40 All 68 43 I C 490 *Nandalal M llick* v *P cha na* (1918) 45 Cal 60 4 I C 434 *S i Ra n* v *K j Beh ri* (19 1) 25 C W.N 884 66 I C 909 (1) A C 66 *M* v *A ja Behari* (19) 44 All 605 6 I C 31 ( ) A A 206 *I k ta* v *Vee a* (19 4) 46 M d L J 463 83 I C 548 (24) A M 60 *Meah* v *D ga* (19 5) 29 C W N 10 90 I C 456 (6) A L 243 *Sundar* v *Habib Chik* (19 0) 4 All 6 J 60 I C 81 *Madhori Sa an* v *P bal* (19 5) 47 All. 891 88 I C 6 3 (5) A A 55 *Sri casa* v *Official As s e* (19) 50 M d 891 103 I C 8 (7) A M 641 *Sik nder Kha* v *Baand Khan* (1927) 8 Lah 617 100 I C 907 (27) A L 435 *B khtan Mi* v *Gh lam Hassan* (1928) 9 Lah 38 11 I C 513 (8) A L 609

(*h*) *Ali Akba* v *Khurshed Al* (190) 27 All 695 *Iusaf* v *Naza* (1913) Punj Rec no 11 p 45 16 I C. 995.

(*i*) *Khu shed Alam Khan* v *Rahmat-ulla Khan* (1918) 40 All 68 43 I C 490

(*j*) *Abdul Sadiq* v *Abdul Aziz* (1899) 1 All. I

(iii) *Second appeal from order passed in appeal under this rule* —No second appeal lies from an order passed in appeal from an order granting an application for review This is now sufficiently clear from the provisions of O 43 r 1 cl. (w) read with s 104 sub s (2) A applies for a review and the application is granted B appeals from the order granting the application. Whether the appellate Court confirms or sets aside the order of the lower Court no second appeal lies to the High Court from the order of the appellate Court (*k*) O 4

(iv) *Appeal from order refusing to readmit application for review dismissed for default under sub rule* (2) —No appeal lies from an order refusing to readmit an application for review of judgment which has been dismissed for default under sub-rule (2) (*l*)

Sub rule (1) (b) In contravention of the provision of rule 4 —It is provided by r 4 above that no application for review should be granted on the ground of discovery of new matter without *strict proof* of the allegation as to such discovery The words strict proof mean proof *according to the formalities of law* Where an order therefore is made granting a review on proof of discovery of new matter according to the formalities of law no appeal lies from the order on the ground that the evidence adduced in proof of the allegation as to discovery of new matter was *not sufficient* to prove the allegation The words strict proof do not refer to *sufficiency of proof* in securing the conviction of the judicial mind on the fact in dispute (*m*)

Grounds of objection in appeal —An order granting an application for review can only be objected to upon the three grounds specified in the rule and no other whether the objection is taken by an appeal from the order (*n*) or in an appeal from the final decree passed in the suit (*o*) The appellate Court can interfere if a review has been granted on insufficient grounds (*p*)

Second application for review —Though no appeal lies from an order rejecting an application for review it does not preclude a second application for review on ground *different* from those taken in the first application (*q*)

Where application for review is time barred.—The period for an application for review of judgment by a Provincial Court of Small Causes is 15 days from the date of the decree by the High Court in the exercise of its original jurisdiction 20 days and by other Courts 90 days [Limitation Act 1908 arts 171 162 173] and the applicant is entitled under s 12 of the Limitation Act to deduct time spent in obtaining copy of the decree (*r*) But the Court may admit the application after the period of limitation if the applicant satisfies the Court that he had sufficient cause for not making the application within the prescribed period [Limitation Act 1908 s 5] Where a second application for review is made after the period of limitation the mere fact that the second application was not made because the first was pending does not constitute sufficient cause for admitting the second (*s*) If an application for review is admitted after the period of limitation on the ground that the applicant has shown sufficient cause the order granting the application may be appealed from as provided by cl (c) of sub r (1) and the order

(*k*) See *Than Singh* v *Chundun Singh* (1885) 11 Cal 30 *Gopal Das* v *Alf Khan* (1889) 11 All 383 *Papayya* v *Chelamayya* (1883) 1 Mad 1 *Fa ti Chund* v *Salig am* (18) 4 Cal 319 See also *Bala* *Bhi a* (1889) 13 Bom 496

(*l*) *Basrat Ali* v *Ma ng Aung* (19) 6 Rang 1 1 10 I C 706 (27) A.R. 04

(*m*) *Ahid* v *Mahend* (1915) 4 Cal 830 9 I C S *Bai Nemathbu* v *B* *mat l l bu* (1919) 4 Bom 95 46 I C 14 *Na Jalal M llick* v *P ia h n* *Mukerje* (1918) 45 Cal 60 4 I C 434 *Chira Jilal* v *Tilo m* (19 0) 47 C l 564 56 I C 34 [F B]

( ) *Kh l d* v *Rahm tull l* (1918) 40 All 68 43 I C 490

(*o*) *Larol Churn* *Gob nd Pros d* (1893) Cal 984

(*p*) *Nrityа* v *J rit* (19 6) 30 C W N 84 8 I C 0 (6) A C 37

(*q*) *Gob d R m* v *Bl la th* (1888) 15 Cal 43 *Pallu* v *Math a* (1916) 38 All 80 3 I.C. 6 *H n S gh* v *M hammad* (19 7) 6 Lah 54 10 I C 5 3 (27) A.L. 200

(*r*) *Far l* v *Um r* (19) Lah L J 1 9 89 I C 10 9 (5) A L 3

(*s*) *Iam n* v *Mal n* (19) 6 Bom 43

may be set aside in appeal if the appellate Court holds that there was not sufficient cause for admitting the application after the period of limitation (t)

Review granted without jurisdiction—If a review is granted in a case where the Court has no *jurisdiction* to grant it it is not clear whether an appeal lies from the order granting the review But the order being one made without jurisdiction, it comes within the purview of s 115 and is therefore open to revision (u) The High Court will not interfere in revision solely on the ground that the Judge grantin the review had omitted to record that the additional evidence was important (v). It has been held that no appeal lies if the review is granted in the inherent jurisdiction (w)

Registry of application granted and order for re hearing

8 [S 630] When an application for review is granted, a note thereof shall be made in the register and the Court may at once re hear the case or make such order in regard to the re hearing as it thinks fit

Bar of certain applications

9 [S 629 Last para] No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained

See notes to r 7 above Second application for review

ORDER XLVIII

Miscellaneous

Process to be served at expenses of party issuin

1 [S 93] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs

Costs of service

(2) The Court fee chargeable for such service shall be paid within a time to be fixed before the process is issued

Orders and notices how ser ed

2 [S 94] All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons

U of forms in appendices

3 [S 644] The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned

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(t) *Madho Das* v *R kman* (1880) 2 All 8

(u) *Ra a adha* v *Va aya an* (1904) 27 Mad 60 607 *Chunilal* v *So v a* (189) 1 Bom 379

( ) *Srin vasa* v *Official Assignee* (19 7) 50 Mad 891 103 I C 377 (27) A M. 641

(w) *Basanta* v *Abhoy* (19 3) 37 Cal L J 99 3 I C 306 (3) A C 4 0

ORDER XLIX

Chartered High Courts

1 [S 636] Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court by any rule or order, directs

Who may serve processes of High Court

Persons employed by them—These are persons in the regular service of the attorney Notice cannot be served by a village headman specially employed for the purpose (x)

2 [*New*] Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court

Saving in respect of Chartered High Courts

3 [*Cf* S 638] The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original Civil jurisdiction, namely —

Application of rules

(1) rule 10 and rule 11, clauses (b) and (c), of Order VII,

(2) rule 3 of Order X,

(3) Rule 2 of Order XVI,

(4) rules 5, 6, 8, 9, 10, 11 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII,

(5) rules 1 to 8 of Order XX, and

(6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum),

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction

Additional rule made by the Bombay High Court under s 122—See Appendix III below

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(x) *Suyin ha v Lanappa* (19 6) 30 C L W.N 34 96 I C 3 ( ) A C 1

ORDER L

Provincial Small Cause Courts

r 1 **1** [*New*] The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts' Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say

Provincial Small Cause Courts

(a) so much of this schedule as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits,

(ii) the execution of decrees against immovable property or the interest of a partner in partnership property,

(iii) the settlement of issues, and

(b) the following rules and orders,—

Order II, r 1 (frame of suit),

Order X, r 3 (record of examination of parties),

Order XV, except so much of rule 4 as provides for the pronouncement at once of judgment,

Order XVIII, rules 5 to 12 (evidence),

Orders XLI to XLV (appeals),

Order XLVII, rules 2, 3, 5, 6, 7 (review),

Order LI

See s 7 and notes thereto

ORDER LI

Presidency Small Cause Courts

r 1 **1** [*New*] Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XXI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts' Act, 1882, this schedule *shall not extend to any suit or proceeding in any* Court of Small Causes established in the towns of Calcutta, Madras and Bombay

Presidency Small Cause Courts

APPENDIX A

PLEADINGS

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(1) Titles of Suits

In the Court of

A B (add description and residence) *Plaintiff*

against

C D (add description and residence) *Defendant*

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(2) Description of Parties in Particular Cases

The Secretary of State for India in Council

The Advocate General of

The Collector of

The State of

The *A B* Company Limited having its registered office at

A B a public officer of the C D Company

A B (add description and residence on behalf of himself and all other creditors of *C D* late of *(add description and residence)*

A B (add description and residence) on behalf of himself and all other holders of debentures issued by the Company Limited

The Official Receiver

A B a minor *(add description and residence)* by *C D* [*or* by the Court of Wards] his next friend.

A B (add description and residence) a person of unsound mind [*or* of weak mind] by *C D* his next friend.

A B a firm carrying on business in partnership at

A B (add description and residence) by his constituted attorney *C D (add description and residence)*

A B (add description and residence) Shebait of Thakur

A B (add description and residence) executor of *C D deceased*

A B (add description and residence) heir of *C D* deceased

f Pleadings

(3) PLAINTS

No 1

MONEY LENT

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 he lent the defendant rupees repayable on the day of

2 The defendant has not paid the same except rupees paid on the day of 19

[*If the plaintiff claims exemption from any law of limitation say* —]

3 The plaintiff was a minor (*or* insane) from the day of till the day of

4 [*Facts showing when the cause of action arose and that the Court has jurisdiction*].

5 The value of the subject matter of the suit for the purpose of jurisdiction is rupees and for the purpose of Court fees is rupees

6 The plaintiff claims rupees with interest at per cent from the day of 19

No 2

MONEY OVERPAID

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver

2 The plaintiff procured the said bars to be assayed by *E F* who was paid by the defendant for such assay and *E F* declared each of the bars to contain 1 500 tolas of fine silver and the plaintiff accordingly paid the defendant rupees

3 Each of the said bars contained only 1 200 tolas of fine silver of which fact the plaintiff was ignorant when he made the payment

4 The defendant has not repaid the sum so overpaid

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 3

GOODS SOLD AT A FIXED PRICE AND DELIVERED

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 *E F* sold and delivered to the defendant [one hundred barrels of flour or the goods mentioned in the schedule hereto annexed *or* sundry goods]

2 The defendant promised to pay rupees for the said goods on delivery [*or* on the day of *some day before the plaint was filed*]

3 He has not paid the same

4 *E F* died on the day of 19 By his last will he appointed his brother the plaintiff his executor

[*As in paras 4 and 5 of Form No 1*]

7 The plaintiff as executor of *E F* claims [*Relief claimed*]

No 4

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED

(*Titles*)

A B the above named plaintiff states as follows —

1 On the day of 19 plaintiff sold and delivered to the defendant [sundry articles of house furniture] but no express agreement wa made as to the price

2 The goods were reasonably worth rupees

3 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 5

GOODS MADE AT DEFENDANT S REQUEST AND NOT ACCEPTED

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 *E F* agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*] and that *E F* should pay for the goods on delivery rupees

2 The plaintiff made the goods and on the day of 19 offered to deliver them to *E F* and has ever since been ready and willing so to do

3 *E F* has not accepted the goods or paid for them

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 6

DEFICIENCY UPON A RE SALE [GOODS SOLD AT AUCTION]

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the plaintiff put up at auction sundry [*goods*] subject to the condition that all goods not paid for and removed by the purcha er within [*ten days*] after the sale should be re sold by auction on his account of which condition the defendant had notice

2 The defendant purchased [*one crate of crockery*] at the auction at the price of rupees

3 The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for (*ten days*] after

4 The defendant did not take away the goods purchased by him nor pay for them within [*ten days*] after the sale nor afterwards.

5 On the day of 19 the plaintiff re sold the [*crate of crockery*] on account of the defendant by public auction for rupees

6 The expenses attendant upon such re sale amounted to rupees

7 The defendant has not paid the deficiency thus arising amounting to rupees

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

of Pleadings

No 7

SERVICES AT A REASONABLE RATE

(*Title*)

A B the above named plaintiff states as follows —

1 Between the day of 19 and the day of 19 at plaintiff [executed sundry drawings designs and diagrams] for the defendant at his request but no express agreement was made as to the sum to be paid for such services

2 The services were reasonably worth rupees

3 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 8

SERVICES AND MATERIALS AT A REASONABLE COST

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 at the plaintiff built a house [known as No in] and furnished the materials therefor for the defendant at his request but no express agreement was made as to the amount to be paid for such work and materials

2 The work done and materials supplied were reasonably worth rupees

3 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 9

USE AND OCCUPATION

(*Title*)

A B the above named plaintiff executor of the will of *X Y* deceased states as follows —

1 That the defendant occupied the [house No Streets] by permission of the said *X Y* from the day of 19 until the day of 19 and no agreement was made as to payment for the use of the said premises

2 That the use of the said premises for the said period was reasonably worth rupees

3 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1*]

6 The plaintiff as executor of *X Y* claims [*Relief claimed*]

No 10

ON AN AWARD

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the plaintiff and defendant having a difference between them concerning [a demand of the plaintiff for

the price of ten barrels of oil which the defendant refused to pay] agreed in writing to submit the difference to the arbitration of *E F* and *G H* and the original document is annexed hereto

2 On the day of 19 the arbitrator awarded that the defendant should [pay the plaintiff rupees]

3 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 11

ON A FOREIGN JUDGMENT

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 at in the State [*or* Kingdom] of the Court of that State [*or* Kingdom] in a suit therein pending between the plaintiff and the defendant duly adjudged that the defendant should pay to the plaintiff rupees with interest from the said date

2 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 12

AGAINST SURETY FOR PAYMENT OF RENT

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 *E F* hired from the plaintiff for the term of years the [house No Street] at the annual rent of rupees payable [monthly]

2 The defendant agreed in consideration of the letting of the premises to *E F* to guarantee the punctual payment of the rent.

3 The rent for the month of 19 amounting to rupees has not been paid

[*If by the terms of the agreement notice is required to be given to the surety add* —]

4 On the day of 19 the plaintiff gave notice to the defendant of the non payment of the rent and demanded payment thereof

5 The defendant has not paid the same

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 13

BREACH OF AGREEMENT TO PURCHASE LAND

(*Title.*)

A B the above named plaintiff states as follows —

1 On the day of 19 the plaintiff and defendant entered into an agreement and the original document is hereto annexed

[*Or* On the day of 19 the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of for rupees.]

of Pleadings

2 On the day of 19 the plaintiff being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant] tendered to the defendant a sufficient instrument of transfer of the same [*or* was ready and will and is still ready and willing and offered to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon

3 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 14

NOT DELIVERING GOODS SOLD

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the day of 19 and that the plaintiff should pay therefor rupees on delivery

2 On the [said] day the plaintiff was ready and willing and offered, to pay the defendant the said sum upon delivery of the goods

3 The defendant has not delivered the goods and the plaintiff has been deprived of the profits which would have accrued to him from such delivery

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 15

WRONGFUL DISMISSAL

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant *or* in the capacity of foreman *or as the case may be*] and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services rupees monthly]

2 On the day of 19 the plaintiff entered upon the service of the defendant and has ever since been and still is ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice

3 On the day of 19 the defendant wrongfully discharged the plaintiff and refused to permit him to serve as aforesaid or to pay him for his services

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 16

BREACH OF CONTRACT TO SERVE

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of rupees and that the defendant should serve the plaintiff as [an artist] for the term of [one year]

2 The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 , offered so to do]

3 The defendant (entered upon) the service of the plaintiff on the above mentioned day but afterwards on the day of 19 he refused to serve the plaintiff as aforesaid.

[As in paras 4 and 5 of Form No 1 and Relief claimed]

No. 17

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP

(Title)

A B the above named plaintiff states as follows —

1 On the day of 19 , the plaintiff and defendant entered into an agreement and the original document is hereto annexed [*Or state the tenor of the contract*]

2 The plaintiff duly performed all the conditions of the agreement on his part

3 The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner]

[As in paras 4 and 5 of Form No 1 and Relief claimed]

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(Title.)

A B the above named plaintiff states as follows —

1 On the day of 19 the plaintiff took *E F* into his employment as a clerk.

2 In consideration thereof on the day of 19 the defendant agreed with the plaintiff that if *E F* should not faithfully perform his duties as a clerk to the plaintiff or should fail to account to the plaintiff for all money evidences of debt or other property received by him for the use of the plaintiff the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof not exceeding *rupees*

[*Or* 2 In consideration thereof the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees subject to the condition that if *E F* should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all moneys 'evidences of debt or other property which should be at any time held by him in trust for the plaintiff the bond should be void]

[*Or* 2 In consideration thereof on the same date the defendant executed a bond in favour of the plaintiff and the original document is hereto annexed]

3 Between the day of 19 and the day of 19 *E F* received money and other property amounting to the value of rupees for the use of the plaintiff for which sum he has not accounted to him and the same still remains due and unpaid

[As in paras 4 and 5 of Form No 1 and Relief claimed]

of Pleadings

No 19

BY TENANT AGAINST LANDLORD WITH SPECIAL DAMAGE

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the defendant by a registered instrument let to the plaintiff [the house No Street] for the term of years contracting with the plaintiff that he the plaintiff and his legal representatives should quietly enjoy possession thereof for the said term

2 ALL conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain his suit

3 On the day of during the said term, *E F* who was the lawful owner of the said house unlawfully evicted the plaintiff therefrom and still withholds the possession thereof from him

4 The plaintiff was thereby (prevented from continuing the business of a tailor at the said place was compelled to expend rupees in moving and lost the custom of *G H* and *I F* by such removal)

[*As in paras* 4 *and* 5 *of Form No* 1 *and Relief claimed*]

No 20

ON AN AGREEMENT OF INDEMNITY

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the plaintiff and defendant being partners in trade under the style of *A B* and *C D* dissolved the partnership and mutually agreed that the defendant should take and keep all the partnership property pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm

2 The plaintiff duly performed all the conditions of the agreement on his part

3 On the day of 19 [a judgment was recovered against the plaintiff and defendant by *E F* in the High Court of Judicature at upon a debt due from the firm to *E F* and on the day of 19] the plaintiff paid rupees [in satisfaction of the same]

4 The defendant has not paid the same to the plaintiff

[*As in paras* 4 *and* 5 *of Form No* 1 *and Relief claimed*]

No 21

PROCURING PROPERTY BY FRAUD

(*Title*)

A B the above named plaintiff state as follows —

1 On the day of 19 the defendant for the purpose of inducing the plaintiff to sell him certain goods represented to the plaintiff that [he the defendant was solvent and worth rupees over all his liabilities]

2 The plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees

3 The said representations were false [*or state the particular falsehoods*] and were then known by the defendant to be so

4 The defendant has not paid for the goods [*or* *f the goods were not delivered*] The plaintiff in preparing and shipping the goods and procuring their restoration expended rupees

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 22

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the defendant represented to the plaintiff that *E F* was solvent and in good credit and worth rupees over all his liabilities [*or* that *E F* then held a responsible situation and was in good circumstances and might safely be trusted with goods on credit]

2 The plaintiff was thereby induced to sell to *E F* [rice] of the value of rupees [on months credit]

3 The said representations were false and were then known by the defendant to be so and were made by him with intent to deceive and defraud the plaintiff [*or*, to deceive and injure the plaintiff]

4 *E F* [did not pay for the said goods at the expiration of the credit aforesaid, *or*] has not paid for the said rice and the plaintiff has wholly lost the same

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 23

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND

(*Title*)

A B the above named plaintiff states as follows —

1 [The plaintiff is and at all the times hereinafter mentioned was possessed of certain land called and situate in and of a well therein and of water in the well and was entitled to the use and benefit of the well and of the water therein and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted

2 On the day of 19 the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well

3 In consequence the water in the well became impure and unfit for domestic and other necessary purposes and the plaintiff and his family are deprived of the use and benefit of the well and water

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 24

CARRYING ON A NOXIOUS MANUFACTURE

(*Title*)

A B the above named plaintiff states as follows —

1 The plaintiff is and at all the times hereinafter mentioned was, possessed of certain lands called situate in

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2 Ever since the day of 19 the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter which spread themselves over and upon the said lands and corrupted the air and settled on the surface of the lands

3 Thereby the trees hedge herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value and the cattle and livestock of the plaintiff on the lands became unhealthy and many of them were poisoned and died

4 The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done and was obliged to move his cattle sheep and farming stock therefrom and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 25

OBSTRUCTING A RIGHT OF WAY

(*Title*)

A B the above named plaintiff states as follows —

1 The plaintiff is and at the time hereinafter mentioned was possessed of [a house in the village of]

2 He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house for himself and his servants [with vehicles *or* on foot] at all times of the year

3 On the day of 19 defendant wrongfully obstructed the said way so that the plaintiff could not pass [with vehicles *or* on foot *or* in any manner] along the way [and has ever since wrongfully obstructed the same]

4 (*State special damage if any*)

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 26

OBSTRUCTING A HIGHWAY

(*Title*)

1 The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from to so as to obstruct it

2 Thereby the plaintiff while lawfully passing along the said highway fell over the said earth and stones [*or* into the said trench] and broke his arm and suffered great pain and was prevented from attending to his business for a long time and incurred expense for medical attendance

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 27

DIVERTING A WATER COURSE

(*Title*)

A B the above named plaintiff states as follows —

1 The plaintiff is and at the time hereinafter mentioned was possessed of a mill situated on a [stream] known as the the village of district of

2 By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill

3 On the day of 19 the defendant by cutting the bank of the stream wrongfully diverted the water thereof so that less water ran into the plaintiff's mill

4 By reason thereof the plaintiff has been unable to grind more than sacks per day whereas before the said diversion of water he was able to grind sacks per day

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 28

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION

(*Title*)

A B the above named plaintiff states as follows —

1 Plaintiff is and was at the time hereinafter mentioned possessed of certain lands situate etc and entitled to take and use a portion of the water of a certain stream for irrigating the said lands

2 On the day of 19 the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid by wrongfully obstructing and diverting the said stream

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 29

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD

(*Title.*)

A B the above named plaintiff states as follows —

1 On the day of 19 the defendants were common carriers of passengers by railway between and

2 On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway

3 While he was such passenger at [*or* near the station] of *or* between the station of and a collision occurred on the said railway caused by the negligence and unskilfulness of the defendants servants whereby the plaintiff was much injured [having his leg broken his head cut etc *and state the special damage if any as*] and incurred expense for medical attendance and is permanently disabled from carrying on his former business as [a salesman]

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

[*Or thus* —" On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants railway which the plaintiff was then lawfully crossing that the said engine and train were driven and struck against the plaintiff whereby etc *as in paras* 3]

of Pleadings

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No 30

INJURIES CAUSED BY NEGLIGENT DRIVING

(*Title*)

A B the above named plaintiff states as follows —

1 The plaintiff is a shoe maker carrying on business at The defendant is a merchant of

2 On the day of 19 the plaintiff was walking southwards along Chowringhee in the city of Calcutta at about 3 o clock in the after noon. He was obliged to cross Middleton Street which is a street running into Chowringhee at right angles While he was crossing this street and just before he could reach the foot pavement on the further side thereof a carriage of the defendant drawn by two horses under the charge and control of the defendants servants was negligently suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee The pole of the carriage struck the plaintiff and knocked him down and he was much trampled by the horses

3 By the blow and fall and trampling the plaintiff s left arm was broken and he was bruised and injured on the side and back as well as internally and in consequence thereof the plaintiff was for four months ill and in suffering and unable to attend to his business and incurred heavy medical and other expenses and sustained great loss of business and profits

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 31

FOR MALICIOUS PROSECUTION

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the defendant obtained a warrant of arrest from [a Magistrate of the said city *or as the case may be*] on a charge of and the plaintiff was arrested thereon, and imprisoned for [days *or* hours and gave bail in the sum of rupees to obtain his release]

2 In so doing the defendant acted maliciously and without reasonable or probable cause

3 On the day of 19 the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff

4 Many persons whose names are unknown to the plaintiff hearing of the arrest and supposing the plaintiff to be a criminal have ceased to do business with him *or* in consequence of the said arrest the plaintiff lost his situation as clerk to one *E F* *or* in consequence the plaintiff suffered pain of body and mind and was prevented from transacting his business and was injured in his credit and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[*As in paras 4 and 5 of Form No 1 and Relief claimed.*]

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No 32

MOVABLES WRONGFULLY DETAINED

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 plaintiff owned [*or state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or describe the goods*] the estimated value of which is rupees

2 From that day until the commencement of this suit the defendant has detained the same from the plaintiff

3 Before the commencement of the suit to wit on the day of 19 the plaintiff demanded the same from the defendant but he refused to deliver them

[*As in paras 4 and 5 of Form No 1*]

6 The plaintiff claims—

(1) delivery of the said goods or rupees in case delivery cannot be had

(2) rupees compensation for the detention thereof

The Schedule

No 33

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the defendant *C D* for the purpose of inducing the plaintiff to sell him certain goods represented to the plaintiff that [he was solvent and worth rupees over all his liabilities]

2 The plaintiff was thereby induced to sell and deliver to *C D* [one hundred boxes of tea] the estimated value of which is rupees

3 The said representations were false and were then known by *C D* to be so [*or* at the time of making the said representations *C D* was insolvent and knew himself to be so]

4 *C D* afterwards transferred the said goods to the defendant *E F* without consideration [*or* who had notice of the falsity of the representation]

[*As in paras 4 and 5 of Form No 1*]

7 The plaintiff claims —

(1) delivery of the said goods or rupees in case delivery cannot be had

(2) rupees compensation for the detention thereof

No 34

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE

(*Title*)

A B the above named plaintiff states as follows —

1 On the day of 19 the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant situated at contained [ten bighas,

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A. 2 The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true and signed an agreement of which the original is hereto annexed But the land has not been transferred to him

3 On the day of 19 the plaintiff paid the defendant rupees as part of the purchase money

4 That the said piece of ground contained in fact only [five bighas].

[As in paras 4 and 5 of Form No 1]

7 Plaintiff claims—

(1) rupees with interest from the day of 19

(2) that the said agreement be delivered up and cancelled.

No 35

AN INJUNCTION RESTRAINING WASTE.

(Title.)

A B the above named plaintiff states as follows —

1 The plaintiff is the absolute owner of [*describe the property*]

2 The defendant is in possession of the same under a lease from the plaintiff

3 *The defendant has [cut down a number of valuable trees and threatens to cut* down many more for the purpose of sale] without the consent of the plaintiff

[As in paras 4 and 5 of Form No 1]

6 The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises

[Pecuniary compensation may also be claimed]

No 36

INJUNCTION RESTRAINING NUISANCE.

(Title)

A B the above named plaintiff states as follows —

1 *Plaintiff is and at all the times hereinafter mentioned was the* absolute owner of the [house No Street Calcutta]

2 The defendant is and at all the said times was the absolute owner of [a plot of ground in the same street]

3 On the day of 19 , the defendant erected upon his said plot a slaughter house and still maintains the same and from that day until the present time has continually caused cattle to be brought and killed there [and *has caused the blood and offal to be thrown into the street opposite the said house* of the plaintiff]

4 In consequence the plaintiff has been compelled to abandon the said house and has been unable to rent the same

[As in paras 4 and 5 of Form No 1]

The plaintiff claims that the defendant be restrained by injunction from committin or permitting any further nuisance

No 37

PUBLIC NUISANCE

(Title)

A B the above named plaintiff states as follows —

1 The defendant has wrongly heaped up earth and stones on a public road knows as Street at so as to obstruct the passage of the public along the same and threatens and intends unless restraining from so doing to continue and repeat the said wrongful act

2 The plaintiff has obtained the consent in writing of the Advocate General [*or* of the Collector or other officer appointed in this behalf] to the institution of this suit

[*As in paras* 4 *and* 5 *of Form No* 1]

The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road]

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid

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No 38

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE

(Title)

A B the above named plaintiff states as follows —

[*As in Form No* 27]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid

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No 39

RESTORATION OF MOVABLE PROPERTY THREATENED WITH DESTRUCTION AND FOR AN INJUNCTION

(Title)

A B the above named plaintiff states as follows —

1 Plaintiff is and at all times hereinafter mentioned was the owner of a portrait of his grand father [which was executed by an eminent painter] and of which no duplicate exist [*or state any facts showing that the property is of a kind that cannot be replaced by money*]

2 On the day of 19 he deposited the same for safe keeping with the defendant

3 On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same

4 The defendant refuses to deliver the same to the plaintiff and threatens to conceal dispose of cut or injure the same if required to deliver it up

5 No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[*As in paras* 4 *and* 5 *of Form No* 1]

8 The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting]

(2) that he be compelled to deliver the same to the plaintiff

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No 40

INTERPLEADER.

(Title)

A B the above named plaintiff states as follows —

1 Before the date of the claims hereinafter mentioned *G H* deposited with the plaintiff [*describe the property*] for [*safe keeping*]

2 The defendant *C D* claims the same [under an alleged assignment thereof to him from *G H*]

3 The defendant *E F* also claims the same [under an order of *G H* transferring the same to him]

4 The plaintiff is ignorant of the respective rights of the defendants.

5 He has no claim upon the said property other than for charges and costs and is ready and willing to deliver it to such persons as the Court shall direct

6 The suit is not brought by collusion with either of the defendants.

[*As in paras 4 and 5 of Form No 1*]

9 The plaintiff claims—

(1) That the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation thereto

(2) that they be required to interplead together concerning their claims to the said property

(3) that some person be authorised to receive the said property pending such litigation

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto

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No 41

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS

(Title)

A B the above named plaintiff states as follows —

1 *E F* late of was at the time of his death and his estate still is indebted to the plaintiff in the sum of [*here insert nature of debt and security if any*]

2 *E F* died on or about the day of By his last will dated the day of he appointed *C D* his executor [*or* revised his estate in trust etc. *or* died intestate *as the case may be*]

3 The will was proved by *C D* [*or* letters of administration were granted etc.]

4 The defendant has possessed himself of the movable [and immovable *or* the proceeds of the immovable] property of *E F* and has not paid the plaintiff his debt

[*As in paras 4 and 5 of Form No 1*]

7 The plaintiff claims that an account may be taken of the movable [and immovable] property of *E F* deceased and that the same may be administered under the decree of the Court

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No 42

ADMINISTRATION BY SPECIFIC LEGATEE

(Title)

[Alter Form No 41 thus]—

[Omit paragraph 1 and commence paragraph 2] *E F* late of died on or about the day of By his last will dated the day of he appointed *C D* his executor and bequeathed to the plaintiff *[here state the specific legacy]*

For paragraph 4 substitute—

The defendant is in possession of the movable property of *E F* and amongst other things of the said *[here name the subject of the specific bequest]*

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said *[here name the subject of the specific bequest]* or that etc

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No 43

ADMINISTRATION BY PECUNIARY LEGATEE

(Title)

[Alter Form No 41 thus]—

[Omit paragraph 1 and substitute for paragraph 2] *E F* late of died on or about the day of By his last will dated the day of he appointed *C D* his executor and bequeathed to the plaintiff a legacy of rupees

In paragraph 4 substitute legacy *for* debt

Another Form

(Title)

E F the above named plaintiff states as follows —

1 *A B* of *K* in the died on the day of By his last will dated the day of he appointed the defendant and *M N* [who died in the testator s lifetime] his executors and bequeathed his property whether movable or immovable to his executors in trust to pay the rents and income thereof to the plaintiff for his life and after his decease and in default of his having a son who should attain twenty one or a daughter who should attain that age or marry upon trust as to his immovable property for the person who would be the testator s heir at-law and as to his movable property for the persons who would be the testator s next-of kin if he had died intestate at the time of the death of the plaintiff and such failure of his issue as aforesaid

2 The will was proved by the defendant on the day of The plaintiff has not been married

3 The testator was at his death entitled to movable and immovable property the defendant entered into the receipt of the rents of the immovable property and got in the movable property he has sold some part of the immovable property

[As in paras 4 and 5 of Form No 1]

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6 The plaintiff claims—

(1) to have the movable and immovable property of A B administered in this Court and for that purpose to have all proper directions given and accounts taken

(2) such further or other relief as the nature of the case may require

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No 44

EXECUTION OF TRUSTS

(*Title*)

A B the above named plaintiff states as follows —

1 He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of *E F* and *G H* the father and mother of the defendant [*or* an instrument of transfer of the estate and effects of *E F* for the benefit of *C D* the defendant and the other creditors of *E F*]

2 *A B* has taken upon himself the burden of the said trust and is in possession of [*or* of the proceeds of] the movable and immovable property transferred by the said instrument

3 *C D* claims to be entitled of a beneficial interest under the instrument

[*As in paras 4 and 5 of Form No 1*]

6 The plaintiff is desirous to account for all the rents and profits of the said immovable property [and the proceeds of the sale of the said *or* of part of the said immovable property *or* movable *or* the proceeds of the sale of *or* of part of, the said immovable property *or* the profits accruing to the plaintiff as such trustee in the *execution of the said trust*] *and he prays that the Court will take the* accounts of the said trust and also that the whole of the said trust estate may be administered in the Court for the benefit of *C D* the defendant and all other persons who may be interested in such administration in the presence of *C D* and such other persons so interested as the Court may direct or that *C D* may show good cause to the contrary

[N B —*Where the suit is by a beneficiary the plaint may be modelled* mutatis mutandis *on the plaint by a legatee*]

No 45

FORECLOSURE OR SALE.

(*Title*)

A B the above-named plaintiff states as follows —

1 The plaintiff is mortgagee of lands belonging to the defendant

2 The following are the particulars of the mortgage —

(a) (date)

(b) (names of mortgagor and mortgagee)

(c) (sum secured)

(d) (rate of interest)

(e) (*property subject to mortgage*)

(f) (amount now due)

(g) (*if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims*)

(*If the plaintiff is mortgagee in possession add*)

3 The plaintiff took posse sion of the mortgaged property on the day of and is ready to account as mortgagee in possession from that time

6 The plaintiff claims—

(1) Payment or in default [sale *or*] foreclosure [and possession]

[*Where Order* 34 *rule* 6 *applies*]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff then that liberty be reserved to the plaintiff to apply for a decree for the balance

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No 46

REDEMPTION

(*Title*)

A B the above named plaintiff states as follows —

1 The plaintiff is mortgagor of lands of which the defendant is mortgagee

2 The following are the particulars of the mortgage —

(*a*) (date)

(*b*) (names of mortgagor and mortgagee)

(*c*) (sum secured)

(*d*) (rate of interest)

(*e*) (property subject to mortgage)

(*f*) (*If the plaintiff's title is derivative state shortly he transfers or devolution under which he claims*)

(*If the defendant is mortgagee in possession add*)

3 The defendant has taken possession [*or* has received the rents] of the mortgaged property

[*As in paras* 4 *and* 5 *of Form No* 1]

6 The plaintiff claims to redeem the said property and to have the same re conveyed to him [and to have possession thereof]

No 47

SPECIFIC PERFORMANCE (No 1)

(*Title*)

A B the above named plaintiff states as follows —

1 By an agreement dated the day of and signed by the defendant he contracted to buy of [*or* sell to] the plaintiff's certain immovable property therein described and referred to for the sum of rupees

2 The plaintiff has applied to the defendant specifically to perform the agreement on his part but the defendant has not done so

3 The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice

[*As in paras* 4 *and* 5 *of Form No* 1]

6 The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [*or* to accept a transfer and possession of the said property] and to pay the costs of the suit

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No 1

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED

1 The defendant did not order the goods
2 The goods were not delivered to the defendant
3 The price was not Rs
4 } [or]
5 } *Except as to Ps* same as { 1, 2, 3
6 }
7 The defendant [for *A B* the defendant s agent] satisfied the claim by payment before suit to the plaintiff [*or* to *C D* the plaintiff s agent] on the day of 19
8 The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19

No 2

DEFENCE IN SUITS ON BONDS

1 The bond is not the defendant s bond

2 The defendant made payment to the plaintiff on the day according to the condition of the bond.

3 The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No 3

DEFENCE IN SUITS ON GUARANTEES

1 The principal satisfied the claim by payment before suit

2 The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement

No 4.

DEFENCE IN ANY SUIT FOR DEBT

1 As to Rs 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff

Particulars are as follows —

		Rs.
1907	January 25th	150
	February 1st	50
	Total	200

2 As to the whole [*or* as to Rs. part of the money claimed] the defendant made tender before suit of Rs. and has paid the same into Court

No 5

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING

1 *The defendant denies that the carriage mentioned in the plaint was the defendant s carriage* and that it was under the charge or control of the defendant s servants. The carriage belonged to of Street Calcutta livery stable keepers employed by the defendant to supply him with carriages and horses and the person under whose charge and control the said carriage was was the servant of the said

2 The defendant does not admit that the said carriage was turned out of Middleton Street either negligently suddenly or without warning or at a rapid or dangerous pace

3 The defendant says the plaintiff might and could by the exercise of reasonable care and diligence have seen the said carriage approaching him and avoided any collision with it

4 The defendant does not admit the statements contained in the third paragraph of the plaint

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No 6

DEFENCE IN ALL SUITS FOR WRONGS

1 Denial of the several acts [*or* matters] complained of

No 7

DEFENCE IN SUITS FOR DETENTION OF GOODS

1 The goods were not the property of the plaintiff

2 The goods were detained for a lien to which the defendant was entitled

Particulars are as follows —

1907 May 3rd To carriage of the goods claimed from Delhi to Calcutta —
45 maunds at Rs 2 per maund Rs

No 8

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT

1 The plaintiff is not the author (*assignee etc*)
2 The book was not registered
3 The defendant did not infringe

No 9

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK

1 The trade mark is not the plaintiff s
2 The alleged trade mark is not a trade mark
3 The defendant did not infringe

No 10

DEFENCE IN SUITS RELATING TO NUISANCES

1 The plaintiff's lights are not ancient (*or* deny his other alleged prescriptive rights)

2 The plaintiff s lights will not be materially interfered with by the defendant s buildings

3 The defendant denies that he or his servants pollute the water [*or* do what is complained of]

[*If the defendant claims the right by prescription or otherwise to do what is complained of he must say so and must state the grounds of the claim i e whether by prescription grant or what*]

4 The plaintiff has been guilty of laches of which the following are particulars —

1850 Plaintiff s mill began to work
1871 Plaintiff came into possession.
1883 First complaint

of Pleadings

5 As to the plaintiff s claim for damages the defendant will rely on the above grounds of defence and says that the acts complained of have not produced any dima to the plaintiff [*If other grounds are relied on they must be stated* e g *limitation as to past damage*]

No 11

DEFENCE TO SUIT FOR FORECLOSURE

1 The defendant did not execute the mortgage

2 The mortgage was not transferred to the plaintiff (*if more than one transf r is alleged say which is denied*)

3 The suit is barred by article of the second schedule to the Indian Limitation Act 1877

4 The following payments have been made viz —

	Rs
(*Insert date*) ————————	1 000
(*Insert date*) ————————	,00

5 The plaintiff took possession on the of and has received the rents ever since of

6 The plaintiff released the debt on the of

7 The defendant transferred all his interest to A B by a document dated

No 12

DEFENCE TO SUIT FOR REDEMPTION

1 The plaintiff s right to redeem is barred by article of the second schedule to the Indian Limitation Act 1877

2 The plaintiff transferred all interest in the property to A B

3 The defendant by a document dated the day of transferred all his interest in the mortgage debt and property comprised in the mortgage to A B

4 The defendant never took possession of the mortgaged property or received the rents thereof

(*If the defendant admits possession for a time only he should state the time and deny possession beyond what he admits*)

No 13

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE

1 The defendant did not enter into the agreement

2 *A B* was not the agent of the defendant (*if alleged by plaintiff*)

3 The plaintiff has not performed the following conditions—(*Conditions*)

4 The defendants did not— *alleged acts of part performance*)

5 The plaintiff s title to the property agreed to be sold is not such as the defendant bound to accept by reasons of the following matter—(*State why*)

6 The agreement is uncertain in the following respects—(*State them*)

7 (*or*) The plaintiff has been guilty of delay

8 (*or*) The plaintiff has been guilty of fraud (*or* misrepre entation)

9 (*or*) The agreement is unfair

10 (*or*) The agreement was entered into by mistake

11 The following are particulars of (7) (8) (9) (10) (*or as the case may be*)

12 The agreement was rescinded under Conditions of Sale No 11 (*or* by mutua agreement)

(In cases where damages are claimed and the defendant disputes his liability to damages he must deny the agreement or the alleged breaches or show whatever other ground of defence he intends to rely on e g the Indian Limitation Act accord and satisfaction release fraud etc)

No 14

DEFENCE IN ADMINISTRATION SUITS BY PECUNIARY LEGATEE

1 *A B s* will contained a charge of debts he died insolvent he was entitled at his death to some immovable property which the defendant sold and which produced the net sum of Rs and the testator had some movable property which the defendant got in and which produced the net sum of Rs

2 The defendant applied the whole of the said sums and the sum of Rs which the defendant received from rents of the immovable property in the payment of the funeral and testamentary expenses and some of the debts of the testator

3 The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19 and offered the plaintiff free access to the vouchers to verify such accounts but he declined to avail himself of the defendant s offer

4 The defendant submits that the plaintiff ought to pay the costs of this suit

No 15

PROBATE OF WILL IN SOLEMN FORM

1 The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act 1865 [*or* of the Hindu Wills Act 1870]

2 The deceased at the time the said will and codicil respectively purport to have been executed was not of sound mind memory and understanding

3 The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant]

4 The execution of the said will and codicil was obtained by the fraud of the plaintiff such fraud so far as is within the defendant s present knowledge being [*state the nature of the fraud*]

5 The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [*or* of the contents of the residuary clause in the said will *as the case may be*]

6 The deceased made his true last will dated the 1st January 1873 and thereby appointed the defendant sole executor thereof

The defendant claims —

(1) that the Court will pronounce against the said will and codicil propounded by the plaintiff

(2) that the Court will decree probate of the will of the deceased dated the 1st January 1873 in solemn form of law

No 16

PARTICULARS (O 6 r 5)

(Title of suit)

The following are the particulars of (*here state the matters in respect of which particulars have been ordered*) delivered pursuant to the order of the of

Particulars

(Here set out the particulars ordered in paragraph if necessary)

APPENDIX B

PROCESS

No 1

SUMMONS FOR DISPOSAL OF SUITS (O 5 rr 1 5)

(Title)

[*Name description and place of residence*]

WHEREAS

has instituted a suit against you for

you are hereby summoned to appear in this Court in person or by a pleader duly instructed and able to answer all material questions relating to the suit or who shall be accompanied by some person able to answer all such questions on the day of 19 at o clock in the noon to answer the claim and as the day fixed for your appearance is appointed for the final disposal of the suit you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence

Take notice that in default of your appearance on the day before mentioned the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court this day of 19

Judge

NOTICE —1 Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness and the production of any document that you have a right to call upon the witness to produce on applying to the Court and on depositing the necessary expenses

2 If you admit the claim you should pay the money into Court together with the costs of the suit to avoid execution of the decree which may be against your person or property or both

No 2

SUMMONS FOR SETTLEMENT OF ISSUES (O 5 rr 1 5)

(Title)

To

[*Name description and place of residence*]

WHEREAS

has instituted a suit against you for

you are hereby summoned to appear in the Court in person or by a pleader duly instructed and able to answer all material questions relating to the suit or who shall be accompanied by some person able to answer all such questions on the day of 19 at o clock in the noon to answer the claim and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence

Take notice that in default of your appearance on the day before mentioned the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court this day of 19

Judge

NOTICE—1 Should you apprehend your witnesses will not attend of their own accord you can have a summons from this Court to compel the attendance of any witness and the production of any document that you have a right to call on the witness to produce on applying to the Court and *on depositing the necessary expenses.*

2 If you admit the claim you should pay the money into Court together with the costs of the suit to avoid execution of the decree which may be against your person or property or both.

No 3

SUMMONS TO APPEAR IN PERSON (O 5 r 3)

(*Title.*)

To

[*Name description and place of residence*]

WHEREAS
has instituted a suit against you for
you are hereby summoned to appear in this Court in person on the
day of 19 at o clock in the noon
to answer the claim and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence

Take notice that in default of your appearance on the day before mentioned the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court this
day of 19

Judge

No 4

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT (O 37 r 2)

(*Title*)

To

[*Name description and place of residence.*]

WHEREAS
has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908 for Rs balance of principal and interest due to him as the of a of which a copy is hereto annexed you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit and within such time to cause an appearance to be entered for you In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs and the sum of Rs for costs together with such interest if any from the date of the institution of the suit as the Court may order

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to appear in the suit

GIVEN under my hand and the seal of the Court this day of 19

Judge.

s of Process

B

No 5

NOTICE TO PERSON WHO THE COURT CONSIDERS SHOULD BE ADDED AS CO PLAINTIFF (O 1 r 10)

(*Title.*)

To

[*Name description and place of residence*]

WHEREAS has instituted the above suit against for and whereas it appears necessary that you should be added as a plaintiff in the said suit in order to enable the Court effectually and complet ly to adjudicate upon and settle all the questions involved

Take notice that you should on or before day of 19 signify to this Court whether you consent to be so added

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 6

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT (O 22 r 4)

(*Title.*)

To

WHEREAS the plaintiff instituted a suit in this Court on the day of 19 against the defendant who has since deceased and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said deceased and desiring that you be made the defendant in his stead

You are hereby summoned to attend in this Court on the day of 19 at A.M. to defend the said suit and in default of your appearance on the day specified the said suit will be heard and deter mined in your absence

GIVEN under my hand and the seal of the Court this day of 19

Judge.

No 7

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT (O 5 r 21)

(*Title.*)

WHEREAS it is stated that defendant witness in the above suit is at present residing in It is ordered that a summons returnable on the day of 19 be forwarded to the Court of for service on the said defendant witness with a duplicate of this proceeding

The Court fee of chargeable in respect to the summons has been realized in this Court in stamps.

Dated 19

Judge

No 8

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER. (O 5 r 24)

(*Title*)

To

The Superintendent of the Jail at

UNDER the provision of Order V rule 24 of the Code of Civil Procedure 1908 a summons in duplication is herewith forwarded for service on the defendant who is a prisoner in jail You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to the Court signed by the said defendant with a statement of service endorsed thereon by you

Judge

No 9

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT OR SOLDIER. (O 5 rr 27 28)

To

UNDER the provisions of Order V rule 27 (28 *or as the case may be*) of the Code of Civil Procedure 1908 a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant with a statement of service endorsed thereon by you

Judge

No 10

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT (O 5 r 23)

(*Title*)

Pead proceeding from the forwarding *for service on* in suit No of 19 of that Court.

Read Serving Officer s endorsement stating that the and proof of the above having been duly taken by me on the oath of and it is ordered that the be returned to the with a copy of this proceeding

Judge

Note.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner

Alterations made in this form by the High Court of Bombay —See Appendix III below rule 4

of Process

No 11

AFFIDAVIT OF PROCESS SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE. (O 5 r 18)

(*Title*)

The affidavit of son of

I make oath/affirm

and say as follows —

(1) I am a process server of this Court

(2) On the day of 19

I received a summons/notice issued by the Court of

in Suit No

of 19 in the said Court dated the

of 19 in the said Court dated the

day of 19 for service on

(3) The said was at the time

personally known to me and I served the said summons/notice on him/her on the

day of 19 , at about o'clock

in the noon at by tendering a copy thereof to him/her

and requiring his/her signature to the original summons/notice

(*a*)

(*b*)

(*a*) Here state whether the persons served signed or refused to sign the process and in whose presence

(*b*) Signature of process server

or

(3) The said not being personally known to me accompanied me to

and pointed out to me a person whom he stated to be the said

and I served the said summons/notice on him/her on the day o

19 at about o'clock in the noon at by

tendering a copy thereof to him/her and requiring his/her signature to the original summons/notice

(*a*)

(*b*)

(*a*) Here state whether the person served signed or refused to sign the process, and in whose presence

(*b*) Signature of process server

or

(3) The said and the house in which he ordinarily resides being personally known to me I went to the said house in

and there on the day of 19 , at

about o'clock in the noon I did not find the said

(*a*)

(*b*)

(a) Enter fully and exactly the manner in which process was served with special reference to Order 5 rules 15 and 17

(b) Signature of process server

or

(3) One accompanied me to and there pointed out to me which he said was the house in which ordinarily resides I did not find the said there

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served with special reference to Order 5 rules 15 and 17

(b) Signature of process server

or

If substituted service has been ordered state fully and exactly the manner in which the summons was served with special reference to the t rms of the order for substituted service

Sworn / Affi med by the said before me this day of 19

Empowered under section 139 of the Code of Civil Procedure 1908 to admi nister the oath to deponents.

Alterations made in this form by the Chief Court of the Punjab under Section 122—See Appendix V below

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No 12

NOTICE TO DEFENDANT (O 9 r 6)

(*Title*)

To

[*Name description and place of residence*]

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has app ared in this Court and you did not so appear but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appeal and answer on the day fixed in the said summons

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same in default of your app arance on the day last mentioned the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 13

SUMMONS TO WITNESS (O 16 rr 1 5)

(*Title*)

To

WHEREAS your attendance is required to on behalf of the in the above suit you are hereby required [personally] to appear before this Court on the day of 19 at o clock in the forenoon, and to bring with you [*or* to send to this Court]

of Process

No. 11

AFFIDAVIT OF PROCESS SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE. (O 5 r 18.)

(Title)

The affidavit of son of

I $\frac{\text{make oath}}{\text{affirm}}$

and say as follows —

(1) I am a process server of this Court

(2) On the day of 19

I received a $\frac{\text{summons}}{\text{notice}}$ issued by the Court of

in Suit No.
of 19 in the said Court dated the
of 19 in the said Court dated the
day of 19 for service on

(3) The said was at the time personally known to me and I served the said $\frac{\textit{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the day of 19 , at about o clock in the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\textit{her}}$ signature to the original $\frac{\text{summons}}{\textit{notice}}$

(*a*)

(*b*)

(*a*) Here state whether the persons served signed or refused to sign the process, and in whose presence

(*b*) *Signature of process server*

or

(3) The said not being personally known to me accompanied me to and pointed out to me a person whom he stated to be the said *and I served the said* $\frac{\text{summons}}{\text{notice}}$ *on* $\frac{\text{him}}{\text{her}}$ on the day of 19 at about o clock in the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$

(*a*)

(*b*)

(*a*) Here state whether the person served signed or refused to sign the process, and in whose presence.

(*b*) Signature of process server

or

(3) The said and the house in which he ordinarily resides being personally known to me I went to the said house in and there on the day of 19 , at about o clock in the noon I did not find the said

(*a*)

(*b*)

(a) Enter fully and exactly the manner in which process was served with special reference to Order 5 rules 15 and 17

(b) Signature of process server

or

(3) One accompanied me to and there pointed out to me which he said was the house in which ordinarily resides I did not find the said there

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served with special reference to Order 5 rules 15 and 17

(b) Signature of process server

or

If substituted service has been ordered state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service

Sworn/Affirmed by the said before me this day of 19

Empowered under section 139 of the Code of Civil Procedure 1908 to administer the oath to deponents.

Alterations made in this form by the Chief Court of the Punjab under Section 122—See Appendix V below

---

No 12

NOTICE TO DEFENDANT (O 9 r 6)

(*Title.*)

To

[*Name description and place of residence*]

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appeal and answer on the day fixed in the said summons.

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same in default of your appearance on the day last mentioned the suit will be heard and determined in your ab ence

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 13

SUMMONS TO WITNESS (O 16 rr 1 5)

(*Title*)

To

WHEREAS your attendance is required to on behalf of the in the above suit you are hereby required [personally] to appear before this Court on the day of 19 at o clock in the forenoon, and to bring with you [*or* to send to this Court]

of Process

A sum of Rs being your travelling and other expenses and subsistence allowance for one day is herewith sent If you fail to comply with this order without lawful excuse you will be subject to the consequences of non attendance laid down in rule 12 of Order XVI of the Code of Civil Procedure.

GIVEN under my hand and the seal of the Court this day of 19

Judge.

NOTICE —(1) If you are summoned only to produce a document and not to give evidence you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

No 14

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS (O 16 r 10)

(*Title*)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons This proclamation is therefore under rule 10 of Order XVI of the Code of Civil Procedure 1908 issued requiring the attendance of the witness in this Court on the day of 19 at o clock in the forenoon and from day to day until he shall have leave to depart and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 15

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS (O 16 r 10)

(*Title*)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons This proclamation is therefore under rule 10 of Order XVI of the Code of Civil Procedure 1908 issued requiring the attendance of the witness in this Court on the day of 19 at o clock in the forenoon, and from day to day until he shall have leave to depart and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 16

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS (O 16 r 10)

(*Title*)

To

The Bailiff of the Court

WHEREAS the witness cited by has not after the expiration of the period limited in the proclamation issued for his attendance appeared in Court You are hereby directed to hold under attachment property belonging to the said witness to the value of and to submit a return accompanied with an inventory thereof within days

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 17

WARRANT OF ARREST OF WITNESS (O 16 r 10)

(*Title*)

To

The Bailiff of the Court

WHEREAS has been duly served with a summons but has failed to attend [absconds and keeps out of the way for the purpose of avoiding service of a summons] You are hereby ordered to arrest and bring the said before the Court

You are further ordered to return this warrant on or before the day of 19 with an endorsement certifying the day on and the manner in which it has been executed or the reason why it has not been executed

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 18

WARRANT OF COMMITTAL (O 16 r 18)

(*Title*)

To

The Officer in charge of the Jail at

WHEREAS the plaintiff (or defendant) in the abovenamed suit has made application to this Court that security be taken for the appearance of to give evidence (or to produce a document) on the day of 19 and whereas the Court has called upon the said to furnish such security which he has failed to do This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the said day and on such other day or days as may be hereafter ordered

GIVEN under my hand and the seal of the Court this day of 19

Judge

of Process

3

No 19

WARRANT OF COMMITTAL. (O 16 r 18)

(*Title*)

To

The Officer in charge of the Jail at

WHEREAS , whose attendance is required before this Court in the abovenamed case to give evidence (*or* to produce a document) has been arrested and brought before the Court in custody and whereas owing to the absence of the plaintiff (*or* defendant) the said cannot give such evidence (*or* produce such document) and whereas the Court has called upon the said , to give security for his appearance on the day of 19 at which he has failed to do This is to require you to receive the said into your custody in the civil prison and produce him before this Court at on the day of 19

GIVEN under my hand and the seal of the Court this day of 19

Judge

APPENDIX C

DISCOVERY, INSPECTION AND ADMISSION

No 1

ORDER FOR DELIVERY OF INTERROGATORIES (O 11 r 1)

In the Court of
Civil Suit No of 19
A B *Plaintiff*

against

C D E F and G H *Defendants*

Upon hearing and upon reading the affidavit of filed the day of 19 It is ordered that the be at liberty to deliver to the interrogatories in writing and that the said do answer the interrogatories as prescribed by Order XI rule 8 and that the costs of this application be

No 2

INTERROGATORIES (O 11 r 4)

(*Title as in No 1 supra*)

Interrogatories on behalf of the above named [*plaintiff or defendant C D*] for the examination of the above named [*defendants E F and G H or plaintiff*]

1 Did not etc
2 Has not etc
etc etc etc

[*The defendant E F is required to answer the interrogatories numbered*]
[*The defendant G H is required to answer the interrogatories numbered*]

No 3

ANSWER TO INTERROGATORIES (O 11 r 9)

(*Title as in No 1 supra*)

The answer of the above named defendant *E F* to the interrogatories for his examination by the above named plaintiff

In answer to the said interrogatories I the above named *E F* make oath and say as follows —

1
2 } Enter answers to interrogatories in paragraphs numbered consecutively

3 I object to answer the interrogatories numbered on the ground that [*state grounds of objection*]

No 4

ORDER FOR AFFIDAVIT AS TO DOCUMENTS (O 11 r 12)

(*Title as in No 1 supra*)

Upon hearing
It is ordered that the do within days from the date of this order answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit and that the costs of this application be

of Discovery

No 5

AFFIDAVIT AS TO DOCUMENTS (O 11 r 13)

(Title as in No 1 supra)

I the above named defendant *C D* make oath and say as follows —

1 I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto

2 I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection*]

3 I have had but have not now in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto

4 The last mentioned documents were last in my possession or power on [*state when and what has become of them and in whose possession they now are*]

5 According to the best of my knowledge information and belief I have not now and never had in my possession custody or power or in the possession custody or power of my pleader or agent or in the possession custody or power of any other person on my behalf any account book of account voucher receipt letter memorandum paper or writing or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in this suit or any of them or wherein any entry has been made relative to such matters or any of them other than and except *the documents set forth in the said first and second schedules hereto*

No 6

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION (O 11 r 14)

(Title as in No 1 supra)

Upon hearing and upon reading the affidavit of filed the day of 19 It is ordered that the d at all seasonable times on reasonable notice produce at situate at the following documents namely and that the be at liberty to inspect and peruse the documents so produced and to make notes of their contents In the meantime it is ordered that all further proceedings be stayed and that the costs of this application be

---

No 7

NOTICE TO PRODUCE DOCUMENTS (O 11 r 16)

(Title as in No 1 supra)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [plaint or written statement *or affidavit* dated the day of 19]

[*Describe documents required*] *X Y Pleader for the*

To *Z Pleader for the*

No 8

NOTICE TO INSPECT DOCUMENTS (O 11 r 17)

(Title as in No 1 supra)

Take notice that you can inspect the documents mentioned in your notice of the day of 19 [*except the documents numbered*

in that notice] at [*insert place of inspection*] on Thursday next the instant between the hours of 12 and 4 o clock

Or that the [*plaintiff or defendant*] objects to giving you inspection of documents mentioned in your notice of the day of 19 on the ground that [*state the ground*] —

No 9

NOTICE TO ADMIT DOCUMENTS (O 12 r 3)

(*Title as in No 1 supra*)

Take notice that the plaintiff [*or* defendant] in this suit proposes to adduce in evidence the several documents hereunder specified and that the same may be inspected by the defendant [*or* plaintiff] his pleader or agent at on between the hours of and the defendant [*or* plaintiff] is hereby required within forty eight hours from the last mentioned hour to admit that such of the said documents as are specified to be originals were respectively written signed or executed as they purport respectively to have been that such as are specified as copies are true copies and such documents as are stated to have been served sent or delivered were so served sent or delivered respectively saving all just exceptions to the admissibility of all such documents as evidence in this suit

G H *pleader* [or *agent*] *for plaintiff* [or *defendant*]

To E F *pleader* [or *agent*] *for defendant* [or *plaintiff*]

[*Here describe the documents and specify as to each document whether it is original or a copy*]

No 10

NOTICE TO ADMIT FACTS (O 12 r 5)

(*Title as in No 1 supra*)

Take notice that the plaintiff [*or* defendant] in this suit for the purposes of this suit require defendant [*or* plaintiff] to admit for the purposes of this suit only the several facts respectively hereunder specified and the defendant [*or* plaintiff] is hereby required within six days from the service of this notice to admit the said several facts saving all just exceptions to the admissibility of such facts as evidence in this suit

G H *pleader* [or *agent*] *for plaintiff* [or *defendant*]

To E F *pleader* [or *agent*] *for defendant* [or *plaintiff*].

The facts the admission of which is required are—

1 That M died on the 1st January 1890
2 That he died intestate
3 That N was his only lawful son
4 That O died on the 1st April 1896
5 That O was never married

No 11

ADMISSION OF FACTS PURSUANT TO NOTICE (O 12 r 5)

(*Title as in No 1 supra.*)

The defendant [*or* plaintiff] in this suit for the purposes of this suit only hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitation if any hereunder specified, saving all just exceptions to the admissibility of any such facts or any of them as evidence in this suit

of Discovery

Provided that this admission is made for the purposes of this suit only and is n t an admission to be used against the defendant [*or* plaintiff] on any other occasion or by any one other than the plaintiff [*or* defendant or party requiring the admission].

E F *pleader* [or *agent*] *for defendant* [or *plaint*?]

To G H *pleader* [or *agent*] for *plaintiff* [or *defendant*]

Facts admitted	Qualifications or limitation if any subject to which they are admitted.
1 That M. died on the 1st January 1890	1
2 That he died intestate	2
3 That N was his lawful son	3 But not that he was his only lawful son
4 That O died	4 *But not that he died on the 1st April 1896*
5 That O was never married	5

No 12

NOTICE TO PRODUCE (GENERAL FORM) (O 12 r 8)

(*Title as in No* 1 *supra*)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books papers letters copies of letters and other writings and documents in your custody possession or power containing any entry memorandum or minute relating to the matters in question in this suit and particularly

G H *pleader* [or *agent*] *for plaintiff* [or *defendant*].

To E F *pleader* [or *agent*] *for defendant* [or *plaintiff*].

APPENDIX D

DECREES

No 1

DECREE IN ORIGINAL SUIT (O 20 rr 6 7)

(*Title*)

Claim for

This suit coming on this day for final disposal before in the presence of for the plaintiff and of for the defendant it is ordered and decreed that and that the sum of Rs be paid by the to the on account of the costs of this suit with interest thereon at the rate of per cent per annum from this date to date of realization

GIVEN under my hand and the seal of the Court this day of 19

Judge

Costs of Suit

Plaintiff	Rs	A	P	Defendant	Rs	A	P
1 Stamp for plaint				Stamp for power			
2 Do for power				Do for petition			
3 Do for exhibits				Pleader s fee			
4 Pleader s fee on Rs				Subsistence for witnesses			
5 Subsistence for witnesses				Service of process			
6 Commissioner s fee				Commissioner s fee			
7 Service of process							
Total				Total			

No 2

SIMPLE MONEY DECREE (Section 34)

(*Title*)

Claim for

This suit coming on this day for final disposal before in the presence of for the plaintiff and of for the defendant it is ordered that the do pay to the the sum of Rs with interest thereon at the rate of per cent. per annum from to the date of realization of the said sum and do also pay Rs the costs of this suit, with interest thereon at the rate of per cent per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court this day of 19

Judge

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Costs of suit

Plaintiff	Rs	A	P	Defendant	Rs	A	P
1 Stamp for plaints				Stamp for power			
2 Do for power				Do for petition			
3 Do for exhibit				Pleader s fee			
Pleader s fee on Rs				Subsistence for witnesses			
Subsistence for witnesses				Service of process			
Commissioner s fee				Commissioner s fee			
Service of process							
Total				Total			

N B—These forms have been substituted for old Forms Nos 3 to 11 by sec 8 of the Transfer of Property (Amendment) Supplementary Act, 1929, which comes into force on 1st April 1930

FORM No 3

Preliminary decree for foreclosure

(Order XXXIV rule 2—Where accounts are directed to be taken.)

(*Title*)

This suit coming on this day etc It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following —

(i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent per annum or at such rate as the Court deems reasonable)

(ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received

(iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties or failing such rate at the same rate as is payable on the principal or failing both such rates at nine per cent per annum)

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2 And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above together with interest thereon, shall

first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon and the balance if any shall be added to the mortgage money or as the case may be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharged of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

(i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the plaintiff

(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the defendant or to such person as he appoints and the plaintiff shall if so required re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the defendant quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that in default of payment as aforesaid the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE.

Description of the mortgaged property

FORM No 3A.

Preliminary decree for foreclosure

(Order XXXIV rule 2—Where the Court declares the amount due)

(Title)

This suit coming on this day etc It is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal the sum of Rs. for interest on the said principal the sum of Rs. for cost charges and

expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security together with interest thereon and the sum of Rs. for the costs of this suit awarded to the plaintiff making in all the sum of Rs.

2 And it is hereby ordered and decreed as follows —

(i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court of the said sum of Rs

(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the defendant or to such person as he appoints, and the plaintiff shall if so required reconvey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the defendant quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that in default of payment as aforesaid the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall *if so required*, deliver up to the plaintiff quiet and peaceable possession of the said property and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE.

Description of the mortgaged property

FORM NO 4

Final decree for foreclosure

(Order XXXIV rule 3)

(*Title*)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of and the application of the plaintiff dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned [and (*if the defendant be in possession of the said mortgaged property*) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property]

Words not required to be deleted

2 And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished

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FORM NO 5

Preliminary decree for sale

(Order XXXIV rule 4—Where accounts are directed to be taken)

(*Title*)

This suit coming on this day etc It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following —

(i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent per annum or at such rate as the Court deems reasonable)

(ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received

(iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs charges and expenses other than the costs of the suit in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties or failing such rate at the same rate as is payable on the principal or failing both such rates at nine per cent per annum)

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above together with interest thereon shall first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon and the balance if any shall be added to the mortgage money or as the case may be be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4 And it is hereby further ordered and decreed—

(i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the plaintiff

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(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant or to such person as he appoints and the plaintiff shall if so required, re convey or re-transfer the said property free from the mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall if so required deliver up to the defendant quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that in default of payment as aforesaid the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

6 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to the defendant or other persons entitled to receive the same

7 And it is hereby further ordered and decreed that if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property

FORM No 5A.

Preliminary decree for sale.

(Order XXXIV, rule 4 — When the Court declares the amount due)

(*Title*)

This suit coming on this day etc It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal, the sum of Rs for interest on the said principal the sum of Rs. for costs charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security together with interest thereon and the sum of Rs. for the costs of the suit awarded to the plaintiff making in all the sum of Rs.

2 And it is hereby ordered and decreed as follows —

(i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court the said sum of Rs

(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the defendant or to such person as he appoints and the plaintiff shall if so required re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall if so required deliver up to the defendant quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that in default of payment as aforesaid the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

4 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to the defendant or other persons entitled to receive the same

5 And it is hereby further ordered and decreed that if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance and that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No 6

Final decree for sale.

(Order XXXIV rule 5)

(Title)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of and the application of the plaintiff dated the day of for a final decree

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and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

2 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to the defendant or other persons entitled to receive the same

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Form No 7

Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed

(Order XXXIV rule 7 —Where accounts are directed to be taken)

(*Title*)

This suit coming on this day etc It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following —

(i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent per annum or at such rate as the Court deems reasonable)

(ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received

(iii) an account of all sums of money properly incurred by the defendant up to this date for costs charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties or failing such rate at the same rate as is payable on the principal or failing both such rates at nine per cent per annum)

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2 It is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon and the balance if any shall be added to the mortgage money or as the case

may be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the defendant

(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff or to such person as he appoints and the defendant shall if so required re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage of this suit and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that in default of payment as aforesaid the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required deliver up to the defendant quiet and peaceable possession of the said property and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE.

Description of the mortgaged property

Form No 7A$_1$

Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed

(Order XXXIV rule 7 —Where accounts are directed to be taken.)

(*Title*)

This suit coming on this day etc It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following —

(i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent per annum or at such rate as the Court deems reasonable)

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(ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received

(iii) an account of all sums of money properly incurred by the defendant up to the date for costs charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties or failing such rate at the same rate as is payable on the principal or failing both such rates at nine per cent per annum)

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above together with interest thereon shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon and the balance if any shall be added to the mortgage money or as the case may be be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the defendant

(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or to such person as he appoints and the defendant shall if so required reconvey or retransfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that in default of payment as aforesaid the defendant may apply to the Court for a final decree for the sale of the mortgaged property and on such application being made the mortgaged property or a

sufficient part thereof shall be directed to be sold and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

6 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudged due to the defendant in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to the plaintiff or other persons entitled to receive the same

7 And it is hereby further ordered and decreed that if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance and that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No 7B

Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed

(Order XXXIV rule 7 —Where the Court declares the amount due)

(TITLE)

This suit coming on this day etc It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal the sum of Rs for interest on the said principal the sum of Rs for costs charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage security together with interest thereon and the sum of Rs for the costs of the suit awarded to the defendant making in all the sum of Rs

2 And it is hereby ordered and decreed as follows —

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court the said sum of Rs.

(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiffs, or to such person as he appoints, and the defendant shall if so required re-convey or re transfer the said property free from the said mortgage and clear of and from

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and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property

2 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs charges and expenses as may be payable under rule 10 together with the subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to the plaintiff or other persons entitled to receive the same

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FORM No 7F

Final decree in a suit for foreclosure sale or redemption where the mortgagor pays the amount of the decree

(Order XXXIV rules 3 5 and 8)

(Title.)

This suit coming on this day for further consideration and it appearing that on the day of the mortgagor or the same being a person entitled to redeem has paid into Court all amounts due to the mortgagee under the preliminary decree dated the day of It is hereby ordered and decreed that—

(i) the mortgagee do execute a deed of reconveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor* [or as the case may be who has redeemed the property] or an acknowledgment of the payment of the amount due in his favour

(ii) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit

And it is hereby further ordered and decreed that upon the mortgagee executing the deed of reconveyance or acknowledgment in the manner aforesaid —

(i) the said sum of Rs be paid out of Court to the mortgagee

(ii) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor* [or the person making the payment] and the mortgagee do when so required concur in registering at the cost of the mortgagor [or other person making the payment] the said deed of re-conveyance or the acknowledgment in the office of the Sub Registrar of and

(iii) * [if the mortgagee plaintiff or defendant as the case may be is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property in the aforesaid preliminary decree mentioned to the mortgagor *[or such person as aforesaid who has made the payment]

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* Words not required to be deleted

Forms of

FORM No 8

Decree against mortgagor personally for balance after the sale of the mortgaged property

(Order XXXIV rules 6 and 8A)

(*Title*)

Upon reading the application of the mortgagee (the plaintiff or defendant as the case may be) and reading the final decree passed in the suit on the day of and the Court being satisfied that the net proceeds of the sale held under the aforesaid final decree amounted to Rs and have been paid to the applicant out of the Court on the day of and that the balance now due to him under the aforesaid decree is Rs

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant as the case may be) personally

It is ordered hereby and decreed as follows —

That the mortgagor (plaintiff or defendant as the case may be) do pay to the mortgagee (defendant or plaintiff as the case may be) the said sum of Rs with further interest at the rate of six per cent per annum from the day of (the date or payment out of Court referred to above) up to the date of realization of the said sum and the costs of this application

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FORM No 9

Preliminary decree for foreclosure or sale

[Plaintiff 1st Mortgagee

vs

Defendant No 1 Mortgagor

Defendant No 2 2nd Mortgagee]

[Order XXXIV rules 2 and 4]

(*Title*)

The suit coming on this day etc It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal the sum of Rs for interest on the said principal the sum of Rs for costs charges and expense (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage security with interest thereon and the sum of Rs for the costs of this suit awarded to the plaintiff making in all the sum of of Rs

(*Similar declarations to be introduced with regard to the amount due to defendant No 2 in respect of his mortgage if the mortgage money due thereunder has become payable at the date of the suit*)

2 It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No 2* [or (if there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively —]

3 And it is hereby ordered and decreed as follows —

(i) (a) that defendants or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff and

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* Words not required to be deleted.

Forms of Decrees

App D

(*b*) that defendant No 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs due to defendant No 2 and

(*ii*) that on payment of the sum declared to be due to the plaintiffs by defendant or either of them in the manner prescribed in clause (*i*) (*a*) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule *11* of *Order XXXIV of the First Schedule* to the Code of Civil Procedure 1908 the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in plaint mentioned and all such documents shall be delivered over to the defendant No (who has made the payment) or to such person as he appoints and the plaintiff shall, if so required re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and also free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the defendant No (who has made the payment) quiet and peaceable possession of the said property

(*Similar declarations to be introduced if defendant No 1 pays the amount found or declared to be due to defendant No 2 with such variations as may be necessary having regard to the nature of his mortgage*)

4 And it is hereby further ordered and decreed that in default of payment as aforesaid of the amount due to the plaintiff the plaintiff shall be at liberty to apply to the Court for a final decree—

(*i*) *[*in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale*] that the defendant jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required deliver to the plaintiff quiet and peaceable possession of the said property or

(*ii*) *[*in the case of any other mortgage*] that the mortgaged property or a sufficient part thereof shall be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property and

(*iii*) *[*in the case where a sale is ordered under clause 4 (ii) above*] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs of this suit and such costs, charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be applied in payment of the amount due to defendant No * and

* Words not required to be deleted

that if any balance be left it shall be paid to the defendant No 1 or other persons entitled to receive the same and

(ii) that if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No 2 the plaintiff or defendant No 2 or both of them as the case may be shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 1 for the amounts remaining due to them respectively

5 And it is hereby further ordered and decreed—

(a) that if defendant No 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff but defendant No 1 makes default in the payment of the said amount defendant No 2 shall be at liberty to apply to the Court to keep the plaintiff s mortgage alive for his benefit and to apply for a final decree (*in the same manner as the plaintiff might have done under clause 4 above*)—

*[(i) that defendant No 1 shall thenceforth stand absolutely debarred and fore closed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required deliver up to defendant No 2 quiet and peaceable possession of the said property] or

*[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No 2 shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property and (b) (if on the application of defendant No 2 such a final decree for foreclosure is passed) that the whole of the liability of defendant No 1 arising from the plaintiff s mortgage or from the mortgage of defendant No 2 or from this suit shall be deemed to have been discharged and extinguished

6 And it is hereby further ordered and decreed *[*in the case where a sale is ordered under clause 5 above*]—

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by defendant No 2 in respect of the plaintiff s mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount and that the balance if any shall then be applied in payment of the amount adjudged due to defendant No 2 in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of this suit and such costs charges and expenses as may be payable to defendant No 2 under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to defendant No 1 or other persons entitled to receive the same and

(ii) that if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of the plaintiff s mortgage or defendant No 2 s mortgage defendant No 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 1 for the amount of the balance

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* Words not required to be deleted.

Forms of Decrees

App D 7 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No 10

Preliminary decree for redemption of prior mortgage and foreclosure or sale on subsequent mortgage

[Plaintiff 2nd Mortgagee.

v

Defendant No 1 Mortgagor

Defendant No 2 *1st Mortgagee*]

(Order XXXIV rules 2 4 and 7)

(TITLE.)

The suit coming on this day *etc* *It is hereby* declared that the amount due to defendant No 2 on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal the sum of Rs. for interest on the said principal the sum of Rs for costs charges and expenses (other than the costs of the suit) properly incurred by defendant No 2 in respect of the mortgage security with interest thereon and the sum of Rs for the costs of the suit awarded to defendant No 2 making in all the sum of Rs

(Similar declarations to be introduced with regard to the amount due from defendant No 1 to the plaintiff in respect of his mortgage if the mortgage money due thereunder has become payable at the date of the suit)

2 It is further declared that defendant No 2 is entitled to payment of the amount due to him in priority to the plaintiff * [or if (there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively —]

3 And it is hereby ordered and decreed as follows —

(i) (a) that the plaintiff or defendant No 1 or one of them do pay into Court on or before the day of *or any later date up to which time for payment* has been extended by the Court the said sum of Rs , due to defendant No 2 and

(b) that defendant No 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff and

(ii) that on payment of the sum declared due to defendant No 2 by the plaintiff *and defendant No 1 or either of them in the manner* prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable *under rule 11* of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 defendant No 2 shall bring into Court all documents in his possession or power relatin

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* *Words not required to be deleted*

to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff or defendant No 1 (whoever has made the payment) or to such person as he appoints and defendant No 2 shall if so required re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by defendant No 2 or any person claiming under him or any person under whom he claims and also free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the plaintiff or defendant No 1 (whoever has made the payment) quiet and peaceable possession of the said property

(Similar declarations to be introduced if defendant No 1 pays the amount found or declared due to the plaintiff with such variations as may be necessary having regard to the nature of his mortgage)

4 And it is hereby further ordered and decreed that in default of payment as aforesaid of the amount due to defendant No 2 defendant No 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

(i) *[*in the case of a mortgage by conditional sale or an anomalous mortgag where the only rem dy provided for in the mortgage leed is foreclosure and not sal*] that the plaintiff and defendant No 1 jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required deliver to the defendant No 2 quiet and peaceable possession of the said property or

(ii) *[*in the case of any oth r mortgage*] that the mortgaged property or a sufficient part thereof shall be sold and that for the purposes of such sale defendant No 2 shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property and

(iii) *[*in the case where a sale is ordered under clause* 4 (ii) *above*] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No 2 in respect of such costs of the suit and such costs charges and expenses as may be payable to the plaintiff under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be applied in payment of the amount due to the plaintiff and that if any balance be left it shall be paid to defendant No 1 or other persons entitled to receive the same and

(iv) that if the money realised by such sal shall not be sufficient for payment in full of the amounts due to defendant No 2 and the plaintiff defendant No 2 or the plaintiff or both of them as the case may be shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 1 for the amounts remaining due to them respectively

* Words not required to be deleted

Forms of Decrees

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5 And it is hereby further ordered and decreed —

(a) that if the plaintiff pays into Court to the credit of this suit the amount adjudged due to defendant No 2 but defendant No 1 makes default in the payment of the said amount the plaintiff shall be at liberty to apply to the Court to keep defendant No 2 s mortgage alive for his benefit and to apply for a final decree (*in the same manner as the defendant No 2 might have done under clause 4 above*)—

*[(i) that defendant No 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property] or

* [(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property]

and (b) (if on the application of defendant No 2 such a final decree for foreclosure is passed) that the whole of the liability of defendant No 1 arising from the plaintiff s mortgage or from the mortgage of defendant No 2 or from this suit shall be deemed to have been discharged and extinguished.

6 And it is hereby further ordered and decreed (*in the case where a sale is ordered under clause 5 above*)—

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No 2 s mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount and that the balance if any shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable to the plaintiff under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to defendant No 1 or other persons entitled to receive the same and

(ii) that if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2 s mortgage or the plaintiff s mortgage defendant No 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance

7 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property

* Words not required to be deleted

FORM No 11

Preliminary decree for sale

[Plaintiff—Sub or derivative mortgagee]

vs

Defendant No 1—Mortgagor

[Defendant No 2—Original mortgagee]

(Order XXXIV rule 4)

(TITLE)

This suit coming on this day etc It is hereby declared that the amount due to defendant No 2 on his mortgage calculated up to this day of is the sum of Rs for principal the sum of Rs for interest on the said principal the sum of Rs for costs charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon and the sum of Rs. for the costs of the suit awarded to defendant No 2 making in all the sum of Rs

(Similar declarations to be introduced with regard to the amount due from defendant No 2 to the plaintiff in respect of his mortgage)

2 And it is hereby ordered and decreed as follows —

(i) that defendant No 1 do pay into Court on or before the said day of or any later date up to which time for payment may be extended by the Court the said sum of Rs due to defendant No 2

(Similar declarations to be introduced with regard to the amount due to the plaintiff defendant No 2 being at liberty to pay such amount)

(ii) that on payment of the sum declared due to defendant No 2 by defendant No 1 in the manner prescribed in clause 2 (i) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 the plaintiff and defendant No 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned and all such documents (except such as relate only to the sub mortgage) shall be delivered over to defendant No 1 or to such person as he appoints, and defendant No 2 shall if so required re convey or re transfer the property to defendant No 1 free from the said mortgage clear of and from all incumbrances created by defendant No 2 or any person claiming under him or any person under whom he claims and free from all liability arising from the mortgage or this suit and shall if so required deliver up to defendant No 1 quiet and peaceable possession of the said property and

(iii) that upon payment into the Court by defendant No. 1 of the amount due to defendant No 2 the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall then be paid to defendant No. 2 and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance

Forms of Decrees

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3 And it is further ordered and decreed that if defendant No 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff the plaintiff shall bring into the Court all documents etc *[as in sub clauses (ii) of clause 2]*

4 And it is hereby further ordered and decreed that in default of payment by defendants Nos 1 and 2 as aforesaid the plaintiff may apply to the Court for a final decree for sale and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold and that for the purposes of such sale the plaintiff and defendant No 2 shall produce before the Court or such officer as it appoints all documents in their possession or power relating to the mortgaged property

5 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be applied in payment of the amount due to defendant No 2 and that if any balance be left it shall be paid to defendant No 1 or other persons entitled to receive the same

6 And it is hereby further ordered and decreed that if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No 2 the plaintiff or defendant No 2 or both of them as the case may be shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 2 or defendant No 1 (as the case may be) for the amount of the balance

7 And it is hereby further ordered and decreed that if defendant No 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff but defendant No 1 makes default in payment of the amount due to defendant No 2 defendant No 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—*(declarations in the ordinary form to be introduced according to the nature of defendant No 2's mortgage and the remedies open to him thereunder)*

8 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

No 12

DECREE FOR RECTIFICATION OF INSTRUMENT

(Title)

It is hereby declared that the dated the day of 19 does not truly express the intention of the parties to such

And it is decreed that the said be rectified by

No 13

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS

(Title)

It is hereby declared that the dated the day of 19 and made between and *is void as against the plaintiff and all other the creditors, if any* of the defendant

No 14

INJUNCTION AGAINST PRIVATE NUISANCE

(*Title*)

Let the defendant his agents servants and workmen be perpetually restrained from burning or causing to be burnt any bricks on the defendant s plot of land marked B in the annexed plan so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff

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No 15

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(*Title.*)

Let the defendant his contractors agents and workmen be perpetually restrained from continuing to erect upon his premises in any hou e or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down so or in such manner as to darken injure or obstruct such of the plaintiff s windows in his said premises as are ancient lights

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No 16

INJUNCTION RESTRAINING USE OF PRIVATE ROAD

(*Title*)

Let the defendant his agents servants and workmen be perpetually restrained from using or permitting to be used any part of the lane at the soil of which belongs to the plaintiff as a carriage way for the passage of carts carriages or other vehicles either going to or from the land marked B in the annexed plan or for any purpose whatsoever

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No 17

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT

(*Title*)

It is ordered that the following accounts and inquiries be taken and made that is to say —

In creditor s suit—

1 That an account be taken of what is due to the plaintiff and all other the creditors of the deceased

In suits by legatees—

2 That an account be taken of the legacies given by the testator s will.

In suits by next-of kin—

3 That an inquiry be made and account taken of what or of what share if any the plaintiff is entitled to as next-of kin (or one of the next of kin) of the intestate

[After the first paragraph the decree will where necessary order in a creditor s suit inquiry and accounts for legatees heirs at law and next-of kin. In suits by claimants other than creditors after the first paragraph in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow omitting the first formal words. The form is continued as in a creditor s suit.]

Forms of Decrees

App D

4 An account of the funeral and testamentary expenses

5 An account of the movable property of the deceased come to the hands of the defendant or to the hands of any other person by his order or for his use

6 An inquiry what part (if any) of the movable property of the deceased is out standing and undisposed of

7 And it is further ordered that the defendant do on or before the day of next pay into Court all sums of money which shall be found to have come to his hands or to the hands of any person by his order or for his use

8 And that if the * shall find it necessary for carrying out the objects of the suit to sell any part of the movable property of the deceased that the same be sold accordingly and the proceeds paid into Court

9 And that Mr *E F* be receiver in the suit (*or* proceeding) and receive and get in all outstanding debts and outstanding movable property of the deceased, and pay the same into the hands of the * (and shall give security by bond for the due performance of his duties to the amount of rupees)

10 And it is further ordered that if the movable property of the deceased be found insufficient for carrying out the objects of the suit then the following further inquiries be made and accounts taken, that is to say—

(*a*) an inquiry what immovable property the deceased was seized of or entitled to at the time of his death

(*b*) an inquiry what are the incumbrances (if any) affecting the immovable property of the deceased or any part thereof

(*c*) an account so far as possible of what is due to the several incumbrancers and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed

11 And that the immovable property of the deceased or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit be sold with the approbation of the Judge free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent

12 And it is ordered that *G H* shall have the conduct of the sale of the immovable property and shall prepare the conditions and contracts of sale subject to the approval of the * and that in case any doubt or difficulty shall arise the papers *shall be submitted to the Judge to settle*

13 And it is further ordered that for the purpose of the inquiries hereinbefore directed the * shall advertise in the newspapers according to the practice of the Court or shall make such inquiries in any other way which shall appear to the * to give the most useful publicity to such enquiries

14 And it is ordered that the above inquiries and accounts be made and taken and that all other acts ordered to be done be completed before the day of and that the * do certify the result of the inquiries and the accounts and that all other acts ordered are completed and have his certificate in that behalf ready for the inspection of the parties on the day of

15 And lastly it is ordered that this suit [*or* proceeding] stand adjourned for [*making* final decree to the day of
Such part only of this decree is to be used as is applicable to the particular case]

Here insert nam of proper officer

Forms of

No 18

FINAL DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE.

(*Title*)

1 It is ordered that the defendant do on or before the day of pay into Court the sum of Rs the balance by the said certificate found to be due from the said defendant on account of the estate of the testator and also the sum of Rs for interest at the rate of Rs per cent per annum from the day of to the day of amounting together to the sum of Rs

2 Let the * of the said Court tax the costs of the plaintiff any defendant in this suit and let the amount of the said costs when so taxed be paid out of the said sum of Rs order to be paid into Court as aforesaid as follows —

(a) The costs of the plaintiff to Mr his attorney [or pleader] and the costs of the defendant to Mr his attorney [or pleader]

(b) And (*if any debts are due*) with the residue of the said sum of Rs after payment of the plaintiff s and defendant s costs as aforesaid let the sums found to be owing to the several creditors mentioned in the schedule to the certificate of the * together with subsequent interest on such of the debts as bear interest be paid and after making such payments let the amount coming to the several legatees *mentioned in the schedule together with* subsequent interest (to be verified as aforesaid) be paid to them

3 And if there should then be any residue let the same be paid to the residuary legatee

No 19

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES

(*Title.*)

1 It is declared that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff

2 And it is ordered that an account be taken of what is due for principal and interest on the said legacy

3. And it is also ordered that the defendant do, within weeks after the date of the certificate of the * pay to the plaintiff the amount of what the * shall certify to be due for principal and interest

4 And it is ordered that the defendant to pay the plaintiff his costs of suits the same to be taxed in case the parties differ

* Here insert name of proper officer

Forms of Decrees

App D

4 An account of the funeral and testamentary expenses

5 An account of the movable property of the deceased come to the hands of the defendant or to the hands of any other person by his order or for his use

6 An inquiry what part (if any) of the movable property of the deceased is outstanding and undisposed of

7 And it is further ordered that the defendant do on or before the day of next pay into Court all sums of money which shall be found to have come to his hands or to the hands of any person by his order or for his use

8 And that if the * shall find it necessary for carrying out the objects of the suit to sell any part of the movable property of the deceased that the same be sold accordingly and the proceeds paid into Court

9 And that Mr *E F* be receiver in the suit (*or* proceeding) and receive and get in all outstanding debts and outstanding movable property of the deceased, and pay the same into the hands of the * (and shall give security by bond for the due performance of his duties to the amount of rupees)

10 And it is further ordered that if the movable property of the deceased be found insufficient for carrying out the objects of the suit then the following further inquiries be made and accounts taken that is to say—

(*a*) an inquiry what immovable property the deceased was seized of or entitled to at the time of his death

(*b*) an inquiry what are the incumbrances (if any) affecting the immovable property of the deceased or any part thereof

(*c*) an account so far as possible of what is due to the several incumbrancers and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed

11 And that the immovable property of the deceased or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit be sold with the approbation of the Judge free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent

12 And it is ordered that *G H* shall have the conduct of the sale of the immovable property and shall prepare the conditions and contracts of sale subject to the approval of the * and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle

13 And it is further ordered that for the purpose of the inquiries hereinbefore directed the * shall advertise in the newspapers according to the practice of the Court or shall make such inquiries in any other way which shall appear to the * to give the most useful publicity to such enquiries

14 And it is ordered that the above inquiries and accounts be made and taken and that all other acts ordered to be done be completed before the day of and that the * do certify the result of the inquiries and the accounts and that all other acts ordered are completed and have his certificate in that behalf ready for the inspection of the parties on the day of

15 And lastly it is ordered that this suit [*or* proceeding] stand adjourned for [*making* final decree to the day of

Such part only of this decree is to be used as is applicable to the particular case]

Here insert name of proper officer

Forms of

No 18

FINAL DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE.

(*Title*)

1 It is ordered that the defendant do on or before the day of pay into Court the sum of Rs the balance by the said certificate found to be due from the said defendant on account of the estate of the testator and also the sum of Rs for interest at the rate of Rs per cent per annum from the day of to the day of amounting together to the sum of Rs

2 Let the * of the said Court tax the costs of the plaintiff any defendant in this suit and let the amount of the said costs when so taxed be paid out of the said sum of Rs order to be paid into Court as aforesaid as follows —

(*a*) The costs of the plaintiff to Mr his attorney [*or* pleader] and the costs of the defendant to Mr his attorney [*or* pleader]

(*b*) And (*if any debts are due*) with the residue of the said sum of Rs after payment of the plaintiff s and defendant s costs as aforesaid let the sums found to be owing to the several creditors mentioned in the schedule to the certificate of the * together with subsequent interest on such of the debts as bear interest be paid and after making such payments let the amount coming to the several legatees *mentioned in the* *schedule together with* subsequent interest (to be verified as aforesaid) be paid to them

3 And if there should then be any residue let the same be paid to the residuary legatee

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No 19

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES

(*Title.*)

1 It is declared that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff

2 And it is ordered that an account be taken of what is due for principal and interest on the said legacy

3. And it is also ordered that the defendant do, within weeks after the date of the certificate of the * pay to the plaintiff the amount of what the * shall certify to be due for principal and interest

4 And it is ordered that the defendant to pay the plaintiff his costs of suits, the same to be taxed in case the parties differ

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* Here insert name of proper officer

Forms of Decrees

App D

No 20

FINAL DECREE IN AN ADMINISTRATION SUIT BY NEXT OF KIN

(Title)

1 Let the * of the said Court tax the costs of the plaintiff and defendant in this suit and let the amount of the said plaintiff s costs when so taxed be paid by the defendant to the plaintiff out of the sum of Rs the balance by the said certificate found to be due from the said defendant on account of the personal estate of *E F* the intestate within one week after the taxation of the said costs by the said * and let the defendant return for her own use out of such sum her costs when taxed

2 And it is ordered that the residue of the said sum of Rs after payment of the plaintiff s and defendant s costs as aforesaid be paid and applied by defendant as follows

(a) Let the defendant within one week after the taxation of the said costs by the * as aforesaid pay one third share of the said residue to the plaintiff s *A B* and *C D* his wife in her right as the sister and one of the next of kin of the said *E F* the intestate

(b) Let the defendant retain for her own use one other third share of the said residue as the mother and one of the next of kin of the said *E F* the intestate

(c) And let the defendant within one week after the taxation of the said costs by the * as aforesaid pay the remaining one third share of the said residue to *G H* as the brother and the other next of kin of the said *E F* the intestate

---

No 21

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS

(Title)

It is declared that the proportionate shares of the parties in the partnership are as follows —

It is declared that this partnership shall stand dissolved [or shall deemed to have been dissolved] as from the day of and it is ordered that the dissolution thereof as from that day be advertised in the Gazette etc

And it is ordered that be the receiver of the partnership estate and effects in this suit and to get in all the outstanding book-debts and claims of the partnership

And it is ordered that the following accounts be taken —

1 An account of the credits property and effects now belonging to the said partnership

2 An account of the debts and liabilities of the said partnership

3 An account of all dealings and transactions between the plaintiff and defendant from the foot of the settled account exhibited in this suit and marked (A) and not disturbing any subsequent settled accounts

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* Here insert name of proper officer

And it is ordered that the good will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned and the stock in trade be sold on the premises and that the *may on the application of any of the parties fix a reserved bidding for all or any of the lots at such sale and that either of the parties is to be at liberty to bid at the sale

And it is ordered that the above accounts be taken and all the other acts required to be done be completed before the day of and that the * do certify the result of the accounts and that all other acts are completed and have his certificate in that behalf ready for the inspection of the parties on the day of

And lastly it is ordered that this suit stand adjourned for making a final decree to the day of

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No 22

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS

(Title)

It is ordered that the fund now in Court amounting to the sum of Rs be applied as follows —

1 In payment of the debts due by the partnership set forth in the certificate of the * amounting on the whole to Rs

2 In payment of the costs of all parties in this suit amounting to Rs

[*These Costs must be ascertained before the decree is drawn up*]

3 In payment of the sum of Rs to the plaintiff as his share of the partnership assets of the sum of Rs being the residue of the said sum of Rs now in Court to the defendant as his share of the partnership assets

[*Or* and that the remainder of the said sum of Rs be paid to the said plaintiff [*or* defendant] in part payment of the sum of Rs certified to be due to him in respect of the partnership accounts]

4 And that the defendant [*or* plaintiff] do on or before the day of pay to the plaintiff [*or* defendant] the sum of Rs being the balance of the said sum of Rs due to him which will then remain due

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No 23

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS

(Title)

It is hereby decreed as follows —

(1) That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed

(2) That the defendant do pay to the plaintiff the sum of Rs with interest thereon at the rate of per cent per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit

Or

(2) That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit

(3) That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree holder] [the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court] [the expiration of three years from the date of the decree].

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* Here insert name of proper officer

APPENDIX E

EXECUTION

No 1

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED (O 21 r 2)

(*Title*)

To

WHEREAS IN execution of the decree in the above named suit has applied to this Court that the sum of Rs recoverable under the decree has been $\frac{\text{paid}}{\text{adjusted}}$ and should be recorded as certified this is to give you notice that you are to appear before this Court on the day of 19 to show cause why the $\frac{\text{payment}}{\text{adjustment}}$ aforesaid should not be recorded as certified

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 2

PRECEPT (Section 46)

(*Title*)

UPON hearing the decree holder it is ordered that this precept be sent to the Court *of* *at* *under section 46 of the Code of* Civil Procedure 1908 with directions to attach the property specified in the annexed schedule and to hold the same pending an application which may be made by the decree holder for execution of the decree

Schedule

Dated the day of 19

Judge

No 3

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT (O 21 r 6)

(*Title*)

WHEREAS the decree holder in the above suit has applied to this Court for a certificate to be sent to the Court of at for execution of the decree in the above suit by the said Court alleging that the judgment debtor resides or has property within the local limits of the jurisdiction *of the said Court and it is deemed necessary and proper to send* a certificate to the said Court under Order XXI rule 6 of the Code of Civil Procedure 1908 it is

Ordered

That a copy of this order be sent to with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non satisfaction

Dated the day of 19

Judge

No 4

CERTIFICATE OF NON SATISFACTION OF DECREE (O 21 r 6)

(*Title*)

Certified that no (1) satisfaction of the decree of this Court in Suit No of 19 a copy of which is hereunto attached has been obtained by execution within the jurisdiction of this Court

Dated the day of 19

Judge

(1) If partial strike out no and state to what extent

Forms of E

Ap

No 5

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT

(O 21 r 6)

(Title)

Number of suit and the Court by which the decree was passed	Names of parties	Date of application for execution	Number of the execution case	Processes issued and dates of service thereof	Costs of execution	Amount realized	How the case is disposed of	Remarks
1	2	3	4	5	6	7	8	9
					Rs A P	Rs A P		

Signature of Muharrir in charge. *Signature of Judge*

APPENDIX E
EXECUTION

No 1

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED (O 21, r 2)

(*Title*)

To

WHEREAS in execution of the decree in the above named suit has applied to this Court that the sum of Rs recoverable under the decree has been $\frac{\text{paid}}{\text{adjusted}}$ and should be recorded as certified this is to give you notice that you are to appear before this Court on the day of 19 to show cause why the $\frac{\text{payment}}{\text{adjustment}}$ aforesaid should not be recorded as certified

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 2

PRECEPT (Section 46)

(*Title*)

UPON hearing the decree holder it is ordered that this precept be sent to the Court of at under section 46 of the Code of Civil Procedure 1908 with directions to attach the property specified in the annexed schedule and to hold the same pending an application which may be made by the decree holder for execution of the decree

Schedule

Dated the day of 19

Judge

No 3

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT (O 21 r 6)

(*Title*)

WHEREAS the decree holder in the above suit has applied to this Court for a certificate to be sent to the Court of at for execution of the decree in the above suit by the said Court alleging that the judgment debtor resides or has property within the local limits of the jurisdiction of the said Court and it is deemed necessary and proper to send a certificate to the said Court under Order XXI rule 6 of the Code of Civil Procedure 1908 it is

Ordered

That a copy of this order be sent to with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non satisfaction.

Dated the day of 19

Judge

No 4

CERTIFICATE OF NON SATISFACTION OF DECREE (O 21 r 6)

(*Title*)

Certified that no (1) satisfaction of the decree of this Court in Suit No of 19 a copy of which is hereunto attached has been obtained by execution within the jurisdiction of this Court

Dated the day of 19

Judge

(1) If partial strike out no and state to what extent

No 5

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT

(O 21 r 6)

(*Title*)

Number of suit and the Court by which the decree was passed	Names of parties	Date of application for execution	Number of the execution case	Processes issued and dates of service thereof	Costs of execution	Amount realized	How the case is disposed of	Remarks
1	2	3	4	5	6	7	8	9
					Rs A P	Rs A P		

Signature of Muharrir in charge. *Signature of Judge*

No 6

APPLICATION FOR EXECUTION OF DECREE (O 21 r 11)

In the Court of

decree holder hereby apply for execution of the decree herein below set forth —

No of suit	Names of parties	Date of decree	Whether any appeal preferred from decree	Payment or adjustment made if any	Previous application if any with date and result	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree	Amount of costs if any awarded	Against whom to be executed	Mode in which the assistance of the Court is required
1	2	3	4	5	6	7	8	9	10
789 of 1897	A B—Plaintiff C D—Defendant	October 11th 1897	No	None	Rs 72 4 recorded on application dated the 4th March 1899	Rs 314 8 2 principal [interest at 6 per cent per annum from date of decree till payment]	As awarded in the decree Rs a p 47 10 4 Subsequently incurred 8 2 0 Total 55 12 4	Against the defendant C D	[When attachment and sale of movable property is sought] I pray that the total amount of Rs [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by attachment and sale of defendant s movable property as per annexed list and paid to me [When attachment and sale of immovable property is sought] I pray that the total amount of Rs [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by the attachment and sale of defendant s immovable property specified at the foot of this application and paid to me

I declare that what is stated herein is true to the best of my knowledge and belief

Signed

Decree holder

Dated the day of 19

[When attachment and sale of immovable property is sought]

Description and Specification of Property

The undivided one third share of the judgment debtor in a house situated in the village of value Rs 40 and bounded as follows —

East by G s house west by H s house south by the public road north by private lane and J s house

I declare that what is stated in the above description is true to the best of my knowledge and belief and so far as I have been able to ascertain the interest of the defendant in the property therein specified

Signed *Decree holder*

No 7

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE (O 21 r 16)

(Title)

To

WHEREAS has made application to this Court for execution of decree in Suit No of 19 on the allegation that the said decree has been transferred to him by assignment this is to give you notice that you are to appear before this Court on the day of 19 to show cause why execution should not be granted

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 8

WARRANT OF ATTACHMENT OF MOVABLE PROPERTY IN EXECUTION OF A DECREE FOR MONEY (O 21 r 30)

(Title)

To

The Bailiff of the Court

DECREE			
Principal			
Interest			
Costs			
Costs of execution			
Further Interest			
Total			

WHEREAS was ordered by decree of this Court passed on the day of 19 in Suit No of 19 to pay to the plaintiff the sum of Rs as noted in the margin and whereas the said sum of Rs has not been paid These are to command you to attach the movable property of the said as set forth in the schedule hereunto annexed or which shall be pointed out to you by the said and unless the said shall pay to you the said sum of Rs together with Rs the costs of this attachment to hold the same until further orders from this Court

You are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the day on which and manner in which it has been executed or why it has not been executed.

GIVEN under my hand and the seal of the Court this day of 19

Schedule *Judge*

Forms of Execution

App E

No 9

WARRANT FOR SEIZURE OF SPECIFIC MOVABLE PROPERTY ADJUDGED BY DECREE

(O 21 r 31)

(*Title*)

To

The Bailiff of the Court

WHEREAS was ordered by decree of this Court passed on the day of 19 in Suit No of 19 to deliver to the plaintiff the movable property (*or* a share in the movable property) specified in the schedule hereunto annexed and whereas the said property (*or* share) has not been delivered

These are to command you to seize the said movable property (*or* a share of the said movable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf

GIVEN under my hand and the seal of the Court this day of 19

Schedule

No 10

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT (O 21 r 34)

(*Title.*)

To

TAKE notice that on the day of 19 the decree holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of whereof a draft is hereunto annexed, of the immovable property specified hereunder and that the day of 19 is appointed for the hearing of the said application and that you are at liberty to appear on the said day and to state in writing any objections to the said draft

Description of Property

GIVEN under my hand and the seal of the Court this day of 19

Judge.

No 11

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND ETC (O 21 r 35)

(*Title*)

To

The Bailiff of the Court

WHEREAS the undermentioned property in the occupancy of has been decreed to , the plaintiff in this suit You are hereby directed to put the said in possession of the same and you are hereby authorised to remove any person bound by the decree who may refuse to vacate the same

GIVEN under my hand and the seal of the Court this day of 19

Judge.

Schedule

No 12

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE

(O 21 r 37)

(Title)

To

WHEREAS has made application to this Court for execution of decree in Suit No of 19 by arrest and imprisonment of your person you are hereby required to appear before this Court on the day of 19 to show cause why you should not be committed to the civil prison in execution of the said decree

GIVEN under my hand and the seal of the Court this day of 19

No 13

WARRANT OF ARREST IN EXECUTION (O 21 r 38)

(Title)

To

The Bailiff of the Court

WHEREAS was adjudged by a decree of the Court in Suit No of 19 dated the day of 19 to pay to the decree holder the sum of Rs as noted in the margin and whereas the said sum of Rs has not been paid to the said decree holder in satisfaction of the said decree these are to command you to arrest the said judgment debtor and unless the said judgment debtor shall pay to you the said sum of Rs together with Rs for the cost of executing this process to bring the said defendant before the Court with all convenient speed You are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the day on which and manner in which it has been executed or the reason why it has not been executed

Principal			
Interest			
Costs			
Execution			
Total			

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 14

WARRANT OF COMMITTAL OF JUDGMENT DEBTOR TO JAIL (O 21 r 40)

(Title)

To

The Officer in charge of the Jail at

WHEREAS who has been brought before this Court this day of 19 under a warrant in execution of a decree which was made and pronounced by the said

Forms of Execution.

App E.

Court on the day of 19 and by which decree it was ordered that the said should pay
And whereas the said has not obeyed the decree nor satisfied the Court that he is entitled to be discharged from custody you are hereby in the name of the King Emperor of India commanded and required to take and receive the said into the civil prison and keep him imprisoned therein for a period not exceeding or until the said decree shall be fully satisfied, or the said shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure 1908 and the Court does hereby fix annas per diem as the rate of the monthly allowance for the subsistence of the said during his confinement under this warrant of committal.

GIVEN under my signature and the seal of this Court this day of 19

Judge

No 15

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE

(Sections 58 59)

(*Title.*)

To

The Officer in charge of the Jail at

UNDER orders passed this day you are hereby directed to set free judgment-debtor now in your custody

Dated

Judge

No 16

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF (O 21 r 46)

(*Title*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 in Suit No of 19 in favour of for Rs It is ordered that the defendant be and is hereby prohibited and restrained until the further order of this Court from receiving from the following property in the possession of the said that is to say to which the defendant is entitled subject to any claim of the said and the said is hereby prohibited and restrained until the further order of this Court from delivering the said property to any person or persons whomsoever

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 17

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF DEBTS OR SECURED BY NEGOTIABLE INSTRUMENT (O 21 r 46)

To

WHEREAS
has failed to satisfy a decree passed against on the day of 19 in Suit No of 19 in favour of for Rs It is ordered that the defendant be and is hereby prohibited and restrained until the further order of this Court from receiving from you a certain debt alleged now to be due from you to the said defendant namely and that you the said be and you are hereby prohibited and restrained until the further order of this Court from making payment of the said debt or any part thereof to any person whomsoever or otherwise than into this Court

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 18

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION (O 21 r 46)

(Title)

To

Defendant and to

Secretary of Corporation

WHEREAS has failed to satisfy a decree passed against on the day of 19 in Suit No of 19 in favour of for Rs It is ordered that you the defendant be and you are hereby prohibited and restrained until the further order of this Court from making any transfer of shares in the aforesaid Corporation namely or from receiving payment of any dividends thereon and you , the Secretary of the said Corporation are hereby prohibited and restrained from permitting any such transfer or making any such payment

GIVEN under my hand and the seal of the Court this day of 19

Judge.

No 19

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY COMPANY OR LOCAL AUTHORITY (O 21 r 48)

(Title)

To

WHEREAS judgment-debtor in the above named case is a *(describe office of judgment debtor)* receiving his salary (or allowance) at your hands and whereas decree holder in the said case has applied in this Court for the attachment of the salary (or allowance) of the said to the extent of due to him under the decree You are hereby required to withhold the said sum of from the salary of the said in monthly instalments of and to remit the said sum in monthly instalments to this Court

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 20

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT (O 21 r 51)

(*Title*)

To

The Bailiff of the Court

WHEREAS an order has been passed by this Court on the day of 19 for the attachment of
You are hereby directed to seize the said and bring the same into Court.

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 21

ATTACHMENT

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT (O 21 r 52)

(*Title*)

To

SIR

The plaintiff having applied under rule 22 of Order XXI of the Code of Civil Procedure 1908 for an attachment of certain money now in your hands *(here state how the money is supposed to be in the hands of the person addressed on what account etc)* I request that you will hold the said money subject to the further order of this Court

I have the honour to be

Sir

Your most obedient Servant

Judge.

Dated day of 19

No 22

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT (O 21 r 53)

(*Title*)

To

The Judge of the Court of

SIR

I have the honour to inform you that the decree obtained in your Court on the day of 19 by in suit No. of 19 in which he was and was
has been attached by this Court on the application of
the in the suit specified above You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment debtor

I have the honour etc.

Judge

Dated the day of 19

No 23

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE
(O 21 r 53)
(*Title*)

To

WHEREAS an application has been made in this Court by the decree holder in the above suit for the attachment of a decree obtained by you on the day of 19 in the Court of in Suit No of 19 in which was and was It is ordered that you the said be and you are hereby prohibited and restrained until the further order of this Court from transferring or charging the same in any way

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 24

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF IMMOVABLE PROPERTY
(O 21 r 54)
(*Title*)

To

Defendant

WHEREAS you have failed to satisfy a decree passed against you on the day of 19 in Suit No of 19 in favour of for Rs It is ordered that you the said be and you are hereby prohibited and restrained until the further order of this Court from transferring or charging the property specified in the schedule hereunto annexed by sale gift or otherwise and that all persons be and that they are hereby prohibited from receiving the same by purchase gift or otherwise

GIVEN under my hand and the seal of the Court this day of 19

Schedule

Judge

No 25

ORDER FOR PAYMENT TO THE PLAINTIFF ETC OF MONEY ETC IN THE HANDS OF A THIRD PARTY (O 21 r 56)
(*Title*)

To

WHEREAS the following property has been attached in execution of a decree in Suit No of 19 passed on the day of 19 in favour of for Rs It is ordered that the property so attached consisting of Rs in money and Rs in currency notes or a sufficient part thereof to satisfy the said decree shall be paid over by you the said to

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 26

NOTICE TO ATTACHING CREDITOR. (O 21 r 58)
(*Title*)

To

WHEREAS has made application to this Court for the removal of attachment on placed at your instance

Forms of Execution

App E

in execut on of the decree in suit No of 19 this is to give you notice to appear before this Court on the day of 19 either in person or by a pleader of the Court duly instructed to support your claim as attaching creditor

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 27

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY

(O 21 r 66)

(*Title*)

To

The Bailiff of the Court

THESE are to command you to sell by auction after giving days previous notice by affixing the same in this Court house and after making due proclamation the property attached under a warrant from this Court dated the day of 19 in execution of a decree in favour of in Suit No of 19 or so much of the said property as shall realize the sum of Rs being the of the said decree and costs still remaining unsatisfied

You are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the manner in which it has been executed or the reason why it has not been executed

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 28

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION

(O 21 r 66)

(*Title*)

To

Judgment-debtor

WHEREAS in the abovenamed suit the decree-holder has applied for the sale of You are hereby informed that the day of 19 has been fixed for settling the terms of the proclamation of sale

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 29

PROCLAMATION OF SALE. (O 21 r 66)

(*Title*)

Notice is hereby given that under rule 64 of Order XXI of the Code of Civil Procedure 1908 an order has been passed by this Court for the sale of the attached property mentioned in the annexed schedule in satisfaction of the claim of the decree holder in the suit (1) mentioned in the margin amounting with costs and interest up to date of sale to the sum of

Suit No of 19 decided by the of in which was plaintiff and was defendant.

The sale will be by public auction and the property will be put up for sale in lots specified in the schedule The sale will be of the property of the judgment debtor abovenamed as mentioned in the schedule below and the liabilities and claims attaching to the said property so far as they have been ascertained are those specified in the schedule against each lot

In the absence of any order of postponement the sale will be held by at the monthly sale commencing at o clock on the at In the event however of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot the sale will be stopped

At the sale the public generally are invited to bid either personally or by duly authorised agent No bid by or on behalf of the judgment creditors above mentioned however will be accepted nor will any sale to them be valid without the express permission of the Court previously given The following are the further

Conditions of Sale

1 The particulars specified in the schedule below have been stated to the best of the information of the Court but the Court will not be answerable for any error misstatement or omission in this proclamation

2 The amount by which the biddings are to be increased shall be determined by the officer conducting the sale In the event of any dispute arising as to the amount bid or as to the bidder the lot shall at once be again put up to auction

3 The highest bidder shall be declared to be the purchaser of any lot provided always that he is legally qualified to bid and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so

4 For reasons recorded it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of rule 69 of Order XXI

5 In the case of movable property the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs and in default of payment the property shall forthwith be again put up and re sold

6 In the case of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent on the amount of his purchase money to the officer conducting the sale and in default of such deposit the property shall forthwith be put up again and re sold

7 The full amount of the purchase money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property exclusive of such day or if the fifteenth day be a Sunday or other holiday then on the first office day after the fifteenth day

8 In default of payment of the balance of purchase money within the period allowed the property shall be re sold after the issue of a fresh notification of sale The deposit after defraying the expenses of the sale may if the Court thinks fit be forfeited to Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold

Given under my hand and the seal of the Court this day of 19

Judge

Forms of Execution

App E

Schedule of Property

Number of lot	Description of property to be sold with the name of each owner where there are more judgment debtors than one	The revenue assessed upon the estate or part of the estate if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government	Detail of any incumbrances to which the property is liable	Claims if any which have been put forward to the property and any other known particulars bearing on its nature and value

No 30

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE.

(O 21 r 66)

(*Title*)

To

The Nazir of the Court

WHEREAS an order has been made for the sale of the property of the Judgment debtor specified in the schedule hereunder annexed and whereas the day of 19 has been fixed for the sale of the said property copies of the proclamation of sale are by this warrant made over to you and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court house and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the day of 19

Judge

Schedule

No 31

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON A RE SALE OF PROPERTY BY REASON OF THE PURCHASER S DEFAULT (O 21 r 71)

(*Title*)

Certified that at the re sale of the property in execution of the decree in the above-named suit in consequence of default on the part of *purchaser* there was a deficiency in the price of the said property amounting to Rs. and that the expenses attending such re sale amounted to Rs. making a total of Rs. which sum is recoverable from the defaulter

Dated the day of 19

Officer holding the sale

No 32

NOTICE TO PERSON IN POSSESSION OF MOVABLE PROPERTY SOLD IN EXECUTION (O 21 r 79)

(*Title*)

To

WHEREAS
has become the purchaser at a public sale in execution of the decree in the above suit of now in your possession you are hereby prohibited from delivering possession of the said
to any person except the said

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 33

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO ANY OTHER THAN THE PURCHASER (O 21 r 79)

(*Title*)

To and to

WHEREAS
became the purchaser at a public sale in execution of the decree in the above suit has of being debts due from you to you
It is ordered that you be and you are hereby prohibited from receiving and you from making payment of the said debt to any person or persons except the said

GIVEN under my hand and the seal of the Court this day of 19 .

Judge.

No 34

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION (O 21 r 79)

(*Title*)

To

and Secretary of Corporation

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit, of certain shares in the above Corporation that is to say of standing in the name of you It is ordered that you be and you are hereby prohibited from making any transfer of the said shares to any person except the said the purchaser aforesaid or from receiving any dividends thereon and you Secretary of the said Corporation from permitting any such transfer or making any such payment to any person except the said the purchaser aforesaid

GIVEN under my hand and the seal of the Court this day of 19

Judge.

No 35

CERTIFICATE TO JUDGMENT DEBTOR AUTHORIZING HIM TO MORTGAGE, LEASE OR SELL PROPERTY (O 21 r 83)

(Title)

WHEREAS in execution of the decree passed in the above suit an order was made on the day of 19 for the sale of the undermentioned property of the judgment debtor and whereas the Court has on the application of the said judgment debtor postponed the said sale to enable him to raise the amount of the decree by mortgage lease or private sale of the said property or of some part thereof

This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed mortgage lease or sale within a period of from the date of this certificate provided that all monies payable under such mortgage lease or sale shall be paid into this Court and not to the said judgment debtor

Description of Property

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 36

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE. (O 21 rr 90 92)

(Title)

To

WHEREAS the undermentioned property was sold on the day of 19 in execution of the decree passed in the above named suit and whereas the decree holder [*or* judgment debtor] has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [*or* fraud] in publishing [*or* conducting] the sale namely that Take notice that if you have any cause to show why the said application should not b granted you should appear with your proofs in this Court on the day of 19 when the said application will be heard and determined

GIVEN under my hand and the seal of the Court this day of 19

Description of Property

Judge

No 37

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE. (O 21 rr 91 92)

(Title)

To

WHEREAS the purchaser of the undermentioned property sold on the day of 19 in execution of the decree passed in the above named suit has applied to this Court to set aside the sale of the said property on the ground that the judgment-debtor had no saleable interest therein

Take notice that if you have any cause to show why the said application should not be granted you should appear with your proofs in the Court on the day of 19 when the said application will be heard and determined

Given under my hand and the seal of the Court this day of 19

Description of Property

Judge

No 38

Certificate of Sale of Land (O 21 r 94)

(*Title*)

This is to certify that has been declared the purchaser at a sale by public auction on the day of 19 of in execution of decree in this suit and that the said sale has been duly confirmed by this Court

Given under my hand and the seal of the Court this day of 19

Judge

No 39

Order for Delivery to certified Purchaser of Land at a Sale in Execution (O 21 r 95)

(*Title*)

To

The Bailiff of the Court

Whereas has become the certified purchaser of at a sale in execution of decree in Suit No of 19

You are hereby ordered to put the said the certified purchaser as aforesaid in possession of the same

Given under my hand and the seal of the Court this day of 19

Judg

No 40

Summons to appear and answer Charge of Obstructing Execution of Decree. (O 21 r 97)

(*Title*)

To

Whereas the decree holder in the above suit has complained to this Court that you have resisted (*or* obstructed) the officer charged with the execution of the warrant for possession

You are hereby summoned to appear in this Court on the day of 19 at A M to answer the said complaint

Given under my hand and the seal of the Court this day of 19

Judge

Forms of Execution

App E

No 41

WARRANT OF COMMITTAL. (O 21, r 98)

(*Title.*)

To

The Officer in Charge of the Jail at

WHEREAS the undermentioned property has been decreed to the plaintiff in this suit and whereas the Court is satisfied that without any just cause resisted [*or* obstructed] and is still resisting [*or* obstructing] the said in obtaining possession of the property and whereas the said has made application to this Court that the said be committed to the civil prison

You are hereby commanded and required to take and receive the said into the civil prison and to keep him imprisoned therein for the period of days.

GIVEN under my hand and the seal of the Court this day of 19

Judge.

No 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND (Section 72.)

(*Title*)

To

Collector of

SIR

In answer to your communication No dated representing that the sale in execution of the decree in this suit of land situate within your district is objectionable I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you

I have the honour to be

Sir

Your Obedient Servant

Judge.

APPENDIX F

SUPPLEMENTAL PROCEEDINGS

No 1

WARRANT OF ARREST BEFORE JUDGMENT (O 38 r 1)

(*Title*)

To

The Bailiff of the Court

WHEREAS the plaintiff in the above suit claims the sum of Rs as noted in the margin and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant is about to

Principal			
Interest			
Costs			
Total			

These are to command you to demand and receive from the said the sum of Rs as sufficient to satisfy the plaintiff s claim and unless the said sum of Rs is forthwith delivered to you by or on behalf of the said to take the said into custody and to bring him before this Court in order that he may show cause why he should not furnish security to the amount of Rs for his personal appearance before the Court until such time as the said suit shall be fully and finally disposed of and until satisfaction of any decree that may be passed against him in the suit

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 2

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT (O 38 r 2)

(*Title*)

WHEREAS at the instance of the plaintiff in the above suit the defendant has been arrested and brought before the Court And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance the Court has ordered him to furnish such security

Therefore I have voluntarily become surety and do hereby bind myself my heirs and executors to the said Court that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit and in default of such appearance I bind myself my heirs and executors to pay to the said Court at its order any sum of money that may be adjudged against the said defendant in the said suit

Witness my hand at this day of 19

Witnesses (Signed)

1

2

Forms of Supplemental Proceedings

App F

No 3

SUMMONS TO DEFENDANT TO APPEAR ON SURETY S APPLICATION FOR DISCHARGE (O 38 r 3)

(Title)

To

WHEREAS who became surety on the day of 19 for your appearance in the above suit has applied to this Court to be discharged from his obligation

You are hereby summoned to appear in this Court in person on the day of 19 at A M when the said application will be heard and determined

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 4

ORDER FOR COMMITTAL (O 38 r 4)

(Title)

To

WHEREAS plaintiff in this suit has made application to the Court that security be taken for the appearance of the defendant to answer any judgment that may be passed against him in the suit and whereas the Court has called upon the defendant to furnish such security or to offer a sufficient deposit in lieu of security which he has failed to do It is ordered that the said defendant be committed to the civil prison until the decision of the suit or if judgment be pronounced against him until satisfaction of the decree

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 5

ATTACHMENT BEFORE JUDGMENT WITH ORDER TO CALL FOR SECURITY FOR FULFILMENT OF DECREE (O 38 r 5)

(Title)

To

The Bailiff of the Court

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit

These are to command you to call upon the said defendant on or before the day of 19 either to furnish security for the sum of Rupees to produce and place at the disposal of this Court when required or the value thereof or such portion of the value as may be sufficient to satisfy any decree that may be passed against him or to appear and show cause why he should not furnish security and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court and you are further commanded to return this warrant on or before the day of 19 *with an endorsement certifying the date on which and the manner in which it has been* executed or the reason why it has not been executed

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 6

SECURITY FOR THE PRODUCTION OF PROPERTY (O 38 r 5)

(*Title*)

WHEREAS at the instance of the plaintiff in the above suit the defendant has been directed by the Court to furnish security in the sum of Rs to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed

Therefore I have voluntarily become surety and do hereby bind myself my heirs and executors to the said Court that the said defendant shall produce and place at the disposal of the Court when required the property specified in the said schedule or the value of the same or such portion thereof as may be sufficient to satisfy the decree and in default of his so doing I bind myself my heirs and executors to pay to the said Court at its order the said sum of Rs or such sum not exceeding the said sum as the said Court may adjudge

Schedule

Witness my hand at this day of 19

Witnesses

1 (Signed)

2

No 7

ATTACHMENT BEFORE JUDGMENT ON PROOF OF FAILURE TO FURNISH SECURITY (O 38 r 6)

(*Title*)

To

The Bailiff of the Court

WHEREAS the plaintiff in this suit has applied to the Court to call upon the defendant to furnish security to fulfil any decree that may be passed against him in the suit and whereas the Court has called upon the said to furnish such security which he has failed to do These are to command you to attach the property of the said and keep the same under safe and secure custody until the further order of the Court and you are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the date on which and the manner in which it has been executed or the reason why it has not been executed

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 8

TEMPORARY INJUNCTIONS (O 39 r 1)

(*Title*)

Upon motion made unto this Court by Pleader of [or Counsel for] the plaintiff A B and upon reading the petition of the said plaintiff in this matter filed [this day] [*or* the plaint filed in this suit on the day of *or* the written statement of the said plaintiff] filed on the day of and upon hearing the evidence of and in support thereof [*if after notice and defendant not appearing*] *add* and also the evidence of

Forms of Supplemental Proceedings

App F

as to service of notice of this motion upon the defendant *C D*] This Court doth order that an injunction be awarded to restrain the defendant *C D* his servants, agents and workmen from pulling down or suffering to be pulled down the house in the plaint in the said suit of the plaintiff mentioned [*or* in the written statement *or* petition, of the plaintiff and evidence at the hearing of this motion mentioned] being No 9 Oilmongers Street Hindupur in the Taluk of and from selling the materials whereof the said house is composed until the hearing of this suit or until the further order of this Court

Dated this day of 19

Judge

[*Where the injunction is sought to restrain the negotiation of a note or bill the ordering part of the order may run thus* —]

restrain the defendants day of 19 parting with out of the custody of them or any of them or endorsing assigning or negotiating the promissory note [*or* bill of exchange] in question dated on or about the etc mentioned in the plaintiff s plaint [*or* petition] and the evidence heard at this motion until the hearing of this suit or until the further order of this Court

[*In Copyright cases*] to restrain the defendant *C D* his servants agents or workmen from printing publishing or vending a book, called or any part thereof until the etc

[*Where part only of a book is to be restrained*] to restrain the defendant *C D* his servants agents or workmen from printing publishing selling or otherwise disposing of such parts of the book in the plaint [*or* petition and evidence etc] mentioned to have been published by the defendant as hereinafter specified, namely that part of the said book which is entitled and also that part which is entitled [*or* which is continued in page to page both inclusive] until etc

[*In Patent cases*] to restrain the defendant *C D* his agents, servants and workmen from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff s plaint [*or* petition or *or* written statement etc] mentioned belonging to the plaintiffs or either of them during the remainder of the respective terms of the patents in the plaintiff s plaint [*or* as the case may be] mentioned and from counterfeiting imitating or resembling the same inventions or either of them or making any addition thereto or subtraction therefrom until the hearing etc

[*In cases of Trade marks*] to restrain the defendant *C D* his servants agents or workmen from selling or exposing for sale or procuring to be sold any composition or blacking [or as the case may be] described as or purporting to be blacking manufactured by the plaintiff *A B* in bottles having affixed thereto such labels as in plaintiff s plaint *or* petition etc] mentioned *or* any other labels so contrived or expressed as by colourable imitation or otherwise to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff *A B* and from using trade cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff *A B* until the etc

[*To restrain a partner from in any way interfering in the business*]

to restrain the defendant *C D* his servants and agents from entering into any contract and from accepting drawing endorsing or negotiating

any bill of exchange note or written security in the name of the partnership firm of *B* and *D* and from contracting any debt buying and selling any goods and from making or entering into any verbal or written promise agreement or undertaking and from doing or causing to be done any act in the name or on the credit of the said partnership firm of *B* and *D* or whereby the said partnership firm can or may in any manner become or be made liable to or for the payment of any sum of money or for the performance of any contract, promise or undertaking until the etc A

No 9

APPOINTMENT OF A RECEIVER (O 40 r 1)

(*Title*)

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 19 in favour of You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order XL, of the Code of Civil Procedure 1908 with full powers under the provisions of that Order

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on

You will be entitled to remuneration at the rate of per cent upon your receipts under the authority of this appointment

GIVEN under my hand and the seal of the Court this day of 19

Judge.

No 10

BOND TO BE GIVEN BY RECEIVER (O 40 r 3)

(*Title*)

KNOW all men by these presents that we and and are jointly and severally bound to of the Court of in Rs to be paid to the said or his successor in office for the time being For which payment to be made we bind ourselves and each of us in the whole our and each of our heirs executors and administrators jointly and severally by these presents

Dated this day of 19

Whereas a plaint has been filed in this Court by against for the purpose of [*here insert the object of suit*]

And whereas the said has been appointed by order of the above mentioned Court to receive the rents and profits of the immovable property and to get in the outstanding movable property of in the said plaint named

Now the condition of this obligation is such that if the above bounden shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immovable property and in respect of the movable property of the said at such periods as the said Court shall appoint and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct then this obligation shall be void otherwise it shall remain in full force

Signed and delivered by the above bounden in the presence of

Note—If deposit of money is made the memorandum thereof should follow the terms of the condition of the bond

APPENDIX G

APPEAL, REFERENCE AND REVIEW

No 1

MEMORANDUM OF APPEAL. (O 41 r 1)

(Title.)

The above named appeals to the Court at from the decree of in suit No of 19 dated the day of 19 and sets forth the following grounds of objection to the decree appealed from namely —

No 2

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF DECREE (O 41 r 5)

(Title)

To

This security bond on stay of execution of decree executed by witnesseth —

That the plaintiff in Suit No of 19 having sued the defendant in this Court and decree having been passed on the day of 19 in favour of the plaintiff and the defendant having preferred an appeal from the said decree in the Court the said appeal is still pending

Now the plaintiff decree holder having applied to execute the decree the defendant has made an application praying for stay of execution and has been called upon to furnish security Accordingly I of my own free will stand security to the extent of Rs mortgaging the properties specified in the schedule hereunto annexed and covenant that if the decree of the first Court be confirmed or varied by the appellate Court the said defendant shall duly act in accordance with the decree of the appellate Court and shall pay whatever may be payable by him thereunder and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged and if the proceeds of the sale of the said properties are insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this day of 19

Schedule

Witnessed by (Signed)

1

2

No 3

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL (O 41 r 6)

(Title)

To

This security bond on stay of execution of decree executed by witnesseth —

That the plaintiff in Suit No of 19 having sued the defendant in this Court and a decree having been passed on the day of 19 in favour of the plaintiff and the defendant having preferred an appeal from the said decree in the Court the said appeal is still pending

Now the plaintiff decree holder has applied for execution of the said decree and had been called upon to furnish security Accordingly I of my own free will stand security to the extent of Rs
mortgaging the properties specified in the schedule hereunto annexed and covenant that if the decree of the first Court be reversed or varied by the appellate Court the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the appellate Court and shall pay whatever may be payable by him thereunder and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged and if the proceeds of the sale of the said properties are insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this day of
19

Schedule

Witnessed by (Signed)
1
2

No 4

SECURITY FOR COSTS OF APPEAL (O 41 r 10)

(*Title*)

To

This security bond for costs of appeal executed by witnesseth —

This appellant has preferred an appeal from the decree in Suit No of 19 against the respondent and has been called upon to furnish security Accordingly I of my own free will stand security for the costs of the appeal mortgaging the properties specified in the schedule hereunto annexed I shall not transfer the said properties or any part thereof and in the event of any default on the part of the appellant I shall duly carry out any order that may be made against me with regard to payment of the costs of appeal Any amount so payable shall be realized from the properties hereby mortgaged and if the proceeds of the sale of the said properties are insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this
day of 19

Schedule

Witnessed by (Signed)
1
2

No 5

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL (O 41 r 13)

(*Title*)

To

You are hereby directed to take notice that the in the above suit has preferred an appeal to this Court from the decree passed by you therein on the day of 19

You are requested to send with all practicable despatch all material papers in the suit

Dated the day of 19

Judge

Forms of Appeal

App G

No 6

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL

(O 41 r 14)

(Title)

APPEAL from the of the Court of dated the day of 19

To

Pespondent

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court and that the day of 19 has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself your pleader or by some one by law authorised to act for you in this appeal it will be heard and decided in your absence

GIVEN under my hand and the seal of the Court this day of 19

Judge

[NOTE.—If a stay of execution has been ordered intimation should be given of the fact on this notice]

No 7

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT JOINED BY THE COURT AS A RESPONDENT (O 41 r 20)

(Title)

WHEREAS you were a party in Suit No of 19 in the Court of and whereas the has preferred an appeal to this Court from the decree passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeal

This is to give you notice that this Court has directed you to be made a respondent in the said appeal and has adjourned the hearing thereof till the day of 19 at A M If no appearance is made on your behalf on the said day and at the said hour the appeal will be heard and decided in your absence

GIVEN under my hand and the seal of the Court this day of 19

Judge

No. 8

MEMORANDUM OF CROSS OBJECTION (O 41 r 22)

(Title)

WHEREAS the has preferred an appeal to the Court at from the decree of in Suit No of 19 dated the day of 19 and whereas notice of the day fixed for hearing the appeal was served on the on the day of 19 the files this memorandum of cross-objection under rule 22 of Order XLI of the Code of Civil Procedure 1908 and sets forth the following grounds of objection to the decree appealed from namely —

Forms of A
A

No. 9

DECREE IN APPEAL. (O. 41, r. 35.)

(Title.)

Appeal No. of 19 from the decree of the Court of dated the day of 19

Memorandum of Appeal.

Plaintiff.
Defendant.

The above-named appeals to the Court at from the decree of in the above suit dated the day of 19 for the following reasons, namely:—

This appeal coming on for hearing on the day of 19 before in the presence of for the appellant and of for the respondent, it is ordered:—

The costs of this appeal, as detailed below, amounting to Rs. are to be paid by The costs of the original suit are to be paid by

Given under my hand this day of 19

Judge.

Costs of Appeal.

Appellant	Amount			Respondent	Amount		
	Rs.	a.	p.		Rs.	a.	p.
1. Stamp for memorandum of appeal				Stamp for power			
2. Do. for power				Do. for petition			
3. Service of processes				Service of processes			
4. Pleader's fee on Rs.				Pleader's fee on Rs.			
Total				Total			

No. 10

APPLICATION TO APPEAL IN FORMA PAUPERIS. (O. 44, r. 1.)

I, the above-named present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the movable and immovable property belonging to me with the estimated value thereof.

Dated the day of 19

(Signed.)

Note.—Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper.

No. 11

NOTICE OF APPEAL IN FORMA PAUPERIS. (O. 44, r. 1.)

(Title.)

WHEREAS the above-named has applied to be allowed to appeal as a pauper from the decree in the above suit dated the day of 19 and whereas the day of 19

Forms of Appeal

App G

been fixed for hearing the application notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore mentioned date

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 12

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED (O 45 r 3)

(*Title*)

To

TAKE notice that has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of Section 110 of the Code of Civil Procedure 1908 or that it is otherwise a fit one for appeal to His Majesty in Council

The day of 19 is fixed for you to show cause why the Court should not grant the certificate asked for

GIVEN under my hand and the seal of the Court this day of 19

Registrar

No 13

NOTICE TO RESPONDENT OF ADMISSION OF THE APPEAL TO THE KING IN COUNCIL (O 45 r 8)

(*Title*)

To

WHEREAS in the above case has furnished the security and made the deposit required by Order XLV rule 7 of the Code of Civil Procedure 1908

Take notice that the appeal of the said to His Majesty in Council has been admitted on the day of 19

GIVEN under my hand and the seal of the Court this day of 19

Registrar

No 14

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED (O 47 r 4)

(*Title*)

To

TAKE notice that has applied to this Court for a review of its decree passed on the day of 19 in the above case The day of 19 is fixed for you to show cause why the Court should not grant a review of its decree in this case

GIVEN under my hand and the seal of the Court this day of 19

Judge

APPENDIX H

MISCELLANEOUS

No 1

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED (O 14 r 6)

(*Title.*)

WHEREAS we the parties in the above suit are agreed as to the question of fact [*or* of law] to be decided between us and the point at issue between us is whether a claim founded on a bond dated the day of 19 and filed as Exhibit in the said suit is or is not beyond the statute of limitation (*or state the point at issue whatever it may be*)

We therefore severally bind ourselves that upon the finding of the Court in the negative [*or* affirmative] of such issue will pay to the said the sum of Rupees (*or* such sum as the Court shall hold to be due thereon) and I the said will accept the said sum of Rupees (*or* such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid [*or* that upon such finding I the said will do or abstain from doing etc etc]

Plaintiff
Defendant

Witnesses
1
2

Dated the day of 19

No 2

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL.

(*Section* 24)

In the Court of the District Judge of
No of 19

To

WHEREAS an application dated the day of 19 has been made to this Court by the in Suit No of 19 now pending in the Court of the at in which is plaintiff and is defendant for the transfer of the suit for trial to the Court of the at —

You are hereby informed that the day of 19 has been fixed for the hearing of the application when you will be heard if you desire to offer any objection to it

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 3

NOTICE OF PAYMENT INTO COURT (O 24 r 2)

(*Title*)

Take notice that the defendant has paid into Court Rs and says that that sum is sufficient to satisfy the plaintiff s claim in full

X Y *Pleader for the Defendant.*

To Z *pleader for the plaintiff*

Forms—Miscellaneous

App H

No 4

NOTICE TO SHOW CAUSE (GENERAL FORM)

(Title.)

To

WHEREAS the above named
has made application to this Court that
You are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 at o'clock in the forenoon to show cause against the application failing wherein the said application will be heard and determined *ex parte*

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 5

LIST OF DOCUMENTS PRODUCED BY PLAINTIFF / DEFENDANT

(O 13 r 1)

(Title)

No	Description of document	Date if any which the document bears	Signature of party or pleader
1	2	3	4

No 6

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS ABOUT TO LEAVE THE JURISDICTION (O 18 r 16)

(Title)

To

plaintiff (or defendant)

WHEREAS in the above suit application has been made to the Court by that the examination of a witness required by the said in the said suit may be taken immediately and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction *(or any other good and sufficient cause to be stated)*

Take notice that the examination of the said witness will be taken by the Court on the day of 19

Dated the day of 19

Judge

No 7

COMMISSION TO EXAMINE ABSENT WITNESS (O 26 rr 4 18)

(*Title*)

To

WHEREAS the evidence of if required by the in the above suit and whereas you are requested to take the evidence on interrogatories [or *viva voce*] of such witness and you are hereby appointed Commissioner for that purpose The evidence will be taken in the presence of the parties or their agents if in attendance who will be at liberty to question the witness on the points specified and you are further requested to make return of such evidence as soon as it may be taken

Process to compel the attendance of the witness will be issued by any Court having jurisdiction on your application

A sum of Rs being your fee in the above is herewith forwarded

GIVEN under my hand and the seal of the Court this day of 19

Judge.

No 8

LETTER OF REQUEST (O 26 r 5)

(*Title*)

(Heading —To the President and Judges of etc etc *or as the case may be*)

WHEREAS a suit is now pending in the in which *A B* is plaintiff and *C D* is defendant And in the said suit the plaintiff claims

(*abstract of claims*)

And whereas it has been represented to the said Court that it is necessary for the purpose of justice and for the due determination of the matters in dispute between the parties that the following persons should be examined as witnesses upon oath touching

E F of

G H of and

I J of

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court

Now I as the of the said Court have the honour to request and do hereby request that for the reasons aforesaid and for the assistance of the said Court you as the President and Judges of the said or some one or more of you will be pleased to summon the said witness (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you or such other person as according to the procedure of your Court is competent to take the examination of witnesses and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (or *viva voce*) touching the said matters in question in the presence of the agents of the plaintiff and defendant or such of them as shall on due notice given attend such examination

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing and all books letters papers and documents produced upon such examination to be duly marked for identification and that you will be further pleased to authenticate such examination by the seal of your tribunal or in such other way as is in accordance with your procedure and to return the same together with such request in writing if any for the examination of other witnesses to the said Court

Forms—Miscellaneous

App H

(*Note*—If the request is directed to a foreign Court the words through His Majesty's Secretary of State for Foreign Affairs for transmission should be inserted after the words other witnesses in the penultimate line of this form)

No 9

COMMISSION FOR A LOCAL INVESTIGATION OR TO EXAMINE ACCOUNTS
(O 26, rr 9 11)

(*Title*)

To

WHEREAS it is deemed requisite for the purpose of the suit that a commission or should be issued, You are hereby appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses or for the production of any documents whom or which you may desire to examine or inspect will be issued by any Court having jurisdiction on your application

A sum of Rs being your fee in the above is herewith forwarded.

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 10

COMMISSION TO MAKE A PARTITION (O 26 r 13)

(*Title*)

To

WHEREAS it is deemed requisite for the purposes for this suit that a commission should be issued to make the partition or separation of the property specified in and according to the rights as declared in the decree of this Court dated the day of 19 You are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary to divide the said property according to the best of your skill and judgment in the shares set out in the said decree and to allot such shares to the several parties You are hereby authorized to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares

Process to compel the attendance before you of any witness or for the production of any documents whom or which you may desire to examine or inspect will be issued by any Court having jurisdiction on your application

A sum of Rs being your fee in the above is herewith forwarded.

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 11

NOTICE TO MINOR DEFENDANT AND GUARDIAN (O 32 r 3)

(*Title*)

Minor Defendant
Natural Guardian

To

WHEREAS an application has been presented on the part of the Plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant you the said minor and you*

* Here insert the name of guardian.

are hereby required to take notice that unless within days from the service upon you of this notice an application is made to this Court for the appointment of you* or of some friend of you the minor to act as guardian for the suit the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit

GIVEN under my hand and the seal of the Court this day of 19

Judge.

No 12

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF PAUPERISM (O 33 r 6)

(Title)

To

WHEREAS has applied to this Court for permission to institute a suit against *in forma pauperis* under Order XXXIII of the Code of Civil Procedure 1908 and whereas the Court sees no reason to reject the application and whereas the day of 19 has been fixed for receiving such evidence as the applicant may adduce in proof of this pauperism and for hearing any evidence which may be adduced in disproof thereof

Notice is hereby given to you under rule 6 of Order XXXIII that in case you may wish to offer any evidence to disprove the pauperism of the applicant you may do so on appearing in this Court on the said day of 19

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 13

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE. (*Section 145*)

(Title)

To

WHEREAS you did on become liable as surety for the performance of any decree which might be passed against the said defendant in the above suit and whereas a decree was passed on the day of 19 against the said defendant for the payment of and whereas application has been made for execution of the said decree against you

Take notice that you are hereby required on or before the day of 19 to show cause why the said decree should not be executed against you and if no sufficient cause shall be within the time specified shown to the satisfaction of the Court an order for its execution will be forthwith issued in the terms of the said application

GIVEN under my hand and the seal of the Court this day of 19

Judge

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* Here insert the name of guardian.

Forms—Miscellaneous

App H

No 14

REGISTER OF CIVIL SUITS (O 4 r 2)

COURT of the ______ of ______ at ______

REGISTER OF CIVIL SUITS in the year 19

		Plaintiff			Defendant			Claim			Appearance			Judgment			Appeal		Execution					Return of Execution		
Date of presentation of plaint	No of suit	Name	Description	Place of residence	Name	Description	Place of residence	Particulars	Amount or value	When the cause of action accrued	Day for parties to appear	Plaintiff	Defendant	Date	For whom	For what or amount	Date of decision of appeal	Judgment in appeal	Date of application	Date of order	Against whom	For what and amount if money	Amount of costs	Amount paid into Court	Arrested	Minute of other Return than Payment or Arrest and date of every Return

N B —Where there [illegible]

No 15

REGISTER OF APPEALS (O 41 r 9)

COURT (*OR* HIGH COURT) AT

REGISTER OF APPEALS FROM DECREES in the year 19

Date of memorandum	No of appeal	Appellant			Respondent			Decree appealed from				Appearance			Judgment		
		Name	Description	Place of residence	Name	Description	Place of residence	Of what Court	No of Original Suit	Particulars	Amount or Value	Day for parties to appear	Appellant	Respondent	Date	Confirmed reversed or varied	For what or amount

THE SECOND SCHEDULE

Arbitration

Arbitration in Suits

1 [S 506] (1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference

Parties to suit may apply for order of reference

(2) Every such application shall be in writing and shall state the matter sought to be referred

Alterations in the rule —

1 The word interested in clause (1) has been added after the word parties See notes below under the head All the parties interested must join in the application

2 The words in person or by their respective pleaders specially authorised in writing in this behalf which occurred in the old section after the word apply and before the words to the Court have been omitted.

Scope of the Schedule—The present Schedule deals with arbitration under three heads (*a*) —

I *Where a suit has been instituted* and all the parties interested agree to refer to arbitration any matter in difference between them in the suit In that case all proceedings from first to last are under the supervision of the Court and they are governed by the provisions of paras. 1 to 16 of this Schedule The first step is to apply to the Court for an order of reference under para 1 If *all the parties interested* have joined in the application an order of reference will be made under para. 3

II Where parties *without having recourse to litigation* agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court In that case the parties to the agreement or any of them may apply to the Court under para 17 to have the agreement filed in Court and to make an order of reference thereon If an order of reference is made all further proceedings will be under the supervision of the Court and they will be governed by the provisions of paras. 3 to 16 so far as they are consistent with the agreement (para 19). See paras. 17 to 19

III Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order *to give effect to the award* In that case any person interested in the award may apply to the Court under para. 20 to have the award filed in Court See paras. 20 21.

All the parties interested must join in the application.—In order to give jurisdiction to the Court to make an order of reference under this and para. 3 it is necessary that *all the parties interested* must apply to the Court (*b*). If one of the parties is a firm all partners must join in the reference (*c*) but a reference by a father who is the manager of a joint Hindu family consisting of himself and his sons will bind the sons (*d*). If all the parties interested do not apply and an order of reference is made

(*a*) *Ghulam Khan v Muhammad Hassa* (190) 29 Cal 16 29 I A 51

(*b*) *Gulam Khan v Muhammad Hassan* (190) 29 Cal. 16 29 I A 51

(*c*) *Gopaldas v Baij Nath* (19 6) 64 All ... 91 I C 930 (...6) A A ...

(*d*) *C ... Dutt v Pukhar P ...* (19 ...) 8 Lah. 693 104 I C ... (...) A L ...

the order is illegal and if an award is made on such reference the award also is illegal (e) and is liable to be set aside in revision (e1) Thus where in a suit for partnership accounts brought by *A* against *B* and *C* *A* and *B* alone applied to the Court to refer the matters in dispute to arbitration and an order of reference was made it was held on an objection raised by *B* to the validity of the award that *C* not having joined in the application the order of reference as well as the award made in pursuance thereof were illegal (*f*) But when the part not referred can be separated from the part referred para 12 (a) would apply So in a suit where some of the defendants were adults and some were minors for whom no guardian ad litem was appointed and the minors were not interested in the dispute of the plaintiff with the adult defendants it was held that the Court was not justified in refusing to file the award made on a reference by all parties for the part which related to the minors and which was invalid could be separated from the other part The proper procedure was to modify or correct the award under para 12 (a) of this Schedule (*g*)

The word interested is new It has been added to give effect to a recent Allahabad decision (*h*) It refers to the succeeding words any matter in difference between them A party to a suit who is not interested in a matter in difference between the other parties to the suit need not join in an application under this paragraph for an order of reference *A* sues *B* and *C* praying as against *B* for a declaration of his title to certain property and as against *C* for possession of the property *A* and *B* alone apply to the Court to refer to arbitration the question as to the *ownership of the property* The Court has jurisdiction to make an order of reference though *C* has not joined in the application for the question of ownership is not in issue between *A* and *C* But *C* not being a party to the reference the award is not binding upon him though it is binding as between *A* and *B* (*i*)

The High Court of Allahabad has held that a defendant who does not put in an appearance and does not contest the suit is not a party within the meaning of this paragraph The mere fact therefore that such a defendant has not joined in the application for an order of reference will not invalidate an award (*j*) On the other hand the High Courts of Calcutta (*k*) and Madras (*l*) have held that the mere fact that the defendant has not put in an appearance and does not contest the suit is no ground for holding that he is not a party interested within the meaning of this paragraph also a party may be interested though no relief is claimed against him (*m*) A person however who is not a necessary party to a suit is not a party interested within the meaning of this para (*n*) See O 1 r 10 (2) The question whether a party is interested within the meaning of this paragraph must be decided on the facts of each particular case (*o*)

(e) *Joy Prokash* v *Sheo Golam* (1885) 11 Cal 8

(e1) *Tej S gh* v *Ghasi R m* (19) 49 All 81 10 I C 236 ( ) A A 563

(f) *Indur S bbarami* v *F dadu* (1903) 6 Mad 4 *Dooly Cha d* v *M muj Mus ji* (1916) 21 C W N 337 41 I C 295 (1) A C 397

(g) *Ragh ath S kul* v *Ramrup* (19 3) . Pat 7 7 6 I C ° ( ) A P 33

(h) *Pitam Mal* v *Sadiq Ali* (190) 4 All . 9

(i) *Bish la* v *Anu to* (18 9) 4 C L R 65 *Pit m Mal* v *Sadiq Ali* (190) 4 All 2.9 *Thag n lu* v *Seethuramaswami* (19 3) 44 M d L J 359 3 I C 70. (3) A M 60 *Saroj* v *Jat nd a* (19) 45 Cal L J 458 103 I C 6 5 ( ) A C 619

(j) *Ishard* v *Keshab Deo* (1910) 3. All 65 7 I C 68 *Ajudh Pra d* v *Bad rud Hus* (191) 39 All 489 493 41 I C 35

contra *Hazwa* v *Mahb b* (1911) 8 All L J 645 10 I C 5 9 *Sabta* v *Dharam* (1912) 3 All 10 18 I C 609

(k) *Girija* v *K a* (1918) 27 Cal L J 339 43 I C 169 *S th Dooly Chand* v *Mam ji* (1916) 1 Cal W N 337 41 I C 295 (1) A C 387 *Laduram Nathmull* v *Nandl l* (1920) 47 Cal 555 55 I C 747 [F B]

(l) *Potii* v *Naras ga* (1919) 4 Mad 632 51 I C 155 Co t a *Kathanatha* v *Vaitha li ga* (1915) 18 Mad L T 374 31 I C 206

(m) *Subba ao* v *Appal a* (1925) 48 Mad L J 14. 86 I C 839 ( ) A M 6 1

( ) *S lta* v *Dha m* (1913) 35 All 10 18 I C 609 *Ajudhia Prasad* v *Badar-ul-Hussin* (1917) 39 All 489 493 41 I C 35

(o) *M had* v *Narave* (1928) 5 Bom 408, 110 I C 343 ( ) A B 45

Arbitration

Sch II, para 1

"**Apply** —This Section requires that all the parties interested should not only agree to a reference but that they should all *apply* to the Court for an order of reference (p) Therefore if one of the parties interested agree to a reference but he changes his mind subsequently and does not join in the application the application for an order of reference should be refused (q)

Matter in difference —This must be a matter in difference in the suit itself (r) Where an award comprises matters which are not in dispute in the suit and adjudicates upon the rights of a person who was not a party to the suit and who was interested in some of them and the findings with reference to the matters in question in the suit could not be separated from those not so in question the award is otherwise invalid within the meaning of para 15 (1) (c) and it should be set under that para so far as it deals with matters in difference in the suit (s)

Application shall be in writing —The provision requiring the application to be in writing is directory only and not imperative hence an award is not invalid merely because the application for the order of reference was not made in writing (t) In *a recent case before the Judicial Committee where the agreement* was in writing but it was not signed by one of the parties it was held that para 1 of this Schedule did not require that the writing should of necessity be signed (u) and it has also been held that the record made by the Court of an oral application is sufficient (v) But where a pardanishin lady was a party and the application was signed by her pleader who was not authorized by his vakalatnama to do so the award was held to be invalid (w) For form of application for an order of reference see the Appendix to this Schedule Form No 1

Before judgment —A suit may be referred to arbitration after a reference is made to the High Court (x)

Court —Section 107 of the Code provides that an appellate Court shall have the same powers as a Court of original jurisdiction If follows therefore that an appellate Court can act under this paragraph and refer matters in dispute in the appeal to arbitration if all the parties interested agree to a reference (y) But a Court to which certain issues have been referred for trial under O 41 r 25 cannot act under this paragraph as the duty of such Court is to *try* the issues as directed by the appellate Court and to return to the appellate Court its findings thereon together with the evidence (z) Similarly a Court dealing with petitions under the Provincial Insolvency Act 1907 has no power to refer the proceedings to arbitrators to decide whether the petitioner should or should not be declared an insolvent (a)

Revocation of arbitrator s authority —When a matter is referred to arbitration by an agreement between the parties *without the intervention of a Court of Justice* the agreement to refer to arbitration cannot be revoked by any party without good cause and

(p) *Dooly Chand* v *Mam j Musaj* (1916) 1 C W N 387 41 I C 29 ( ) I A C 387
(q) *Mian Bakhsh* v *Sher M hammad* (1911) Punj Rec no 17 p 39 9 I C 193
(r) *Peddapalayam* v *Peddapalayam* (19 1) 31 W N 7 6 63 I C 92, ('21) A M 09
(s) *Chamria* v *Chamria* (1926) 3 I A 1 3 Cal 58 9 I C 633 ('2) A PC 93
(t) *Shama Sundram* v *Abdul Lat f* (1900) 7 Cal 61 *Abdul Hamid* v *I iaz ud-d n* (1908) 30 All 3
(u) *Umed S ng* v *Nol hay M 1* (1916) 43 I A 1 43 Cal 90 32 I C 161
(v) *Mahabir* v *Manohar* (19 1) 48 All 2 I C 816 ( ) A A 51
(w) *Fa ndra Nath* v *Dwa ka Nath* (192) C W N 83
(x) *P m Lal* v *Deoraj* (19 1) 41 All 91 61 I C 601 ( ) A A 1 3
(y) *D lla* v *Khedu* (1911) 33 All 615, 11 I C 935 *S roth Ch nder* v *Ambica Chern* (1891) 18 Cal 0
(z) *Nand Ram* v *Fakir Chand* (188) 7 All 5 3
(a) *Ladha S ngh* v *Thag S ngh* (1910) Pun Rec no 50 p 143 31 I C 349

a mere arbitrary revocation will not be permitted by the Court (*b*) Where a claimant did not proceed with the reference for a period of nine months without any just cause it was held that it amounted to a good cause sufficient to entitle the other party to revoke the submission (*c*) Similarly if the arbitrator is indebted to one of the parties at the time of the reference or becomes so indebted after the reference and this fact is not disclosed to the other party the non disclosure is a sufficient cause for revoking the submission upon discovery of the fact (*d*)

But when a matter is referred to arbitration *by an order of the Court* the Court alone can revoke the authority of the arbitrator and only in the cases specified in paras 5 8 and 15 The Court has no power to revoke the authority of an arbitrator in any other case Thus where after an order of reference was made under para 3 the defendant applied to the Court for an order to revoke the authority of the arbitrator and to appoint a new arbitrator in his place on the ground that he had come to know of certain facts which showed that the arbitrator was not worthy of the confidence reposed in him it was held that the Court had no power to make the order as the case did not come either under para 5 8 or 15 It was further held that the objection raised by the defendant could only be considered *after* the award was made and filed in Court and only to the extent permitted by para 15 (*e*) Note the words or being otherwise invalid in para 15 cl (c)

Where a party dies after application but before order of reference—The death of a party to an application made under this rule for a reference to arbitration before the order of reference is made does not operate as a revocation of the authority of the proposed arbitrator therefore if the right to sue survives it is competent to the Court to make an order of reference after substitution of the representative of the deceased party (*f*) All that is necessary is substantial representation without strict adherence to the rules of the Civil Procedure Code as to legal representatives and guardians ad litem (*g*)

Withdrawing from suit pending arbitration—See note to O 23 r 1 under the same head

Execution proceedings—This Schedule does not apply to execution proceedings and a reference to arbitration by an execution Court is without jurisdiction (*h*)

Form—For form or application for an order of reference see the Appendix to this Schedule form No 1

Appointment of arbitrator

2 [S 507, 1st para] The arbitrator shall be appointed in such manner as may be agreed upon between the parties

Order of reference

3 [S 508] (1) The Court shall by order, refer to the arbitrator the matter in difference which he is required to determine and

(*b*) *Fest j v Ma okjee* (1868) 12 M I A 11 113 *S lia M h mm d v Sh Prasad* (1908) 30 All 145 *Perum ll v Perumalla* (1904) 7 Mad 11 *K j Lall v B wari Lall* (1910) 4 Pat L J 391 399 48 I C 711

(*c*) *Coley v Du Costa* (1890) 17 Cal 200

(*d*) *Mahomed v Hak m n* (190) 3 Cal 8

(*e*) *H l mbhai v Sta ka* (1886) 10 Bom 381 *Chaturbh j v I agh ba* (1914) 36 All 354 23 I C 759

(*f*) *D tta v Khed* (1911) 33 All 645 11 I C 935

(*g*) *B y kd v S n Bh san* (19 1) 6 C W N 604 70 I C 4 9 ('22) A C 2 6

(*h*) *T Ha g v onaw gd* (19 3) 5 C I 39 83 I C 833 ('25) A C 81

Arbitration

Sch II, para 3 shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order

(2) Where a matter is referred to arbitration the Court shall not save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit

The word making has been substituted for the word delivery In fact the word delivery was construed as meaning making See notes below under the head making of award

Fixing of time or the making of award —The present paragraph provides that the Court shall fix a reasonable time for the making of the award and specify such time in the order of reference Paragraph 8 enables the Court from time to time to enlarge the period for the making of the award Paragraph 15 provides that an award made after the expiration of the period allowed by the Court may be set aside by the Court The provision contained in this paragraph requiring the Court to fix a reasonable time for the making of the award is not merely directory but imperative Hence this provision should be strictly followed At the same time it has been held that if no time is fixed for delivery of the award in the order of reference but the Court subsequently makes an order for enlarging the time (para 8) and fixes in that order the time within which the award should be made the omission to fix the time in the order of reference is not fatal to the award (i) Rankin J has described the provisions as to reasonable time as the main pillar of the scheme of the Schedule By the reference the Court parts with control of the suit temporarily for the time limit will bring the matter back to the Court and enable it to resume control and either to grant further time or to supersede the arbitration under para 8 If the Court fixes no time limit it surrenders control and jurisdiction is involved because such an order professes to abrogate jurisdiction — Accordingly a reference which gave the arbitrators leave to extend for such further time *as they may allow themselves* was held to be invalid and the arbitration was superseded (j) See para 15 cl (1) (c) and notes thereto

Making of award —An award is said to be made when it is completed and signed by the arbitrators Hence it is sufficient if the award is *made* that is completed and signed by the arbitrators within the period limited under this paragraph It is not necessary to the making of the award that it *should actually reach the hands of the* Court within such period The validity of the award depends upon the making of it within the period allowed and it is immaterial on what date it is actually delivered to the Court Thus where the time fixed by the Court for the delivery of an award in a suit pending before it was 16th April 1900 and the award was completed and signed on the 16th April but did not reach the hands of the Court until the 17th of April it was held that the award was within time (l)

Clause (2) —Where a matter is referred to arbitration the Court should not deal with it in the same suit except in the manner provided in this Schedule Hence the Court has no power to grant permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit for there is no paragraph in this Schedule corresponding

(i) *[illegible] Chaudhrain Bhagwa* [illegible] (1931) 13 All 3[illegible] 18 I A 55 *Lachman Das v Abpa kash* (19[illegible]) 30 All 169 See in this connection [illegible] *Awehu v A nor Adsaye* (19[illegible]6) A C 755

(j) *Fab ndra v Jogendra* (19[illegible]3) C W N 4[illegible] [illegible] I C 4[illegible]9 ('23) A C 41[illegible] See also [illegible] *v Meer Mymoodeen* ([illegible]) 6 M I A 134

(l) *A[illegible] v Arunachalam* (1[illegible]) [illegible] *I mersey v* [illegible] (1[illegible]) [illegible] 119 *[illegible] Lam v Bhaw* (19[illegible]) [illegible] 105 *Asad-ul-lah v Mohammad* [illegible] All 4[illegible]

to O 23 r 1 (*l*) Nor can the Court revoke the authority of the arbitrator and appoint a new arbitrator except in the cases specified in paragraph 5 (*m*) Nor is it open to the Court to hear the suit on the merits unless the arbitration has been superseded under paras 5 8 or 15 (*n*) Similarly the Court has no power to confirm an order passed by the arbitrators making payments of their fees a condition precedent to the hearing of the reference there being no paragaph in this Schedule empowering the Court to make an order in that behalf (*o*) On the same principle where an award is once set aside on any ground as for instance that one of the parties to the reference had died before the termination of the arbitration proceedings the Court has no power to send back the case to the arbitrators for decision (*p*)

Form —For form of order of reference see form No 2 to the Appendix to this Schedule

4 [S 509] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

Where reference is to two or more order to provide for difference of opinion

(a) by the appointment of an umpire , or

(b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail , or

(c) by empowering the arbitrators to appoint an umpire , or

(d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act

Decision of majority —Where the order of reference did not provide that the decision of the majority of arbitrators should prevail and two of the five arbitrators refused to act it was held that an award by the remaining three who constituted the majority was not valid (*q*)

Empowering arbitrators to appoint an umpire.—The arbitrators have no power to appoint an umpire unless they are authorized in that behalf (*r*)

Delegation of duty by arbitrator —An arbitrator cannot delegate his duties to a third person (*s*) But he may delegate to a third person the performance of acts of a ministerial character Thus where an arbitrator employed his son to take some

(*l*) *Sheoamba* v *Deodat* (1887) 9 All 168 *Debi Charan* v *Bipra* (190) 7 Cal W N 1 6

(*m*) *Harimbhai* v *Shanker* (18 6) 10 Bom 381

( ) *Jamna* v *N b* (190) 4 All 31

(*o*) *Steel* v *Roberts* (1851) 6 Cal 609

(*p*) *I Aka m I m* v *Nand Ra* (1908) 30 All 505

(*q*) *G rupathappa* v *V ratingappa* (1884) 7 Mad 1 4

( ) *Smith* v *Ludha* 1893) 17 Bom 1 9

(*s*) *Jamna* v *Nanb* (190) 24 All 312.

Arbitration

Sch II, paras 4 5 measurements instead of taking them himself it was held that the award was on that reason invalid (t)

Power of Court to appoint arbitrator in certain cases

5 [S 507, (2), 510 511] (1) In any of the following cases, namely —

(a) where the parties cannot agree within a reasonable time with *respect to the appointment* of an arbitrator, or the person appointed refuse to accept the office of arbitrator, or

(b) where an arbitrator or umpire—

(i) dies, or

(ii) refuses or neglects to act or becomes incapable of acting, or

(iii) leaves British India in circumstances *showing* that he will probably not return at an early date, or

(c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators as the case may be, with a written notice to appoint an arbitrator or umpire

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit

Notice to appoint arbitrator—Where an order of reference is made on the joint application of A and B and the arbitrator refuses to act and A serves B with notice to appoint a new arbitrator the appointment of the new arbitrator must be made both by *A* and *B* and not by *B* alone (u)

Duty of Court under this paragraph—In the event of the happening of any *of the events mentioned in this paragraph the Court must adopt one of the two courses* pointed out in the paragraph namely appoint a new arbitrator or make an order superseding the arbitration Thus where one of three arbitrators refused to act and the

(t) *F ta v Municipal Committee of Lahore* (190) ... (u) *Charta I ... Mal* (191) ...

Court neither appointed a new arbitrator nor made an order superseding the arbitration it was held that the award made by the other two was invalid (t)

Appointment of new arbitrator or umpire—Under the Code of 1882 the Court had no power on the happening of either of the events referred to in cl (a) of *this paragraph to appoint a new arbitrator without the consent of all the parties to the* reference the reason being that the corresponding section 507 of that Code contained the words and [if] the parties desire that the nomination shall be made by the Court (w) But these words have been omitted in cl (a) and the Court has power under this paragraph to appoint a new arbitrator without the consent of all the parties even in the cases mentioned in cl (a) In cases covered by cl (b) it is open to the Court to appoint only one new arbitrator in place of several old arbitrators (x) But the Court has no power to appoint an arbitrator or umpire under sub para (2) unless notice is given as required by sub para (1) and the party served with the notice has been given an opportunity of being heard (y)

The power of the Court to appoint a new arbitrator or umpire may be limited by agreement A and B submitted to arbitration on the terms that the umpire should be selected from seven persons named The umpire first selected refused to act and the Court appointed a new umpire who was not one of the seven persons named It was held that the umpire not being one of the seven named in the agreement the award of the umpire was invalid (z)

An irregularity of procedure in the appointment of a new arbitrator is cured by consent of parties So when one of three arbitrators refused to act and the two remaining arbitrators co opted a third and the parties consented the award was held to be valid (a)

Where the arbitrator named by the parties refuses to act the Court though it has the power to appoint another arbitrator has no power to direct the parties to pay any remuneration to him (b)

Where arbitrator refuses to act.—If an arbitrator refuses to act the Court cannot compel him to act Thus where an arbitrator refused to act and the Court instead of accepting his refusal directed him to proceed and make an award it was held that the award was invalid The finality of an award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves and that such judges are *willing* to settle the disputes between them (c) But an arbitrator has full power to retract his resignation before it is accepted The mere circumstance of an arbitrator having first tendered and then withdrawn his resignation does not divest him of the character of arbitrator (d) When arbitrators refuse to act and the Court proceeds to try the suit an order superseding arbitration may be implied (e)

Order superseding arbitration—When once a matter is referred to arbitration by an order of the Court the Court has no power to hear the suit on the merits unless the arbitration has been superseded by an order under this paragraph (f) or under paragraph 8 or 15

(t) *Na Alam v Fik Chand* (1885) All 5_3 *Zham r j v B prad* (19 0) 1 Mad 113 *Th k r D s v Nara* (19 0) Lal L J 63 58 I C 644

(w) See *Pugard a v M dinan* (1883) 6 Mad 414 *I p I hari v 4 od* (1891) 18 Cal 3 4

(x) *Pampe d v J gannath* (18 0) 6 C L P 1

(y) *Abd I (A v D Daval* (1919) 41 All 5 8 50 I C 6 *Th kar D v J m D s* (19 3) Lal L J 163 83 I C 9 5 (3) A L 3 4

(z) *Barr cho v Sow a* (18) Mad H C

(a) *Mahmud She kh v M s Ka k ar h d C* (11 4) C W N 631 81 I C 5 4 (4) A C 6

(b) *Jaj th C Mel* (19 3) 1 All 301 11 I C 611 ( ) A A 144

(c) *Sh kha v J st m* (1 3) All 0 *Ja d o M I K A va Lal* (1 1) 43 All 101 5 I C 76 (1) A A 3 1

(d) *H v in v Lh jan t K* (1 8) 10 All 13

(e) *M r s Lk too* (19 0) 5 P t L J 67 5 I C 4 3

(f) *Ja n v N n Al* (190) 24 All 312

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Revision —An order of the Court deciding the question whether the arbitrator should be superseded or a new arbitrator should be appointed is a "case decided" within the meaning of s 115 and is subject to revision (*g*)

Form —For form of order for appointment of new arbitrator see the Appendix to this Schedule form No 3

6 [S 512] *Powers of arbitrator or umpire appointed under paragraph 4 or 5* Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference

7 [S 513] *Summoning witnesses and default* (1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desire to examine, as the Court may issue in suits tried before it

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court

8 [S 514] *Extension of time for making award* Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period, or may make an order superseding the arbitration, and in such case shall proceed with the suit

Alteration in the rule —The words "either before or after expiration of the period fixed for the making of the award" are new They give effect to decisions under the old section (*h*) But they do not abrogate the ruling of the Privy Council in *Raja Har Narain* v *Chaudhrain* (*i*) that r 3 is not merely directory but is mandatory (*j*)

Extension of time for making award —If the time originally fixed for making an award has expired and no award is made the Court may extend the time for making the award It is not necessary that the application to extend the time should be made *before* the expiry of the period originally fixed for making the award The application may be made even *after* the expiry of the time originally fixed (*k*) Put

(*g*) *Jagannath* v *Chhedi* (1929) 51 All 501 115 I C 611 ('29) A A 144

(*h*) *Jamna* v *Nanib Ali* (190) 24 All 31

(*i*) (1881) 13 All 300 18 I A 55

(*j*) *Robindra* v *Jogendra* (1923) 7 C W N 420 80 I C 459 ('23) A C 410

(*k*) *Harnarain* v *Bhagwat* (1888) 10 All 1[illegible]

it must be made *before* the award is made The Court has no power to enlarge the time for the making of an award after the time for making it has expired *and after the award has been made* (*l*) Sec 148 of this Code does not alter the law laid down in this respect (*m*) An award made after the expiration of the period allowed by the Court may be set aside under paragraph 15 (1) (c) The application for extension of time need not necessarily be in writing (*n*)

Where by an order of reference power is given to the *arbitrator* to extend the time for making the award he can only extend the time *before* the time originally fixed for making the award has expired (*o*)

Estoppel—The parties to a reference may be *estopped* by their conduct from impeaching the validity of an award on the ground that it was made after time (*p*)

Appeal—An appeal lies from an order superseding an arbitration where the award has not been completed within the period allowed by the Court [s 104 sub s (1) cl (a)]

Where umpire may arbitrate in lieu of arbitrators

9 [S 515] Where an umpire has been appointed he may enter on the reference in the place of the arbitrators,—

(a) if they have allowed the appointed time to expire without making an award, or

(b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree

Award to be signed and filed

10 [S 516] Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them, and notice of the filing shall be given to the parties

Award need not be signed by arbitrators in each other s presence—It is sufficient if all the arbitrators agree to the terms of the award and sign it There is no provision of law requiring them to sign in the presence of each other (*q*) But the award must be signed by all the arbitrators before it is filed (*r*) but not necessarily at the same time and place (*s*) An award signed by one of the arbitrators while it is on the file of the Court is invalid (*t*)

Necessity of arbitrator s presence at meetings—When a case has been referred to arbitration the presence of all the arbitrators at all meetings and above all

(*l*) *Raja Har Narain v Chaudhrain Bhagwant Kuar* (1891) 13 All 300 18 I A 55 *Lakshmanan Chettiar v Sundaram Aiyar* (1 9) 15 Mad 384 *Ram Manohar v Lal Lachman* (18) 14 All 343
(*m*) *Shib Krishna v Sri Kishen Chand* (1911) 38 Cal 5, 1 I C 13 doubted in *Latto Kumar v Upendra Nath* (1919) 4 Pat L J 65 0 50 I C 5
(*n*) *Sakalchand v Ambaram* (19 4) 6 Bom L R 50 80 I C 60 ( ) A B 350
(*o*) *Co-operative Hindustan Bank v Bhola Nath* (1914) 19 C W N 165 31 I C 59
(*p*) *Pati Kumari v Upendra Nath* (1919) 4 Pat L J 6 0 50 I C 5
(*q*) *Muthukutti v Achi Nyakan* (1893) 19 Mad 2
(*r*) *Ayyasami Mudalia v Appandai* (19 0) 3 Mad L J 145 54 I C 912
(*s*) *Abdul Rahman v Shahabaz Din* (1920) 1 Lah 4 1 55 I C 853
(*t*) *Ramesh Chandra v Karunamoyi* (190) 33 Cal 493 *Kanakku v Nagalinga* (1909) 3 Mad 510 4 I C 871

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at the last meeting when the final act of arbitration is done is essential to the validity of the award (*u*)

Together with any depositions and documents — The Court has jurisdiction to compel arbitrators to give up documents that may have been filed before them as exhibits during the course of the arbitration. Also if the original records of the suit are handed to the arbitrators to enable them to proceed with the arbitration, and they fail to return them the Court can compel them to return the records (*v*). The arbitrators omission to file with his award the depositions and documents may lead to the inference that he has been guilty of legal misconduct (*w*)

Notice of the filing shall be given — It is a material irregularity within the meaning of s 115 if the Court gives judgment without issuing notice and judgment so given will be set aside in revision (*x*)

Delivery of award — The act of an arbitrator in delivering an award to the proper officer of the Court for the purpose of being filed in Court is not an application within the meaning of the Limitation Act. Hence there is no period of limitation within which an award should be delivered by an arbitrator to the Court (*y*)

Form — For form of award see the Appendix to this Schedule form no 5.

Statement of special case by arbitrators or umpire

11 [S 517] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award

Special case — The special case must be on a point of law only (*z*)

Appeal — An appeal lies from an order on an award stated in the form of a special case [s 104 sub s (1) cl. (b)]. Where the arbitrators differ on certain matters referred to them but instead of referring their differences to an umpire as provided by the order of reference they submit *their own opinions* in the form of a special case for the opinion of the Court such submission is not an *award* stated in the form of a special case and no appeal therefore lies from any order made upon such submission (*a*)

Form — For form of special case see the Appendix to this Schedule form no 4

Power to modify or correct award

12 [S 518] The Court may, by order modify or correct an award,—

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred, or

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(*u*) *Nand Ram* v *F ... Chand* (1885) 7 All. 5 3
(*v*) *A ... g* v *Nuffer* (1890) 17 Cal 83
(*w*) *Yusuf Khan* v *I ... asat Ali* (19 6) 1 Luck 130 93 I C 446 (5) A O 307
(*x*) *Ra ... ga ami* v *Muttusami* (1888) 11 Mad 144 *Chaturbhuj* v *Ga ... e h* (1898) 20 All. 4 4 *I ... j t* v *Bissay* (19 6) 94 I C 115 (6) A C 1018 See also *Ba j Nath* v *N a a n* (19 8) 50 All 51 10 I C 608 ( ) A 614
(*y*) *Robarts* v *Harrison* (1881) 7 Cal. 333.
(*z*) *Laxman* v *Ram ... handra* (1925) 48 Bom. 463, 84 I C 3 8 (5) A B ...
(*a*) *P ... hottamdas* v *J ... amgop ...* (1910) 35 Bom. 130 8 I C 171

Arbitra[illegible]
Sch
par[illegible]
12-[illegible]

(b) Where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision, or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission

Power to modify or correct.—The Court has no power to modify or correct an award except in the three cases mentioned in the paragraph and it cannot alter the directions given in the award as to payment of costs (*b*). A Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator (*c*).

Where a part of the award is upon a matter not referred to arbitration.—Where the matters in dispute in a suit are referred to arbitration but not the question of costs, any direction in the award as to costs may be struck out by the Court, for such direction is a matter that is separable (*d*). An award that goes beyond the terms of the reference is to that extent *ultra vires* (*e*). But where no separation is possible the Court should remit the award to the reconsideration of the same arbitrator under paragraph 14, cl (a).

Arbitrator's power to set aside gift on payment of a certain sum as compensation.—The power to decide all disputes between the parties includes the power, where the validity of a gift is challenged, to set aside the gift upon payment of compensation to the donee (*f*).

Clause (c).—This clause is new. An arithmetical error is no ground for setting aside an award (*g*).

Appeal.—An appeal lies from an order modifying or correcting an award: see sec 104, sub-sec (1), cl (c).

13. [S. 519.] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Order as to costs of arbitration

14. [S. 520.] The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

When award or matter referred to arbitration may be remitted

(a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration,

(*b*) [illegible] (19[illegible]6) [illegible] 93 I C 336 ([illegible]6) A [illegible] 51[illegible]

(*c*) *Parm*[illegible] (1916) [illegible] P c no [illegible] 43 [illegible] I C [illegible] *raman* (19[illegible]1) 45 [illegible] 51 [illegible] I C [illegible] ([illegible]1) A [illegible] 191 [illegible] 45[illegible] I (19[illegible]4) [illegible] All L J 816 81 I C 8 5 ([illegible]4) A [illegible] 800

(*d*) *Dandus*[illegible] (18[illegible]) 9 Bom 8[illegible] See [illegible] *Das* (191[illegible]) [illegible] I C 6[illegible]

(*e*) *M*[illegible] (1901) [illegible] All 334 [illegible] *M*[illegible] *Lah* [illegible] (190[illegible]) [illegible] Cal [illegible] I A 16[illegible]

(*f*) [illegible] (19[illegible]) [illegible] Luck 1 10 I C [illegible] A O 1

(*g*) [illegible] *Lal* [illegible] *Das* (19[illegible]0) [illegible] All [illegible] 53 I C

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unless such matter can be separated without affecting the determination of the matters referred ,

(b) where the award is so indefinite as to be incapable of execution ,

(c) where an objection to the legality of the award is apparent upon the face of it

Remission of award when the award has left undetermined any of the matters referred to arbitration—The reason why an award which does not dispose of all matters referred is invalid seems to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all. This implied condition may be waived by the consent of all the parties before the arbitrators (*h*)

Where the issues in a suit were referred to arbitration and there was no distinct and separate finding by the arbitrators on *each* of the issues but there was a decision on the whole matter in controversy between the parties it was held that the award could not be said to have left undetermined any of the matters referred to arbitration and it should not therefore be remitted to the reconsideration of the arbitrator (*i*) A separate finding on each issue is not necessary when the whole matter in issue between the parties is decided by the arbitrators (*j*) But where several issues in a suit are referred to arbitration and the arbitrator decides by the award only one issue the award must be remitted to his reconsideration (*k*) If the arbitrator fails to reconsider the award the award becomes void see paragraph 15 Even if parties come to an agreement as regards some of the matters referred to arbitration the award should contain a determination of those matters though it be in terms of the agreement otherwise the award would be open to the objection that it has left those matters undetermined (*l*)

Award patently illegal—This is the rule in *Hodgkinson* v *Fernie* (*m*) which limits the right of interference by the Court to the case where a question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award This rule was extended in *Sandaner* v *Asser* (*n*) to a case where an award referred to a contract and construed it The Court of Appeal held that they were entitled to look at the contract and come to the conclusion that it was wrongly construed. *Sandaner* v *Asser* has been doubted and in *Champsey Bhara & Co* v *Jivraj Balloo* (*o*) the Privy Council said An error of law on the face of the award means in their Lordships view that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment some legal proposition which is the basis of the award and which you can say is erroneous. In this case cotton had been rejected by a buyer on a final award that it was of inferior quality under Rule 52 of the Rules of the Bombay Cotton Trade Association. This rule gave the buyer the option of invoicing rejected cotton back at the market rate—an option which he would of course only exercise if the market rate had risen. But here the

(*h*) *Mukund Ram* v *S l q R m* (1894) 1 Cal 90 1 I A 4 *Il gwan D* \ *Sh v Di l* (1913) Punj R c no 9 p 3— at p 33 17 I C 584 *Janend a* v *S s Chan l a* (19) 6 Lat 556 100 I C 8 1 (—8) A 1 7

(*i*) *George* v *Last an So ry* (1809) 2 Mad 20—

(*j*) *Ghi la Fh n* v *M h mmad Has an* (190) 29 Cal 167 188 — I A 51

(*k*) *Janardon* v *Sambhu Nath* (1889) 18 Ca 806

(*l*) *Hari Kunw* v *Lakhmi Ram* (1916) 38 All 380 39 393 3— I C 833

(*m*) (1857) 3 C B N S 187

(*n*) [190] K B 184

(*o*) (1923) 47 Bom 578 50 I A 3 4 3 L C 436 (3) A PC 66 followed in *Sewlal Mag lal* v *Madan* (19—) 6 Cal 1— 88 I C 49 (—) A C 699

market rate was below the contract rate and the defaulting seller claimed to recover the difference The award allowed the claim and in the preamble of the award narrating the events which led up to the dispute and the reference to arbitration mention was made of the contract and the letter of rejection for inferiority The Bombay High Court seized upon this recital and said that as the contract referred to the Rules and as the rejection was under Rule 52 the arbitrators must have wrongly construed the option in the rule as an obligation and that this was an error patent on the face of the award The Privy Council however said that the rule in *Hodgkinson* v *Fernie* (p) does not mean that if in the narrative a reference is made to the contention of one party that opens the door to seeing first what that contention is and then going to the contract on which the parties depend to see if that contention is sound They also observed that the arbitrators were entitled to put their own construction on Rule 52 In another similar case the error was said to be in the construction of a contract which was referred to in the award but their Lordships pointed out that the contract was not incorporated in the award which only made a guarded allusion to it for the purpose of earmarking the origin of the dispute (q) Where the only question in a suit was whether a Hindu was born blind and therefore not entitled to inherit and the suit was referred to arbitration and the arbitrator made an award whereby the blind man was declared to be entitled to a life interest in a certain portion of the property it was held on an objection to the award under cl (c) of this paragraph that the award was not so patently illegal that it could not be remitted to the reconsideration of the arbitrator (r)

Appeal —No appeal lies from an order under this paragraph remitting an award to the reconsideration of arbitrators Where an award is remitted to the reconsideration of the arbitrator and the arbitrator submits a fresh award and a decree is passed in accordance with the revised award no appeal lies from the decree on the ground that the order of remittal was wrong (r 16) and that the original award ought to have been accepted and acted upon (s) But where an award is remitted to the reconsideration of the arbitrator and the arbitrator refuses to reconsider the award (which consequently becomes void under paragraph 15) and the Court proceeds to try the case and passes a decree in the ordinary way [para 15 sub para (2)] the legality of the order remitting the award may be challenged on appeal from such decree (t) see sec 105

15 [S 521] (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it But no award shall be set aside except on one of the following grounds, namely —

Ground for setting aside award

(a) corruption or misconduct of the arbitrator or umpire,

(b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire,

(p) (1857) 3 C B N S 187
(q) Saleh Mahomed v Nathoomal (19) 54 I A 427 104 I C 466 55 Cal 196 (927) A PC 164
(r) Malepadi v Malepalli (1918) 41 Mad 10 ... 44 I C 644
(s) S... v ... (190) 31 Mad 479
(t) George v ... (1) 22 Mad ...

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(c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit

Points of distinction between s 521 of the Code of 1882 and this paragraph —

1 *Award made after expiration of period allowed by Court* See notes below under the same head

2 *When the award is otherwise invalid* See notes under the same head

3 Clause (2) is new

Misconduct—The term "misconduct" does not necessarily imply moral turpitude it includes neglect of the duties and responsibilities of the arbitrator and what Courts of Justice expect from them before allowing finality to their awards (t). Nor does it necessarily imply corruption (u)

Acts amounting to misconduct—The following acts have been held to amount to "misconduct" on the part of an arbitrator affording a ground for setting aside an award —

1 Irregularities in procedure which amount to no proper hearing of the matters in dispute (v) e g hearing and receiving evidence from one side in the absence of the other side without giving the other side affected by such evidence the opportunity of meeting and answering it (x)

2 Proceeding with arbitration in the absence of one of the arbitrators (y)

3 Refusing to hear witnesses produced by the parties (z)

4 Arbitrators improperly adding another to their number (a)

5 Where three out of five arbitrators were not present at the time the award was made and did not sign the award although it purported to be signed by all of them it was held that this amounted to misconduct and the award was set aside (b)

6 Making inquiries about the matters in reference from outside sources in the absence of the parties (c)

7 An unexplained delay of 5 years in making the award has been held to imply misconduct (d)

(t) Ganga Sahai v Lekhraj (1887) 9 All 253 Amir Begam v Badr-ud-din Husain (1914) 36 All 336 23 I C 825 (P C) Tej Bahadur v Abdul Hamid (1923) 25 Bom L R 30, 8 I C 4 (24) A I R 149

(u) Behari Charan v Nand Lal Chand (1903) 30 Cal 397

(w) Amir Begam v Badr-ud-din (1914) 36 All 336 313 23 I C 825 (P C)

(x) Chandi Din v W Crowder (1894) 18 Bom 299 Muhammad Ali v Abdul Hamid (19..) 7 Lah L J 463 ..I C 101 (..5) A I R 5 0

(y) Thimmaraju v Rapuraju (1 ..) 1 Mad 113 Nand Lal v Fateh Chand (1 ..) 7 All 523

(z) Yaqoob v Mahadeo Rao (1883) 1 C L R 561

(a) Pharan v Bakoran (1855) 7 N W P 34

(b) Ram Narain v Braj Nath (1907) ... 3 L..

(c) Abdul Hamid v Muhammad (1 ..) 3 A L J ... 3 7 101 I C 1 3 ( ) A I R ... Lah 11

(d) Phool Lal v Chunni Lal (1925) 5 Lah 11 107 I C 07 (25) A I R 49

Acquiescence in acts amounting to misconduct—It is misconduct if some of the arbitrators are not present at some of the meetings. But if this procedure is adopted with the concurrence of all the parties or acquiesced in by them it is not open to any of the parties to impeach the award on that ground (e)

Acts not amounting to misconduct—An arbitrator is not bound by technical rules of procedure. Therefore it is not a valid objection to an award that the arbitrator did not act in strict conformity with the rules of evidence (f). But he should not make private inquiries behind the backs of the parties (g) unless authorized by the wide terms of the reference (h). Again the rule of evidence which declares that letters written "without prejudice" should not be admitted in evidence being a rule founded upon natural justice is as binding upon arbitrators as upon Courts of Justice and an arbitrator is wrong in receiving and acting upon such a letter. But if no objection is taken by the other side to the admissibility of such letter and an award is made the award will not be set aside on the ground of misconduct (i). If it is provided in an agreement for reference that an adjustment relied upon by the plaintiff should not be taken into consideration by the arbitrator a *bona fide* mistake on the part of the arbitrator in admitting the adjustment in evidence does not amount to misconduct. Such a stipulation is nothing but a rule of evidence introduced *pro hac vice* (j). If the arbitrator is selected on account of his special knowledge of the matter in dispute it is not misconduct for him to use his special knowledge (k). But otherwise it is misconduct for an arbitrator to ignore the evidence and decide on his special knowledge (l)

It is not misconduct on the part of the arbitrator to delegate to a third party the performance of acts of a ministerial character so long as he exercises his own judgment on the matters referred (m). Misconduct cannot be presumed from the mere fact that the arbitrator is the relative of one of the parties (n). The mere fact that the *arbitrator has failed to account for the delay in making the award is no ground for* presuming fraud (o)

In *Buta v. Municipal Committee of Lahore* (p) certain matters in dispute between A and B were referred to arbitration. The agreement of reference was drawn up by A's counsel. The arbitrator feeling doubtful as to the meaning of a certain clause in the agreement wrote to A to obtain his counsel's opinion on the meaning of that clause. A obtained the opinion and sent it on to the arbitrator. B was not informed of this until after the award was made. It was held that though it would have been prudent and discreet for the arbitrator to have written to A with B's knowledge and informed B of the opinion the omission to do this did not amount to misconduct as there was no ground for impeaching the good faith of any of the parties concerned

Evidence of arbitrator—Where a charge of dishonesty or partiality is made against an arbitrator any relevant evidence he can give is properly admissible. It is however necessary to take care that evidence admitted as relevant on such charges is not used for a different purpose namely to scrutinize the decision of the arbitrator on matters within his jurisdiction and in which his decision is final (q)

(e) J ... v ... (1919) 4 L ... L J 334 40 408 48 I C 711 ... v ... (1894) 18 Bom ... 99
(f) S ... v ... Chackary ... (18 ...) 11 Mad 85 ... v ... (192 ...) 3 Rang 3 7, 91 I C 6 ... A I R ... 3
(g) G ... v Bulleo S ... (19 ...) ... All L J 117 ... I C ... A ... 61
(h) H ... B ... v Lachhman Das (19 ...) ... All L J ... 64 I C 934 ... A ... 69
(i) H ... v ... (1 ...) 4 Cal ... 31
(j) ... v ... (1914) 38 Bom 60 19 I C 931
(k) ... v ... (19 ...) 28 Bom L R ... 97 I C ... A I R ... 5
(l) G pala ... v ... (19 ...) 50 Mad L J 514 93 I C ... A I R ... M 752
(m) Buta v Municipal Committee of Lahore (190 ...) ... Cal ... A I R ...
(n) ... v ... (1885) ... All ...
(o) ... v ... (190 ...) ... Bom ...
(p) (190 ...) ... Cal 854 ... I ... 168
(q) ... v ... (1914) 36 All 336 344 23 I C 6... [F C]

Arbitration

Sch II, para 15

Appeal from decree based on an award on ground of misconduct—No appeal lies from a decree passed in accordance with an award on the ground of misconduct of the arbitrator (*r*). The only remedy available to the party aggrieved by the award is to apply to have it set aside under this paragraph. See notes to paragraph 16 below under the head Invalid award.

Fraudulent concealment of any matter which ought to have been disclosed—Where the arbitrator was the retained pleader of the plaintiff and this fact was not disclosed by the plaintiff to the defendant before the arbitrator was appointed, the award was set aside on the ground that that fact was one which ought to have been disclosed. *Every disclosure which might in the least affect the minds of those* who are proposing to submit their dispute to the arbitrament of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made (*s*).

Award made subsequent to order superseding arbitration—If an order is made superseding the arbitration under paragraph 5 or 8 or under cl. ( ) of this paragraph or if the period fixed for making the award has expired, the arbitrators have no longer seisin of the reference and they are *functi officio* and cease to have any more power to make an award than the man in the street (*t*). Similarly an arbitrator is *functus officio* after the award is made and he cannot thereafter add *to or alter the* award (*u*).

Award made after expiration of period allowed by Court—Clause (c) of s 521 *stopped at the words the suit which occur in cl (1) sub cl (c) of this para.* It was followed by another clause which ran thus: And no award shall be valid unless made within the period allowed by the Court. The latter clause has now been omitted and instead thereof we have the words or after the expiration of the period allowed by the Court added into sub cl (c). The effect of this alteration is that the only remedy now open to the party impeaching an award on the ground that was made after the expiration of the period allowed by the Court is to apply under this paragraph *to set aside the award. If no application is made to set* aside the award under this paragraph or if the application is made but refused the award becomes final and no *appeal* will lie from a decree based upon the award (*v*). [Under the Code of 1882 it was held that an appeal lay from a decree based upon such an award (*w*).] If the application to set aside the award is granted and an order is made under sub para. (?) superseding the arbitration the order is appealable under s 104 sub (1) cl (a). See notes to r 16 below. No appeal lies from a decree based on an award etc and notes to *paragraph 3 above Making of award*.

Another consequence of the alteration is that whereas under s 521 of the old Code an award out of time was a nullity (*x*) it is not so under the present rule. Under the present rule it is merely voidable and if not sought to be set aside within the period of limitation [Limitation Act 1908 art 158] it is binding upon the parties.

When the award is otherwise invalid—The words or being otherwise invalid at the end of sub-cl. (c) are new. Under the Code of 1882 it was held that when

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(*r*) *Wali v Fbji* (190) 29 Bom 23; *Ram Dhan v Karan Singh* (1895) 18 All 414; *Bihari Lal v Chunni Lal* (1907) 29 All 457; *Kombi v P nj* (1894) 1 Mad 40.

(*s*) *Kali Prosanno v Rajani Kant* (1898) 25 Cal 141; *Yusuf Khan v R a t Ali* (19 6) 1 Luck 139 93 I C 446 (26) A O 307.

(*t*) *Ibrahim v Mohs* (1896) 18 All 4 4-5.

(*u*) *Jafri Begam v Syed Ali Raza* (1901) 23 All 383 28 I A 111.

(*v*) *Sh b Krist Dow & Co v S k Chandra* (191) 39 Cal. 8; 18 I C 6.

(*w*) *Patto Kumar v Upendra Nath* (1919) 4 Pat L J 375 50 I C 5 (191) 2 Cal ... 892, 18 I C 60 ... *Moh* ... I 34 I C 1.

(*x*) *Ch ha Mal v Hari R m* (1 8) 8 All 55; *Har Narain v Bh ... t* (1891) 13 All 300 18 I A 5; *Lachman Das v ... ka h* (1908) 30 All. 169.

an award was not a valid and legal award an appeal would lie from the decree based upon such award even though the decree might be in accordance with the award. The leading case on the subject was *Kali Prosanno Ghose v Rajani Kant* (y) decided by the High Court of Calcutta in the year 1898. The object of adding the words "or being otherwise invalid" into sub cl (c) is to supersede the Calcutta and other decisions which allowed an appeal from a decree based upon an *invalid* award and to give effect to the principle of finality in cases of arbitration enunciated by their Lordships of the Privy Council in *Ghulamkhan v Muhammad Hassan* ( ) and followed in recent cases (a). The result is that the only remedy now open to a party seeking to impeach an award as being invalid is to apply under this paragraph to have it set aside. If he fails to do so or if an application is made but refused the award becomes final and *no appeal* will lie from a decree based upon the award. See notes to paragraph 16 under the head "Invalid award". It is worth while noting that the Special Committee which introduced these alterations intended to allow an appeal from an order under this paragraph setting aside or refusing to set aside an award (b) but no such provision is contained in s 104. The words "or being otherwise invalid" do not include the question whether there was or was not a valid reference to arbitration. An application in revision will therefore lie on the ground of the initial invalidity of the reference (c)

An award is not illegal merely because it is based on evidence given by one of the parties on a special oath administered under the Indian Oaths Act with the consent of the other party (d)

An award is invalid if the arbitrators go beyond the scope of the suit and decide matters which are not in suit and which concern persons who are not parties to the suit. Pand in J said such an award cannot be treated partly as an award on a reference by the Court and partly as an award by private agreement for there is no provision for such simultaneous arbitration and the jurisdiction for the different types of arbitration must not be confused (e). The Privy Council reserved their opinion as to whether there may not be an exception to this comprehensive statement as to simultaneous arbitration but held that such an award was not in accordance with the order of reference and therefore otherwise invalid under para 15 (f). In a subsequent case parties to a suit applied for a reference as to matters in difference in the suit and other matters as well. The Court referred to arbitration the matters in difference in the suit only. The parties then made a reference without the intervention of the Court of these other matters to the same arbitrators who made two awards. It was held that as the arbitrators had kept the two matters distinct the award on the reference was valid (g)

Appeal from order under this paragraph—Except in the case provided by s 104 cl (a) no appeal lies from an order under this paragraph setting aside or refusing to set aside an award (h). If the objecting party does not appear in support of his objection the Court has no option but to pronounce judgment in accordance with the award (i) and the decree made thereon cannot be set aside under O 9 r 13 because it is not an ex parte decree (j). But if the order under this paragraph is made by a

(y) (189) 25 Cal 141
( ) (190) 29 Cal 16 153 29 I A 51
(a) See *Chairman of the Purnea Municipality v* [illegible] (1906) 33 Cal 693 90 [illegible]
(b) See Gazette of India 1908 Part V p 183.
(c) [illegible]
(d) [illegible]
( ) [illegible]
(f) [illegible]
(g) [illegible]
(h) [illegible]
( ) [illegible]
(j) (19 4) 3 Pat. [illegible]

Arbitration

Sch II, paras 15, 16

Chartered High Court it amounts to a judgment within the meaning of cl 15 of the Letter Patent and is appealable under that clause See notes to s 104 under the head Letters Patent appeal See also notes to paragraph 21 below under the head Appeal

It has been held by the High Courts of Calcutta Madras and Bombay and by the Chief Court of the Punjab that *though no appeal lies from an order setting aside an award* the legality of the order may be challenged on appeal from the decree that may be ultimately passed in the suit (k) [s e s 105] A different view has been taken by the High Court of Allahabad (l)

Revision —An order under this paragraph setting aside or refusing to set aside an award is not subject to revision (m) But an order superseding arbitration may be attacked under s 105 in appeal from the decree in the suit (n)

16 [s 522] (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award

Judgment to be according to award

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award

After the time for making such application has expired —That is after 10 days from the date on which the award is filed in Court and notice of the filing has been given to the parties see Limitation Act 1908 sch 1 art 158 as amended by Act 18 of 1919 Before the amendment the period of 10 days commenced from the date on which the award was submitted to the Court See the preamble to Act 18 of 1919 The amendment seems to have been suggested by the judgments of the learned judges in the undermentioned Calcutta case (o)

No appeal lies from a decree based on an award except *in so far as such* decree is in excess of or not in accordance with the award —In references to arbitration the general rule is that as the parties choose their own arbitrator to be the judge in the dispute between them they cannot object to his decision either upon the law or upon the facts It is now well established that where a matter is referred to an arbitrator he is the sole and final judge of all questions not only of fact but of law (p)

(k) *Anb v Nadj r* (1885) 11 Cal 17.. 1 *A h thajy v Tlimm yja* (1908) 31 Mad 84 *Damod r v I th nath* (190) 26 Bom 5 1 *Jun a v M bar k Ala i* (191) Pun. Rec no 97 p 33 I I C 8 p 361 34 I C 19 *Ch manl v K sha lal* (19 3) 4 I m 1 3 I C 404 (..3) A B 40 *Shah M hammad I ah llah* (19..) 47 All 1 1 85 I C 50 (..) A A 4 4

(l) *Gang Prasad v Kura* (1906) 8 All 408

(m) *Damod r v Ragh ath* (190) 26 Bom 551 *Kali Charan v Saral Chunde* (1903) 30 Cal 397 *P m Jawava Mal v De Ditta Mal* (1916) Punj Rec no 117

(n) *P d a Pr ad v Math ra Pr d* (192) A A 566 All 916 83 I C 1 .

(o) *So a h l v H ry l ux* (1919) 46 Cal 53 I C 46

(p) *Ad s v Gr t North of Scotland Ry Co* [1891] A C 31 *M ntgomery & Co v* ... *e* (1893) 3 L T 406

Thus where an award was impeached on the ground that it was against law their Lordship of the Privy Council said "They [arbitrators] may have erred in law but arbitrators may be judges of law as well as judges of fact and an error in law certainly does not vitiate an award" (q) And this principle has been carried so far that if parties submit to an arbitrator the decision of a bare point of law and he gives an erroneous decision his award is binding notwithstanding (r) In all these cases the Court would say to the party seeking to set aside the award "You have constituted your own tribunal you are bound by its decision" (s) The present paragraph gives effect to the principle of finality of awards by declaring that no appeal shall lie from a decree based on an award except is so far as the decree is in excess of or not in accordance with the award (t) The only cases in which the Code allows an appeal from a decree based on an award are—

(1) where the decree is *in excess* of the award as where the decree gives interest which the arbitrators have not awarded (u) or

(2) where the decree is *not in accordance with* the award

In this respect there is no difference between a decree based upon a private award (para 21) and a decree based upon an award made through the intervention of the Court (v)

Is a decree based on an award which has been *modified* by the Court under paragraph 12 a decree *in accordance with* the award? It has been held by the High Court of Allahabad that it is not and hence an appeal lies from the decree Thus where an award directed the defendant to make certain payments to the plaintiff by instalments and the award was modified by the Court under paragraph 12 by omitting the direction as to payment by instalments and a decree was passed on the award as so modified it was held that an appeal would lie from the decree (w) The soundness of this decision is open to question It is submitted that a decree is in accordance with an award within the meaning of this paragraph if it is in accordance with the award as modified under paragraph 12 though it may not be in accordance with the *original* award Paragraph 16 says "The Court shall proceed to pronounce judgment *according to the award*" It is clear that when an award is modified under paragraph 12 the only award in accordance with which judgment can be pronounced is the modified award Moreover the decision runs counter to the principle of finality which finds expression in the Code

Where an application made under para 15 cl (c) to set aside an award on the ground that it was made after the expiration of the period allowed by the Court has been refused and a decree is subsequently passed in accordance with the award no appeal lies from the decree if it is in accordance with the award Nor does any appeal lie from the *decree* under the Letters Patent (x) See notes to paragraph 15 above "Award made after expiration of period allowed by Court" and notes "Appeal from order under this paragraph" above See also notes to s 104 "Letters Patent appeal" above

Invalid award—Under the old section it was held by the Courts in India that though a decree might be in perfect accordance with an award an appeal would lie from the decree if the award upon which the decree was based was *invalid* The reason

(q) *Ch l m Kh* v *M hammad H sa* (190) 9 Cal 16 9 I A 51 *Kot l ngh* v *I m ra* (19 4) 3 Pat 443 81 I C 994 (24) A I 4 8

(r) *St ff* v *Andrews* (1816) 4 Ma l ck 6

(s) *Per* Willi n J in *Hodgk son* v *Fern e* (1857) 3 C B N S 189

(t) *Ch l m Kh* v *M h m d Ha san* (190) 9 Cal 16 9 I A 51 *H* ... v *S der Lal* (1908) 35 C 1 649 35 I A 68

(u) *Moh Lall* v *J g N* ... (15 4) 3 W R 105

(v) *B had S gh* v *Negi Puran ngh* (19) 30 All 151 *Kulsum* v *Al Akba* (1917) 9 All 401 411 39 I C 730

(w) *J waha* v *M I I j* (18 6) 8 All 419

(x) *Sh b Krist Dae d C* v *Satish Chandra* (191) 39 Cal 6 18 C

Arbitration

Sch II, para 16

given was that that section presuppo ed a valid and legal award and not an award upon which no decree could be passed (y) *A different* view however was taken by their Lordships of the Privy Council in *Ghulam Khan* v *Muhammad Hussain* ( ) decided in the year 1902 After that expression of opinion two of our High Courts held that no appeal lay under s 522 from a decree passed on an award on the ground that the award was invalid (a) *Under the present* Code it is quite clear that no appeal lies from a decree where such decree is passed in accordance with the award though the award may be invalid. But the party *aggrieved* by the award may apply under para. 15 cl (1), sub cl (c) to have the award set aside If he does not avail himself of that remedy the award *becomes final* and no appeal lies from the decree ba ed upon the award. This change has been introduced by the in ertion of the words or the award be , otherwise invalid *in para 1 cl (1) sub cl (c)* The object is to give finality to awards as stated in the notes to paragraph 15 under the head Where the award is otherwise invalid. *The effect* of this alteration is that no appeal lies under this Code when a *decree has been passed under the pre ent paragraph upon an award except in so far* as the decree i in excess of or not in accordance with the award (b) The result is that all those cases in which it was held under the Code of 1882 that a decree thou h it be *in accordance* with the award may be challenged by way of appeal on the ground that there was no valid and legal award are no longer law In a Lahore case sons of one of the parties interested in the property were joined as parties after the award was filed, and made detailed objections to the award When their objections were disallowed and a decree passed in terms of the award, the Court held that they had by their conduct submitted to the arbitration proceedings and had no right of appeal although they had not actually been parties to the reference (c)

Illustrations

(a) An order of reference made on the application of *some only* of the parties *interested is illegal* [see paragraph 1] Therefore an award made in pursuance of su h order is al o illegal According to the old section an appeal would lie from a decree *upon such an award (d)* But no appeal lies under this paragraph and the only remedy open to the party aggrieved by the award is to apply to the Court under paragraph 15, cl (1) sub-cl (c) to set aside the award. Such an application should be made within 10 days from the date on which the award is submitted to the Court See paragraph I

(b) An award made *after* the expiration of the period fixed by the Court under *paragraph 3 or enlarged by the Court under paragraph 8 is invalid* According to the old section an appeal would lie from a decree based on such award (e) No appeal lies

(y) *Lachman* v *Brijpal* (1884) 6 All 174 *Sham Lal* v *Misri Kunwar* (1907) 9 All 4 6 *Kali Prosa na Ghose* v *I ajani Kant* (1898) 3 Cal 141 *Nand m* v *Nemchand* (1893) 17 Bom 357 *Shib Lal* v *Chatarbhuj* (1909) 31 All 450 I C 363

(z) (190) 29 Cal 167 29 I A 51

(a) See *Chairman of the P rnea Municipal ty* v *Sira Sani I am* (1906) 33 Cal 899 90 903 *Kanakku* v *N galinga* (1909) 3 Mad 510 4 I C 871

(b) *Mah med* v *I all* (19 4) 26 Bom L R 171 9 I C. 3 (4) A B 3 4 *Guran D tta* v *I okhar Ram* (19) 8 Lah 693 104 I C 0 ( ) A L 36 *Lutawan* v *Lachya* (1914) 36 All 63 1 I C 983 (1 B) *L tcha* v *Abd I* (1915) 38 M d 56 1 I C 309 *Kh d ram* v *Cha d cha an* (1916) 1 I t L J 306 35 I C 3 8 *Kanha ya Lal* v *Jagan ath Prasad* (19 1) 43 All 30 60 I C 8 ( ) *m Pran* A 16 *Hari Sh nk r* v *I m Pran* (19 3) 45 All 441 I C 8 4 (3) A 50 *Mahomed* v *I all* (19 4) 6 Bom L R 171 9 I C 3 (4) A B. 321 See also *Shib Kristo Daw & Co* v *Sa t Chand a* (191) 39 Cal 8 18 I C 47 *Balkishan* v *Sohan S ngh* (19) 10 Lah 8 1 116 I C 359 ( ) A L 4 6 *Maung Tun* v *Mau g Tun* (19) 7 Ran (9) A R.

(c) *Guran Ditta* v *Pokhar Ram* (19) 8 Lah. 693 104 I C 20 ( ) A L 36

(d) *Ind r* v *Kandadai* (1903) 6 M 3 4 *Jy Prokash* v *Sheo Golam* (18 5) 11 Cal 3 *Sh b Lal* v *Chatarbh j* (1909) 31 All 4 I C. 363

( ) *Ch ha Mal* v *Hari Ram* (19 6) 8 All. 31 *Lachman Das* v *Abprokash* (19) 30 All 169

under the present paragraph but the party aggrieved by the award may apply to have it set aside under paragraph 15. See notes to para 15. Award made after expiration of period allowed by Court.

(c) An award must be signed before it is filed and it must be signed by all the arbitrators. An award signed by *some* only of the arbitrators is illegal. Similarly an award signed by an arbitrator *after* the same has been filed in Court is illegal. According to the old section an appeal would lie from a decree based on such award (*f*). No appeal lies under this paragraph but the party aggrieved by the award may apply under paragraph 15 to have it set aside (*g*).

(d) The matters in difference in a suit between A and *B* are referred to the arbitration of *C*. *C* is the retained pleader of *A* but this fact is not disclosed to *B* [see para 15]. *C* makes an award. The award is illegal. According to the old section an appeal would lie from the decree (*h*). No appeal lies under the present paragraph but *B* can apply to have the award set aside under paragraph 15.

An appeal lies from a decree based upon a judgment pronounced in contravention of the provisions of this paragraph though the decree may be in accordance with the award.—It has been held by the High Court of Allahabad that if a decree is passed on an award *before the time for making the application to set aside the award has expired* an appeal will lie from the decree though the decree may be in accordance with the award (*i*). But in such cases the Bombay and Lahore High Courts interfere by way of revision (*j*). The Allahabad High Court has held that where an application to set aside an award has been refused by the Court *without considering it* and a decree is passed on the award an appeal will lie from the decree though the decree may be in accordance with the award. The reason given is that the word "refused" in this paragraph means refused *after judicial consideration* (*k*).

Second appeal.—A second appeal will lie to the High Court where the decree of the Court of first instance is in accordance with the award and such decree is set aside by the first appellate Court. The reason is that no appeal lies from a decree passed in accordance with an award and the first appellate Court acts *without jurisdiction* in entertaining the appeal and setting aside the decree passed in accordance with the award (*l*). In a similar case the High Court of Calcutta held that no second appeal lies but that the High Court may *revise* the order under s. 115 (*m*).

A second appeal will also lie where the Court of first instance sets aside the award and passes a decree on the merits and the first appellate Court sets aside the decree and passes a decree in accordance with the award. The mere fact that the decree of the first appellate Court is in accordance with the award is no ground for refusing the appeal (*n*).

Revision.—We have seen that no appeal lies from a decree passed in accordance with an award. Section 115 provides that where no appeal lies from a decision an application may be made to the High Court for a *revision* of the decision. No such

(*f*) *Nandram v. Nemchand* (1903) 17 Bom 357; *Premchand Chand v. Karunamoyi* (1906) 33 Cal 498.
(*g*) *Khudiram v. Chandi Charan* (1916) Pat. L. J. 306, 35 I. C. 3 8.
(*h*) *Kali Prosanno Ghose v. Rajani Kant* (1898) 25 Cal 141.
(*i*) *Nimchand v. Albert Puech* (190) 29 All 584.
(*j*) *Parubhai v. Dahyabhai* (19 1) 45 Bom 83, 59 I. C. 811 (1) A. I. R. 3; *Ilahi ... Darbari v. ...* (19 1) 3 Lah. L. J. 4 , 64 I. C. 391 (1) A. L. 19; *Bhikhalal v. ...* (19 5) 49 Bom 535, 87 I. C. 910 (5) A. I. 341.
(*k*) *Ibrahim v. M... ...* (1 96) 18 All 422; *Sahdeo ... v. M...* (19) 42 All 1 9, 98 I. C. 933 ( ) A. A. 1 .
(*l*) *Krishna v. M...* (1 99) 22 Mad 1 .
(*m*) *Lokkanta ... v. ...* (1911) 38 Cal 1, 9 I. C. 16.
(*n*) *Shyam Charan v. Prolhad* (1904) 8 C. W. N. 390; *Ganga Prasad v. Kura* (19) 8 All 408; *Ganesh ... v. Lakhan ...* (19 8) 3 Luck 2, 1 I. C. 545 ( ) A. O. 1 B.

Arbitration

Sch II, para 16 application, however should be admitted in the case of an award. In the case of an award revision would be more objectionable than an app al If an application for revision were admis ible in a case where the decree is in accordance with the award, the finality of any award would be open to question (o) Thus where an application was made for revision on the ground that there was no valid order of reference and that the award was therefore a nullity and that no decree ought to have been pas ed on such an award the High Court of Allahabad refused to entertain the application (p). But in a later case where the lower Court dealing with the objections set a ide the award because of a suppo ed defect in the reference the Allahabad High Court interfered in revision on the ground that the Court had acted without jurisdiction (q) The better opinion seems to be that revision is admi sible for the purpo e not of interfering with the arbitrator but with the exercise of juri diction by the Courts below in the procedure and order of the judge d aling with the objections (r) See notes above An appeal lies from a decree based upon a judgment etc

Enforcement —When a decree is passed in terms of the award the only mode of enforcing the award is by execution of the decree no separate suit will lie to enforce the award (s)

Where the Court acts as arbitrator —Where a reference i made to the presiding Judge the parties must be deemed to have agreed to accept his decision as final Hence no appeal lies from the decision of the judge in a such ca e (t) Nor is the decision subject to the provi ions of the present Schedule so as to entitle either party to object to the decision as if it was an award under this schedule A decree passed in accordance with such a decision must be regarded as a con ent decree and it comes within the purview of O 23 r 3 The same principle applies even if the reference is made to th presiding Judge and another person jointly (u) A Judge to whom a reference is made has no power to alter his deci ion once it i given. *In this respect* his position is that of an arbitrator who has no power to alter an award once it is made by him (v) See notes to s 21 above

Distinction between valuer and arbitrator —*A* sue *B* for a declaration that he is entitled to one half share of certain property An order is made by consent that *A* should pay *B* a quarter of the value of the property to be settled by a certain referee nominated by the parties The order is not one passed under para 2 and 3 and the decision of the referee is not an award on which a judgment could be pronounced under the present paragraph (w) But the terms of the agreement between the parties may *be such that the valuer may be invested with the* power of an arbitrator in which case the valuation made by him may operate as an award In *Jackson* v *Barry Railway Co* (x) the building contract contained the following clau e In the event of any question or dispute arising between the company and the contractor as to [the

(o) *Gh lam Khan* v *Muham ad Hassan* (1902) 29 Cal 167 9 I A 51 *Bat ha* v *Abdul* (1915) 38 Mad 256 I I C 08

(p) *Uj dhia Pra d* v *B da l Hu* (1917) 39 All 489 493 49 41 I C 357

(q) *Kanh iya Lal* v *Jaga ath Ir ad* (19 1) 43 All 305 60 I C 857 (1) A A 16 *(pal D* v *R ij Nath* (19 6) 48 All 3 91 I C 930 ('26) A A 38 *Tej S gh* v *(ha Ram* (19) 49 All 81 10 I C 236 ('27) A A 563

( ) *Merali* v *Sheriff* (191) 36 Bom 10 1 I C 697 *K haja Lal* v *J j ath Ir d* *s prd (bind S ngh* v *Bh gu Nath* (19 4) 46 All 686 8 I C 16 (4) A A 789 *Bh khalal* v *Acha t Lal* (19) 43 Bom 535 87 I C 910 ('25) A B 341 See also *K nhia Lal* v *Na ain gh* (1916) Punj Re no 28 p 75 31 I C 700 *I marem* v *Venkatara a* (19 6) 49 Mad L J 322 91 I C 74 (7) A M 401

(s) *Sa Sekha Aiya* v *Lal t Mohan* (1925) 5 I A 9 5 Cal 314 86 I C 15 ('25) A PC 31

(t) *Nulam ahi Thamm na* (1903) 6 Mad L J ... *Sa d Z n* v *Kalabhai* (1 99) 23 I m

(u) *Ch a* v *Venk t ram* (1919) 4 Mad 425 6 9 51 I C 8 7

(v) *B tanta Nath* v *Sita Nath* (1911) 35 Cal 4 1 9 I C 96

(w) *Choo y Mo ey* v *Ram K I r* (19 1) 49 Cal 155 *Maenaghten* v *Lamesh* ar (19 3) 30 Cal 831

(x) [1893] 1 Ch 238 *Ives* v *Willans* [1894] Ch 478

followed the enumeration of several questions] such questions or disputes shall be referred to the engineer whose decision shall be conclusive and binding on both parties It was assumed that the above clause was an agreement to refer to arbitration and the only question argued was whether in view of a letter written by the engineer to the contractor *after* intimation to the parties to proceed with the arbitration the engineer had rendered himself incapable of acting as an arbitrator It was contended on behalf of the contractor that the true inference from he letter was that the engineer had so completely made up his mind against him that he would not be patiently listened to and receive an honest decision but this contention was overruled

Sch para 16, 1

Order of reference on agreements to refer

17 [S 523] (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates that the agreement be filed in Court

Application to file in Court agreement to refer to arbitration

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the others or other of them as defendants or defendant, if the application has been presented by all the parties or, if otherwise, between the applicant as plaintiff and the other parties as defendants

(3) On such application being made the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants requiring such parties to show cause, within the time specified in the notice why the agreement should not be filed

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator

Alteration in the paragraph —In cl 4 the words and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or if there is no such provision and the parties cannot agree the Court may appoint an arbitrator are substituted for the words and shall make an order of reference thereon and may also nominate the arbitrator when he is *not named* therein and the parties cannot agree as to the nomination

Arbitration
Sch II, para 17

Does not apply.—The procedure prescribed by this paragraph does not apply to cases to which the Arbitration Act applies See notes to s 89

Scope of the paragraph.—Paras 1 to 16 deal with cases in which the parties to a suit agree to refer the matters in difference between them in the suit to arbitration and apply to the Court for an order of reference The application in such a case must be made by all the parties to the suit interested in the matters in difference proposed to be referred to arbitration. This and the subsequent paragraph refer to cases in which persons themselves agree independently of the Court to refer the matters in difference between them to arbitration (y) In such a case any party to the agreement may apply to the Court to have the agreement filed and to have an order of reference made thereon. Where such an order is made the provisions of paras 2 to 16 apply to the proceedings in so far as they are consistent with the agreement so filed ( ) [para 19] When a submission is filed in Court under this paragraph the submission is said to be made a rule of the Court

Agreement to refer to arbitration matters in difference in a pending suit.—An agreement to refer to arbitration matters in difference between the parties to a pending suit without the order of the Court under paras 1 to 3 above is illegal and cannot be filed under this paragraph (a) Whether an award made on such a reference is an adjustment within the meaning of O 23 r 3 has been discussed in the notes on that rule under the heading submission and award

Though an agreement to refer matters in dispute in a pending suit without an order of the Court is invalid there is nothing to prevent parties compromising their suit on the terms of an award made on such an agreement Thus in a Patna case (b) parties came to an agreement to arbitrate in a pending suit and applied the same day to the Court to withdraw the suit The suit was allowed to be withdrawn and the award made and filed under paras 20 and 21 This was quite correct for the agreement was virtually conditional on the Court surrendering its jurisdiction by allowing the suit to be withdrawn. An agreement to refer to arbitration the partition of a testator s estate does not encroach upon the jurisdiction of the Court in which proceedings for the probate of the will are pending and is therefore valid (c)

The agreement must be in writing.—This paragraph does not apply unless the agreement to refer is in writing (d)

Agreement to refer future differences to arbitration.—Where a charter party contains a clause that any disagreement that *may* arise [i e arise *in future*] between the contracting parties as to the proper interpretation of the charter should be referred to arbitration the agreement though it refers to *future* differences can be filed under this paragraph (e) Agreements to refer *future* differences are not outside the scope of this section

Numbered and registered as a suit.—It has been held that in spite of these words a proceeding under this para is not a suit for a suit is commenced by the plaint (f) The High Court of Calcutta has held that a proceeding under para 17 is a suit (g) It is submitted however that these words make it a statutory suit otherwise the words would have been Numbered and registered as if it were a su

(y) *Gh lam Kh n v M h mmad Hasan* (190) -9 Cal 167 9 I A 51
(z) *Sh o Dat v Sheo Sh nker* (190) -7 All 53 56
(a) *D kars v Yeshwa t a* (19 9) 31 Bom L R 1403
(b) *Kokil S gh v Ramasray* (19-4) 3 Pat 44 81 I C 921 ('24) A I 488
(c) *Sha ka v Ram hand a* (19-3) 5 Bom L.R. 437 73 I C 415 ('23) A B 36
(d) *T ncowry v F kir Chand* (19 3) 30 Cal 218
(e) *Fa lbhoy v The Bombay and Persia Steam Navigation Co* (1896) 20 Bom L R 11
(f) *P m l v Marwi* (19 0) ... *Sat sh handra v Pa* 59 I C 7 ... (19 1) 6 Pat L J -7 61 I C ('21) A I 161
(g) *G ru Charan v Uma Charan* (1921) C W N 940 ... I C 945

Sufficient cause —Where an agreement is to refer to several specified arbitrators and one of the arbitrators dies before the application s made under this paragraph the Court should not make an order of reference under this paragraph (*h*) But it is otherwise if the agreement contains an express provision that in case of death of any arbitrator another arbitrator may be appointed in his place (*i*) During the pendency of a private arbitration one of the parties died and the arbitrator thinking he had no power to join the legal representative refused to go on On an application to file the agreement it was held that the Court had no power to order the arbitrator to proceed (*j*) In another similar case (*k*) the Court appointed a new arbitrator under para 5 which is made applicable by para 19 if its exercise is not inconsistent with the agreement of reference

Arbitrator appointed in accordance with the provisions of the agreement —Thus where an agreement provides for a reference to a European merchant the Court has no power to appoint an Indian merchant (*l*) If the agreement is for reference to three arbitrators the Court cannot add a clause that in case of disagreement the opinion of the majority shall prevail (*m*)

Where the agreement to refer has been duly revoked —Where an agreement to refer has been revoked for good cause by one of the parties thereto the Court is not competent to order it to be filed under this paragraph (*n*) See notes to para 1 under the head Revocation of arbitrator s authority

Umpire —If an agreement filed under this paragraph does not contain any provision for the appointment of an umpire in the event of the arbitrators being unable to agree the Court has no power under this paragraph to appoint an umpire (*o*)

Appeal —An order under this paragraph filing or refusing to file an agreement to refer to arbitration is now appealable as an *order* [s 104 sub s (1) cl (d)] Under the Code of 1882 it was appealable as a *decree* (*p*)

Revision —The mere fact that the application is not numbered and registered as a suit as required by cl (2) of this paragraph is no ground for interfering in revision such an irregularity is not a material irregularity within the meaning of s 115 (*q*)

Stay of suit where there is an agreement to refer to arbitration

18 [*New Cf* Arbitration Act 9 of 1899 s 19] Where any party to any agreement to refer to arbitration or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit, and the Court, if satisfied that there is no sufficient reason why the

(*h*) *Mohan Lal* v *Damodar Das* (1918) Punj Rec n 71 p 33 44 I C 866
(*i*) *S l m* v *S bj* (1919) Punj Rec no 155 p 414 51 I C 636
(*j*) *Ahmad Noor Khan* v *Abd r Rahm n* (1920) 4 All 191 54 I C 366
(*k*) *Fazl Ilahi* v *Prag Narain* (1922) 44 All 5 3 67 I C 33 (22) A A 133
(*l*) *Dreyfus & Co* v *G ndita* (1911) Punj R c no 35 p 1 3 9 I C 655

(*m*) *Ramayya* v *R payya* (19 6) 51 Mad L J 440 97 I C 6 4 (26) A M 1193
(*n*) *Coley* v *Da Costa* (1 90) 17 Cal 200
(*o*) *M hammad Abid* v *Muhammad Asrha* (1 6) 8 All 64
(*p*) *Gh lam Khan* v *Muhammad Hassan* (1901) 29 Cal 167 9 I A 51 See also *Venkata chala* v *R ngah* (1916) 36 Mad 3 3, 354 3 5 32 I C 57
(*q*) *W l M hamm d* v *Bahawal Bakhsh* (1914) Punj Rec no 3 p 101 I I C 92

Arbitration

Sch II, para 18 matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was at the time when the suit was instituted and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit

History of the section —This paragraph is a reproduction with slight alterat[illegible] of section 19 of the Indian Arbitration Act The latter section is based on s 4 of the English Arbitration Act 1889 which again is based on the Common Law Procedure Act, 1854 s 11 As to the history of the last mentioned section see *Doleman & Sons v Ossett Corporation* (r)

By s 28 of the Indian Contract Act agreements in restraint of legal proceedings are declared void To that section there was an exception to the effect that if the parties have agreed to refer their dispute to arbitration the existence of the agreement shall be a bar to seeking redress in the ordinary Courts The exception also recognised the r[illegible] to sue for specific performance of the agreement Then came the Specific Relief Act of 1877 which by s 21 took away the right to sue for the specific performance of the agreement but preserved the right to the party who was willing to abide by the agreement to object to a trial of the suit filed by the other party Lastly paragraph [illegible] of this Schedule repealed that portion of s 21 of the Specific Relief Act which enabled the defendant to plead the agreement to refer as a bar to the suit In lieu of this provision we have the present paragraph which enables a party who is willing to abide by the agreement to apply for a stay of the suit filed by the other party But the application must be made at the earliest possible opportunity and in all cases where issues are settled at or before such settlement If the application is not so made the suit will proceed, and any award made by the arbitrator after the institution of the suit is a nullity The reason is that as soon as a suit is brought in respect of the subject matter of the reference the arbitrators become *functus officio* (s) The Calcutta High Court has held that though the award made while the suit is pending and not stayed is a nullity the party benefiting by the award may still obtain a stay order apply for the award to be filed under para 20 and then when the Court refuses to file it on the ground that it is invalid the arbitrator whose jurisdiction has been restored by the stay order may complete their proceedings and make a fresh award (t) The rule does not apply when the award deals with a question that is not in issue in the suit (u)

At the earliest possible opportunity and in all cases where issues are settled at or before such settlement —The corresponding words in s 19 of the Indian Arbitration Act 1899 are at any time after appearance and bef re filing a written statement or taking any other steps in the proceedings It has been held under the English Arbitration Act 1889 that were the defendant did not know what was the subject matter of the action and asked for a statement of claim the mere request for the statement of claim was not a step in the proceedings (v) But where the defendant was unaware that the contract contained an arbitration clause and asked

(r) [191] 3 K B 257 268 70

(s) *Appayu v Seen* (1918) 41 Mad 115 4 I C 514 *Sh o B [illegible] v [illegible]* (1914) 1 All L J 757 4 I C 490 [illegible] ma (19[illegible]) 26 C W N 967 69 I C 863 (23) A [illegible] 13 Cf also *Doleman and Sons v Ossett Corporation* [191] 3 K B [illegible] *D bandh v Darya [illegible]* (1919) 46 Cal 1041 51 I C 80 *[illegible] mprasad v M han lal* (1920) 47 Cal 7 60 I C 89 [illegible] A [illegible] 770 *Ramprasad v Moha [illegible]* (19 0) 47 Cal 75 60 I C 89 [illegible] As soon as the suit is instituted [illegible] tribunal becomes *functus* [illegible] (*f* also [illegible] *Lal* [illegible] 44 All 2[illegible] 6 I C 79 ([illegible]) A [illegible] (a case under the India Arbitration Act) [illegible]

(t) [illegible] (19[illegible]) 6[illegible] 60 I C 863 ('23) A C 135

(u) J *Narain Bibi Lal v Narai* (192[illegible]) 3 L[illegible] 96 69 I C 8[illegible] ('2[illegible]) A L 369

(v) *Ives v Williams* [1894] Ch 4 8

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for an order of discovery and the order asked for was made it was held that he had taken a step in the proceedings and therefore was not entitled to a stay (*w*)

Institutes any suit —These words show that the present rule refers only to suits instituted *after* the agreement to refer to arbitration has been made *A* sues *B* in respect of certain matters The parties then agree to refer the matters to arbitration Subsequently *A* declines to proceed with the arbitration and writes to *B* that he will proceed with the suit *B* applies for an order staying the suit The Court has no power under this paragraph to stay the suit for the suit was instituted *prior* to the agreement (*x*)

No sufficient cause —The burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not on the defendant to show that no such reason exists (*y*)

May make an order staying the suit —The Court has a *discretion* under this paragraph as to staying a suit instituted by one party to a submission against the other party At the same time it must be remembered that it is the *prima facie* duty of the Court to act upon the agreement between the parties (*z*) If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Court then since that Act of Parliament [that is the Common Law Procedure Act 1854 s 11 which corresponds to the present paragraph] was passed a *prima facie* duty is cast upon the Courts to act upon such an agreement (*a*) If however the arbitration proves abortive the Court may remove the stay and proceed with the trial of the suit (*b*)

Denial of agreement —Where one of the parties denies the agreement to refer set up by the other party it is within the province of the Court to decide whether there is such an agreement (*c*)

Validity of agreement to refer —To bring a case within this paragraph there must be a subsisting agreement to refer capable of being carried into effect A suit therefore cannot be stayed under this paragraph if the submission has been revoked for good cause (*d*) Nor can it be stayed if the original contract containing the arbitration clause is followed by another agreement *materially* altering the original contract for in that case the arbitration clause ceases by virtue of the alteration to have any effect But a mere extension of time for the performance of that which a party under the original contract is bound to perform does not amount to a *material* alteration and the arbitration clause does not cease to operate in such a case (*e*) See Pollock and Mulla's Indian Contract Act notes to s 28

Stay refused —Where an arbitration clause does not cover all the matters in respect of which the suit is brought the Court will not as a rule split the suit into two parts one to be tried by the arbitrator and the other to be tried in Court the Court will in such a case try the whole suit (*f*) Where fraud is charged the Court will in

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(*w*) [illegible] [1918] 1 K B 3 8

(*x*) [illegible] (1904) 33 C [illegible] 19) [illegible] (1910) 34 [illegible] 133 [illegible] cases under Sec 19 of the Arbitration Act

(*y*) [illegible] *Durgaprasad* (1919) 46 Cal 1041 51 I C [illegible] *Hodgson* v [illegible] (188) 9 Q B D [illegible] (19 1) [illegible]

(*z*) In re [illegible] (18[illegible]) 44 C D [illegible] (1 99) 4 [illegible] *Durgaprasad* (1919) 46 Cal 1041 51 I C [illegible]

(*a*) *Willesford* v [illegible] (18 3) L R 8 Ch [illegible] per Lord [illegible]

(*b*) [illegible] (19 1) 45 [illegible] 1191 [illegible] 458

(*c*) [illegible] (191) Punj Rec no [illegible] 508

(*d*) [illegible] *Thompson* (18 6) 1 Q B D [illegible] (1) [illegible] Q B D 1

(*e*) [illegible] (1914) 41 Cal 35 [illegible]

(*f*) [illegible] (1 [illegible]) 43 C D 1[illegible]

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general refuse to refer the dispute to arbitration if the party charged with the fraud desires a public inquiry (*g*)

Presidency Small Cause Court —The Presidency Small Cause Court Bombay has power to stay a suit under this para, by virtue of rules framed under the Presidency Small Cause Courts Act 1882 by the High Court of Bombay (*h*)

Appeal —An appeal lies from an order staying or refusing to stay a suit when there is an agreement to refer to arbitration see s 104 sub-s (1) cl (e)

19 [S 524] The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon

Provisions applicable to proceedings under paragraph 17

Does not apply —This paragraph does not apply to cases to which the Arbitration Act applies See notes to s 89

So far as they are consistent with any agreement filed under paragraph 17 —This paragraph provides that where an order of reference is made under paragraph 17 the provisions of paras 3 to 16 shall apply to all proceedings under the order *only so far as they are consistent with the agreement filed under paragraph 17* Thus under paragraph 8 the Court has the power to extend the period for the making of the award. But if the agreement filed under paragraph 17 provides that the arbitrators shall make their award within a fixed period and that they shall have no power to enlarge the time for making the award, the stipulation in the agreement will prevail to the exclusion of the provision in paragraph 8 But the words so far as they are consistent with any agreement filed under paragraph 17 would not preclude the Court from setting aside an award for misconduct of the arbitrators though there may be a clause in the agreement that the award should be accepted as final (*i*) Nor do they preclude the Court from appointing a new arbitrator under paragraph 5 in place of one who refuses to act provided there is no clause in the submission expressly excluding the power of the Court to make such an appointment (*j*) If the new arbitrator refuses to act the Court may make an order superseding arbitration and such order is not appealable (*k*)

Arbitration without the intervention of a Court

20 [S 525] (1) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction

Filing award in matter referred to arbitration without intervention of Court

(*g*) *Russell* v *Russell* (1880) 14 C.D 471

(*h*) *Tatya* v *Hathibhai* (19–8) 52 Bom 4 0 111 I C 841 (–8) A B 75

(*i*) *Birla* v *Kalapall* (1883) 6 Mad –68

(*j*) *Bala* v *Seetharama* (1894) 17 Mad 49– ; *Ilahi* v *Iraj Narain* (19–) A A 133 ; 5 3 67 I C 739 (–) A A 133

(*k*) *Zaki Ahmed* v *Tasliman-nissa* (19–) All. –7 89 I C. 404 (–) A A 33

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over the subject matter of the award that the award be filed in Court

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant requiring them to show cause, within a time specified, why the award should not be filed

Old section —This paragraph corresponds to s 525 of the Code of 1882 except that in cl (1) the word any Court having jurisdiction over the subject matter of the award have been substituted for the words Court of the lowest grade having jurisdiction over the matter to which the award relates See notes below Court to which *application should be made under this paragraph*

Does not apply —This paragraph does not apply to cases to which the Arbitration Act applies see note to s 89

Pending suit —See notes to para 17 above under the head Agreement to refer to arbitration matters in a pending suit See also notes to O 23 r 3 above Adjustment submission and award

Scope of this and subsequent paragraph —The present paragraph and paragraph 21 refer to cases where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award (*l*)

This paragraph is no bar to a regular suit to enforce an award —Under the corresponding section 525 of the Code of 1882 it was held that a party interested in an award may *at his option* avail himself of the summary remedy provided by that section to enforce the award or he may bring a regular suit to enforce the award (*m*) There is nothing in the present Code to preclude such a suit Rather such a suit is saved by s 89 as appears from the words save in so far as is otherwise provided by any other law for the time being in force (*n*) See notes to para 21 below Res judicata

A valid award constitutes a bar to a suit on the original demand —An award duly passed in accordance with the submission of the parties is equivalent to final judgment Hence if an award is made for a partition of joint property no party to the reference can *sue* for partition. The award is an answer to the suit though no decree may have been passed on the award (*o*)

Court to which application should be made under this paragraph —It is the subject matter of the *award* and not the subject matter of the *reference* that determines the jurisdiction of the Court under the present paragraph. Under the old section the application to file the award had to be made to the Court of the lowest grade having jurisdiction over the matter to which the award relates and these words were held by the High Court of Calcutta to mean the Court of the lowest grade having jurisdiction over the subject matter of the *reference* (*p*) The words subject matter

(*l*) *Gh l m Kh* v *Muh mm d H san* (1902) 29 Cal 167 18 29 I A 51

(*m*) *S blarava* v *Sada na* (1897) 20 Mad 490 *Bh jha* v *B h ry Lal* (1906) 33 Cal 881

(*n*) *Nathu Mal* v *Muh mmad Sh f* (1917) Punj Rec no 1 p 44 at p 48 39 I C 349

(*o*) *K hna* v *Bala m* (1896) 19 Mad 290 *Bhajaha* v *B hary Lal* (1906) 33 Cal 881 *M hammad N waz Khan* v *Alam Khan* (1891) 18 Cal 414 18 I A 73

(*p*) *Na gh Das* v *Ajodhya* (1904) 31 Cal 903

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of the award have been substituted in this paragraph for the words matter to which the award relates to make it clear that an application under this paragraph may be made to any Court having jurisdiction over the subject matter of the award. So when the subject matter of an award was the management and control of three temples in the district of Berar and the question of the application of the revenue was between members of the founder s family not resident in Berar the Privy Council held that the District Judge of Berar has no jurisdiction to entertain an application to file it (q)

Limitation —The application under this paragraph should be made within 6 months from the date of the award Limitation Act 1908 sch I art 1 8 (r). The date of the award means not the date the award bears but the date on which it was given to the parties (s) i e the date of publication (t) The application is not a suit and therefore the applicant cannot claim the benefit of section 6 of the Limitation Act ( ) See notes to para 17 above Numbered and registered as a suit

Where an award is delivered in parts —If the agreement to refer provides that the matter in dispute may be taken up and dealt with *seriatim* and that the award may be delivered bit by bit each portion decided may be dealt with as a distinct award under this paragraph (u)

Lost award —When an award has been lost the procedure of this rule cannot be resorted to and the parties must be referred to a regular suit (w)

Where any matter has been referred to arbitration —*Do the words any matter refer only to a matter in respect of which a suit can be entertained by a Court under s 9 of the Code ?*—This paragraph provides that when *any matter* has been referred to arbitration without the intervention of a Court and an award has been made thereon any person interested in the award may apply that the award be filed in Court. Paragraph 21 provides for the passing of a decree on the award But what if *the matter* referred to arbitration is one as to which a Civil Court has no jurisdiction to entertain a suit under s 9 of the Code *e g* disputes about *man pan* and an award is made thereon Has the Court jurisdiction to file such an award and pass a decree thereon under paragraph 21 ? It has been held by the High Court of Bombay that it has and that it is not against the policy of the law to give effect to such awards (x) The result is that rights which are not at all civil rights may be the subject matter of an arbitration and award and of the decree of a Civil Court It would be interesting to know how the decree if disobeyed would be enforced However this may be it is clear that if a matter is such that on grounds of public policy it can be disposed of only by a Court it cannot be the subject of a reference and if such a matter is referred and an award is made the Courts should refuse to pass a decree thereon. Thus the right to succeed to the trusteeship of a *public* charitable trust is not a right which can be settled by *arbitration* A Court therefore has no jurisdiction to entertain an application to file an award in such a matter under this paragraph (y)

Numbered and registered as a suit —See notes to para 17 under the same head The Bombay High Court has held that the application when numbered and registered as a suit becomes a suit for the purpose of O 38 and the Court has jurisdiction to direct attachment before judgment ( )

(q) *Amlal v Ka ha ch* (19 4) 51 C 361 51 I A 83 I C 534 (4) A I C 9
( ) S *I m l g h* *hraj Nath* (1915) 38 All 8 91 31 I C 899
(s) *D ll* *S gh v Dos* *B h d r* (1883) 9 Cal 57
(t) *A j Lall v I a wa s Lall* (1919) 4 P t I J 354 48 I C 711
( ) *M The I n v Ma g l a* (19 3) 1 Ra g 6 81 I C 493 (3) A R 6
(v) *Shaik* *Ebi* *Nob n Ch nd* (1) C L R 9
(w) *M d Khal ja v* *Ghulam Nab* (19) 1 Lal 45 55 I C 815
(x) *I gha enl a v G r rao* (1913) 3 *B m* 10 1 C 8
(y) *M h mmad Ibrah m v Ahmad* (19) 12 603 61 C 19
(z) (*d v I kal* *h* (19) 49 B m L R 35 101 I C 43 (7) A B

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21 [s 526] (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award

Filing and enforcement of such award

(2) Upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award

Points of distinction between s 256 of the Code of 1882 and this paragraph —

1 The words where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon have been added into cl (1) to negative the view held by the High Court of Bombay under the old section that the Court had no power to determine questions relating to the factum and validity of the agreement to refer and of the award and to give effect to the view held by the other High Courts See notes below Where the Court is satisfied that the matter has been referred to arbitration &c

The word proved has been substituted for the word shown In fact it was held under the old section that the word shown meant proved (a) See notes below under the head Proved

Does not apply —This paragraph does not apply to cases to which the Arbitration Act applies See notes to s 89

When the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon —These words are new In the absence of these words in the corresponding section of the Code of 1882 it was held by the High Court of Bombay that if an application was made under that section to file an award and the other party raised objections to the factum or validity of the submission and award the Court has no jurisdiction to inquire whether the parties had or had not referred the matters in dispute to arbitration and should therefore reject the application and refer the applicant to a regular suit to enforce the award (b) On the other hand the High Courts of Allahabad (c) Calcutta (d) and Madras (e) held that the Court had the power under that section to determine all questions relating to the existence and validity of the alleged agreement to refer and of the award and that the applicant must not be referred to a separate suit The present paragraph supersedes the Bombay decisions and gives effect to the decisions of the other High Courts

Proved —It is not sufficient to allege grounds of objections under paras. 14 and 15 It is necessary that the grounds of objection should be *proved* See notes above under the head Points of distinction etc

(a) *J* ... *v* ... *Lal* (1904) 16 All 31; ... *v* *Mathurabh* (1904) 8 Bom ...
(b) *T* ... *v* *M* ... (1906) ... Bom 596
(c) ... *v* ... (189..) ... All ...
( ) ... *v* ... (1906) 28 All ...
(d) *Mahomed v H* ... (19..) 25 Cal ...
(e) ... *v* *Thad* ... *reddy* (19..) ... Mad ...

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Grounds of objection under paras 14 and 15—Where a matter has been referred to arbitration *under an order of the Court* the Court has power in the cases mentioned in para 14 to remit the award to the reconsideration of the arbitrator Thus if an award determines any matter not referred to arbitration the Court may remit the award under para 14 and if such matter can be separated without affecting the determination of the matters referred the Court may amend the award by striking out that portion of the award which is in excess of the reference and enforce the award as to the rest of it In the case however of an arbitration *without the intervention of the Court* [paras 20 21] the High Courts have held in a series of cases that if the award determines matters outside the scope of the reference the Court must refuse to file the award even when the matter not referred can be separated from that which was referred the reason given being that the Court had under this para only two courses open to it, namely to file the award or refuse to file it and that it had no power to remit or amend the award (*f*) This however is incorrect for para 21 refers to para 14 where the principle of separation is recognised. The point is concluded by the decision of the Privy Council (*g*) that the part of the award which is good should be filed and the remainder that is bad rejected

An arithmetical error according to the Allahabad High Court does not render the award invalid (*h*) But the Lahore High Court has held that the Judge has no power to correct an arithmetical mistakes even with the consent of the parties affected the reason given being that a Court acting under this paragraph must either file the award as it is or refuse to file it (*i*) But this is inconsistent with the Privy Council ruling referred to above

Award made after long delay—Where the agreement to refer was made in 1905 and the award was not made until 1910 and the Court came to the conclusion that it would probably not have been made at all but for one of the parties having brought a criminal complaint against one of the arbitrators the Court refused the application to file the award. The Court presumed from the circumstances of the case that the reference had been abandoned (*j*)

Award made after revocation of submission—An award made after the agreement to refer has been revoked by one of the parties thereto for good cause cannot be filed under this paragraph (*k*)

Appeal—An appeal lies from an *order* under this paragraph filing or refusing to file an award [s 104 sub s (1) cl (*f*)] even though no express order is made (*l*) But no appeal lies from the order passed on appeal (*m*) see s 104 (2) (*n*) But s. 104 refers to

(*f*) *Allarakhia* v *Jehangir* (1873) 10 Bom H C 391 *Mustafa Khan* v *Phulja Bibi* (190) 27 All 5 6 *D d ka* v *D d l* (188) 6 Bom 663 *Mana* v *Malli hery* (1890) 3 Mad 68 *Th ru engada Thieng* v *I aid natl* (1906) 9 Mad 303 *Dinabandh* v *Ch t mo i* (1914) 19 C W N 476 26 I C 696 *Au j Lall* v *Ba a i Lall* (1919) 4 Pat L J 394 401-40 48 I C 711 *Dha pat R i* v *Fak n Devi* (1914) Punj Rec no 30 p 108 23 I C 4

(*g*) *B ta* v *M cipal Committee of Lahore* (190) 29 Cal 854 9 I A 168 *Am Begum* v *P irudd n H sa* (1914) 36 All 336 23 I C 6 5 followed in *Sha kh Mahomed* v *Sheikh Abdul I ah m* (1925) 4 L 6 0 93 I C 61 (2) A I 810

(*h*) *Sham Lal* v *Pu hottam Das* (1900) 4 All 7 59 I C 585

(*i*) *Mohammad Afzul* v *Abd l Ham d* (1925) 7 Lah L J 463 85 I C 161 (25) A L.

570

(*j*) *Muhammad Fa an Kha* v *S d r Begam* (1919) Punj Rec no 71 p 17 54 I C 847

(*k*) *Sh hem khi* v *Nob n Chu der* (1) 4 C L R 9

(*l*) *Shankar D s* v *Amirch d* (1925) 7 Lah L J 91 88 I C 533 ( ) A L 5 *J nd* v *Sarw Lande* (19) 4 All 4 88 I C 6 (5) A A 434

(*m*) *Ahm l D* v *Alla Trad g Co* (19 5) P R no 66 p 7 31 I C 80

(*n*) *Khettra Nath* v *I shabala* (1913) 18 C W N 381 I C 391 *oudom* (1914) 19 C W N 914 I C 55 3 *Lakhmi* (1916) 38 All 34 33 I C 833 *I m D* v *Am* (19) Punj Rec no 1 3 p 10 I C 51 *Lachmi Nara n* v *Nath* (19) 4 All 18 54 I C 415 *Sarwan Land* (1925) 47 All 712 I C 6 (25) A A 406

appeals within British India and does not take away the right of appeal to Privy Council given by section 109 (o) Again though an appeal lies from an *order* made under the paragraph no appeal lies from a *decree* passed on an award except in so far as the decree is in excess of or not in accordance with the award (p) [see sub para (2)] But is the right of appeal lost if the decree on the award is passed before the appeal is preferred from the order? It has been held that it is not and it has been further held that if the appellate Court sets aside the order it is competent also to declare that the decree based on the order is vacated (q) See notes to para 15 above Award made after expiration of period allowed by the Court

The making of a decree is no bar to an application to restore a petition of objection which has been dismissed for default of appearance (r) A applies to file an award under para 20 *B* objects to the filing of the award on certain grounds On the date fixed for the hearing of the objections *B* does not appear Thereupon his objections are disallowed and an *ex parte* decree is passed against *B* in accordance with the award *B* thereupon applies under O 9 r 13 to set aside the *ex parte* decree and to hear his objections to the award The application is rejected *B* then appeals from the order rejecting the application. Is the order appealable? Yes it is appealable under O 43 r 1 (d) by which it is provided that an appeal lies from an order rejecting an application for an order to set aside an *ex parte* decree *in a case open to appeal* The case is one open to appeal for the question between the parties was whether or not the award should be filed as a decree of the Court and any *order* made upon it would be appealable under s 104 sub s (1) cl (f) (s)

Res judicata—It has been held by the High Court of Allahabad that the refusal of a Court to file a private award on the ground of misconduct of the arbitrator does not operate as *res judicata* in respect of a suit subsequently brought to enforce the award the reason given being that the doctrine of *res judicata* pre supposes a former *suit* and a decree in that suit and that the order of refusal is not a decree but merely an order (t) This decision has been followed by the Bombay High Court (u) The Calcutta High Court has held that the bar of *res judicata* would only apply to grounds of objection referred to in paras. 14 and 15 heard and finally decided (v)

Withdrawal of suit—The fact that an application has been made under para 20 does not preclude the applicant from withdrawing the application under O 23 r 1 at any time *prior* to the pronouncement of judgment and preparation of the decree

(o) *Ramlal v K h hand* (19 4) 51 I A 51 Cal 361 83 I C 534 (4) A PC 5

(p) *Bahadur S gh v Nega Pu S gh* (1908) 30 All 151 *A lsum v Ali Akbar* (191) 30 All 401 411 30 I C 30 *Ma g Tun v M g I o* (19 3) 1 Rang 65 6 I C 504 (3) A R 199

(q) *Shaikh M hammad v Sh ikh Abd l* (19 5) 4 l t 6 0 93 I C 61 (‘25) A P 810 *Ja t v rna* (19 5) 47 All 743 83 I C 6 (’25) A A 404 See 19 C. W N 948 8 I C 557 and other cases cited in f n (k)

(r) *Mak d Ram v Naubat S gh* (19‘0) 18 All L J 56 57 I C 900

(s) *N hal S gh v Khushhal S gh* (1916) 38 All 297 33 I C 80 *M habi Prasad v Ralki v Da* (1922) 1 Pat 48 6 I C 9 ( ) A P 376

(t) *Kunj Lal v D rga Prasad* (1910) 3 All 434 6 I C 1‘7 *H rakh Ram v Lal hmi Ram* (1920) 43 All 108 60 I C 676

(u) *Ramal v Mard* (19‘1) 45 Bom 329 59 I C 5 (‘1) A B 3 *r Abd l A iz v Chand* (19 5) 27 Bom L R 6 89 I C 68 (5) A B 418

(v) *Guru Ch ran v Um Charan* (19 1) 26 C W N 940 70 I C 985

Arbitration

Sch II, paras 21-23

It is true that a suit alone can be withdrawn under O 23 r 1 but an application filed under para 20 is numbered and registered as a *suit* (w)

22 [*New Cf* **Arbitration Act 9 of 1899 s 3**] The last thirty seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration or to any award to which the provisions of this Schedule apply

Exclusion of certain words in the Specific Relief Act 1877

Last thirty seven words of sec 21 of the Specific Relief Act—The said words are— but if any person who has made such a contract [that is a contract to refer to arbitration] and has refused to perform it sues in respect of any subject which he has contracted to refer the existence of such contract shall bar the suit These words have been omitted in view of the provisions of para 18 above

23 [*New*] The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be issued for the respective purposes therein mentioned

Forms

(w) *Gauri Shankar* v *Maida Koer* (1904) 31 Cal 516

APPENDIX

No 1

Application for an Order of Reference

(Title of suit)

1 This suit is instituted for (*state nature of claim*)

2 The matter in difference between the parties is (*state matter of difference*)

3 The applicants being all the parties interested have agreed that the matter in difference between them shall have referred to arbitration

4 The application therefore apply for an order of reference

A B
C D

Dated the day of 19

Note —If the parties are agreed as to the arbitrators it should be so stated

---

No 2

Order of Reference

(Title of suit)

Upon reading the application presented on the day of 19 it is ordered that the following matter in difference arising in this suit namely —

---

be referred for determination to X and Y or in case of their not agreeing then to the determination of Z who is hereby appointed to be umpire and such arbitrators are to make their award in writing on or before the day of 19 and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within months after the time during which it is within the power of the arbitrators to make an award shall have ceased

Liberty to apply

Given under my hand and the seal of the Court this day of 19

Judge

No 3

Order for Appointment of New Arbitrator

(Title of suit)

Whereas by an order dated the day of 19 [*state order of reference and death refusal etc of arbitrator*] it is by consent ordered that

Arbitration

Sch II

Z be appointed in the place of *X* deceased (or as the case may be) to act as arbitrator with *Y* the surviving arbitrator under the said order and it is ordered that the award of the said arbitrators be made on or before the day of 19

Given under my hand and the seal of the Court this day of 19

Judge

No 4

SPECIAL CASE.

(*Title of suit*)

In the matter of an arbitration between *A B* of and *C D* of the following special case is stated for the opinion of the Court —

[*Here state the facts concisely in numbered paragraphs*]

The question of law for the opinions of the Court are —

First whether ________________________________

____

Secondly whether ________________________________

____

X
Y

Dated the day of 19

No 5

AWARD

(*Title of suit*)

In the matter of an arbitration between *A B* of and *C D* of —

WHEREAS *in pursuance of an order of reference* made by the Court of and dated the day of 19 the following matter in difference between *A B* and *C D* namely ________________________________

____

has been referred to us for determination

Now we having duly considered the matter referred to us do hereby make our award as follows —

We award—

(1) that ________________________________

(2) that ________________________________

Dated the day of 19

X
Y

THE THIRD SCHEDULE

Execution of Decrees by Collectors

1 [S 321] Where the execution of a decree has been transferred to the Collector under section 68, he may—

Powers of Collector

(a) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment debtor to raise the amount of the decree or

(b) raise the amount of the decree by letting in perpetuity, or for a term on payment of a premium or by mortgaging the whole or any part of the property ordered to be sold, or

(c) sell the property ordered to be sold or so much thereof as may be necessary

Clause (a)—See O 21 r 83

Payment by instalments—A Collector to whom a decree for sale of mortgage property has been transferred for execution under s 68 is limited to one of the three courses specified in this paragraph and may not depart from them much less may he do what the Court itself could not do in such a case—allow payment of the debt to be made by instalments (a) Nor has the Collector jurisdiction when mortgaged property is sold under O 34 r 12 free of a prior mortgage encumbrance to settle accounts as to what is due on each mortgage (b) When the Collector receives sale proceeds they are assets held by the Court and so an application for ratable distribution must be made before receipt of sale proceeds by the Collector (c)

2 [S 325] Where the execution of a decree, not being a decree ordering the sale of immovable property in pursuance of a contract specifically affecting the same but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immovable property, has been so transferred the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment debtor can be discharged without a sale of the whole of his available immovable property, may proceed as hereinafter provided

Procedure of Collector in special cases

(a) *Mahadaji v Hari* (1883) 7 Bom 332
(b) *Abdul Ishak v Muhammad Matad...* (1924) 46 All 414 78 I C 429 (1924) A A 30
(c) *Dattatraya v Pundlik* (1920) 22 Bom L R 1001 58 I C 992

Execution by Collectors

Sch III, paras 3, 4

3 [S 322 A] (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

Notice to be given to decree holders and to persons having claims on property

(a) every person holding a decree for the payment of money against the judgment debtor capable of execution by sale of his immovable property and which such decree holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder,

(b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced

(2) Such notice shall be published by being affixed on a conspicuous part of the Court house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit, and where the address of any such decree holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise

Power of Collector to hear objections to execution of decree transferred to him for execution —Where a decree for money is transferred for execution to the Collector under s 68 he is not authorized under this paragraph to hear any objection by the parties interested in the property advertised for sale to the sale of that property nor is it any part of the Collector's duty to decide whether the property has or has not been properly attached (*d*)

4 [S 322 B] (1) Upon the expiration of the said period the Collector shall appoint a day for hearing any representations which the judgment debtor and the decree holders or claimants (if any) may desire to make and for holding such inquiry as he may deem

Amount of decrees for payment of money to be ascertained and immovable property made available for their satisfaction

(*d*) Unk r ... gh v Mah ... K r (1 ...) 20 All 42...

necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment debtor's immovable property, and may from time to time, adjourn such hearing and inquiry

Sch par 4.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment debtor to any of the decrees or claims of which the Collector is informed or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immovable property available for that purpose

(3) Where any such dispute arises the Collector shall refer the same with a statement thereof and his own opinion thereon to the Court which made the original order for sale, and shall pending the reference, stay proceedings relating to the subject thereof The Court shall dispose of the dispute if the matter thereof is within its jurisdiction or transmit the case to a competent Court for disposal and the final decision shall be communicated to the Collector who shall then draw up a statement as above provided in accordance with such decision

5 [S 322 C] The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4 draw up a statement specifying the circumstances of the judgment debtor and of his immovable property so far as they are known to the Collector or appear in the records of his office and forward such statement to the District Court, and such Court shall thereupon issue the notices hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector

[illegible]

6 [S 322D] The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall as between the parties thereto have the force of and be appealable as a decree

[illegible]

Execution by Collectors

Sch III, para 7

7 [S 323] (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

Scheme for liquidation of decrees for payment of money

(a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property, or,

(b) if it appears that the amount with interest (if any) in accordance with the decree and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—

(i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property, or

(ii) by mortgaging the whole or any part of such property, or

(iii) by selling part of such property, or

(iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale, or

(v) partly by one of such modes, and partly by another or others of such modes

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing or for preserving the property from sale in satisfaction of an incumbrance the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property

which he deems sufficient If any disputes arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time be made in this behalf by the Local Government

The words Local Government have been substituted for the words Chief Controlling Revenue Authority which occurred in the corresponding s 323 C P C 1882

8 [S 324] Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor, or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property, and if on the expiration of the said six weeks, the said balance is not so paid, the Collector shall sell such property or part accordingly

Recovery of balance (if any) after letting or management

Mortgage —Instead of selling the Collector may mortgage the property (e)

9 [S 324A] (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court

Collector to render accounts to Court

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the

(e) *Jechanso v Naran Mot* (19"5) ° Bom L R 21 &0 I C 816 ("5) A B °

Execution by Collectors

Sch III, para 9 property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him

(3) The balance shall be applied by the Court—

(a) in providing for the maintenance of such members of the judgment debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit, and,

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immovable property, or otherwise as the Court may under section 73 direct, or

(c) where the Collector has proceeded under paragraph 2,—

(i) in keeping down the interest on incumbrances on the property,

(ii) where the judgment debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit, and

(iii) in discharging rateably the claims of the original decree holder and any other decree holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment debtor or such other person as the Court directs

Accounts—The Collector though bound to render accounts under this paragraph cannot be compelled to give up the account books in Court nor does this paragraph require him to pay the balance into Court (f)

(f) [illegible] (1904) 6 Bom L R [illegible]

Charges—In Bombay the Collector is entitled to deduct fees according to the scale prescribed in case of sales by the Land Revenue Code and the Civil Court will make a further deduction on account of poundage from the balance of the sale proceeds (g)

10 [S 325] Where the Collector sells any property under this Schedule he shall put it up to public auction in one or more lots, as he thinks fit and may—

Sales how to be conducted

(a) fix a reasonable reserved price for each lot,

(b) adjourn the sale for a reasonable time whenever, for reason to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property,

(c) buy in the property offered for sale, and re sell the same by public auction or private contract, as he thinks fit

11 [S 325 A] (1) So long as the Collector can exercise or perform in respect of the judgment debtor s immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment debtor or his representative in interest shall be incompetent to mortgage, charge lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money

Restrictions to alienation by judgment debtor or his representative and prosecution of remedies by decree holders

(2) During the same period no Civil Court shall issue any process of execution either against the judgment debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree holder has been temporarily deprived

(g) Syed Mahmad v Thakurlal (19 6) 28 Bom. L.R 590 9 I C 365 (6) A.I.R. 355 | Narayan v Laxman (19 ?) ? Bom L.R 1191 ?? I C (?) A.I.R 1

Execution by Collectors

Sch III, paras 11-13

Incompetent to mortgage —A mortgage by a judgment debtor of his property while it is under the management of the Collector to whom decrees against the judgment debtor have been transferred for execution is absolutely void and not merely void as against the Collector and those claiming under him (h)

Alienate —The word alienate in this paragraph contemplates a transfer which is to take effect immediately and not after death. It does not therefore include a disposition of property by will (i)

Alienation subsequent to certification of adjustment—An intimation by a decree holder to the Collector to whom the decree is transferred for execution that his claim under the decree has been satisfied by the judgment-debtor and the record of such intimation by the Collector amounts to a due certifying of the adjustment of a decree within the meaning of O 21 r 2 After the adjustment has been so certified the prohibition against alienation imposed by this paragraph no longer subsists, and it is competent to the judgment debtor to mortgage sell or alienate his property (j)

Limitation—When the property of the judgment-debtor was taken under management by the Collector and released more than 12 years after the date of the decree that period was excluded in the computation of limitation both under the Limitation Act and section 48 of the Code (k)

Provision where property is in several districts

12 [S 32 B] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct

Powers of Collector to compel attendance and production

13 [S 32 C] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents

(h) *Gaurishankar* v *Chinnumiya* (1918) 45 I A 19 46 Cal. 183 49 I C 31, dissenting from *Magniram* v *Bakubai* (191) 36 Bom 510 16 I C 5 0 *Ramkisan Singh* v *Maham mad* (1923) 3 C W N 114 109 I C 574 ('23) A PC 16 The observation at the end of the judgment in *Ganga Prasad* v *Ganga Baksh* (190) 29 All. 415 can no longer be supported since the decision in *Gaurishankar's case*

(i) *Muhammad* ... v *Muhammad* ... (1910) 33 All. 33 8 I C 831

(j) *Kushalchand* v *Nandram* (1911) 35 Bom ... 1 I C 5..

(k) *Shavam Keram* v *Collector of Benares* (...) 4 All. 119 5 I C 4..

THE FOURTH SCHEDULE

(*See Section* 155)

ENACTMENTS AMENDED

1	2	3	4
Year	No	Short title	Amendment
1870	VII	The Court Fees Act 1870	In article 1 of Schedule I after the word plaint the words written statement pleading a set off or counter claim and after the word Act the words or of cross objection shall be inserted. From article 11 of Schedule II the words from an order rejecting a plaint or shall be omitted For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted namely — Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure 1908

Execution by Collectors

Sch III, paras 11-13

Incompetent to mortgage —A mortgage by a judgment debtor of his property while it is under the management of the Collector to whom decrees against the judgment debtor have been transferred for execution is absolutely void and not merely void as against the Collector and those claiming under him (h)

Alienate —The word alienate in this paragraph contemplates a transfer which is to take effect immediately and not after death. It does not therefore include a disposition of property by will (i)

Alienation subsequent to certification of adjustment—An intimation by a decree holder to the Collector to whom the decree is transferred for execution that his claim under the decree has been satisfied by the judgment-debtor and the receipt of such intimation by the Collector amounts to a due certifying of the adjustment of a decree within the meaning of O 21 r 2 After the adjustment has been so certified the prohibition against alienation imposed by this paragraph no longer subsists, and it is competent to the judgment debtor to mortgage sell or alienate his property (j)

Limitation—When the property of the judgment debtor was taken under management by the Collector and released more than 12 years after the date of the decree that period was excluded in the computation of limitation both under the Limitation Act and section 48 of the Code (k)

Provision where property is in several districts

12 [S 325 B] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct

Powers of Collector to compel attendance and production

13 [S 325 C] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of document

(h) *Gaurishankar* v *Ch maya* (1918) 45 I A 219 46 Cal 183 48 I C 31, dissenting from *Maganram* v *Bakubai* (191) 36 Bom 510 16 I C 6 0 *Ramkisan Singh* v *Maham mad* (19-8)3 C W N 1149 100 I C 574 (28) A I C 16 The observation at the end of the judgment in *G nga Prasad* v *G nga Baksh* (190) 29 All 415 can no longer be supported since the decision in *G rishank* r case

(i) *M hammad S y d* v *Muhammad Imad* (1910) 33 All 33 8 I C 831

(j) *Kushal hand* v *Nandram* (1911) 35 Bom 14 I I C 5—

(k) *Shayam Karam* v *Collector of Etawah* (19) 4 All 118 5 I C 4—

THE FOURTH SCHEDULE

(*See Section* 155)

ENACTMENTS AMENDED

1	2	3	4
Year	*No*	*Short title*	*Amendment*
1870	*VII*	*The Court Fees Act 1870*	*In article 1 of Schedule I after the* word plaint the words written statement pleading a set off or counter claim and after the word Act the words or of cross objection shall be inserted. From article 11 of Schedule II the words from an order rejecting a plaint or shall be omitted. For the entry in the first column of Schedule II relating to article 10 the following entry shall be substituted namely — Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure 1908

APPENDIX I

The High Courts Act or the Charter Act, 1861

An Act for Establishing High Courts of Judicature in India (a)

(24 & 25 Vict, C 104), [*6th August* 1861]

[Repealed and re enacted with slight modifications by the Government of India Act 1915]

Be it enacted by the Queen s Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows —

High Court may be established in the several Presidencies of India

1 It shall be lawful for Her Majesty by Letters Patent under the great Seal of the United Kingdom to erect and establish a High Court of Judicature at *Fort William* in *Bengal* for the *Bengal* Division of the Presidency of *Fort William* aforesaid and by like Letters Patent to erect and establish like High Courts at *Madras* and *Bombay* for those Presidencies respectively Such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency or such other time as in such Letters Patent may be appointed in this behalf

Constitution of High Court

2 The High Court of Judicature at *Fort William* in *Bengal* and at the Presidencies of *Madras* and *Bombay* respectively shall consist of a Chief Justice and as many Judges not exceeding fifteen as Her Majesty may from time to time think fit and appoint who shall be selected from—

1st Barristers of not less than five years standing or

2nd Members of the Covenanted Civil Service of not less than ten years standing and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period or

3rd Persons who have held judicial Office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years or

4th Persons who have been Pleaders of a Sudder Court or a High Court for a period of not less than ten years if such Pleaders of a Sudder Court shall have been admitted as Pleaders of a High Court

Provided that not less than one third of the Judges of such High Courts respectively including the Chief Justice shall be Barristers and not less than one third shall be Members of the Covenanted Civil Service

(a) By the term of thi[illegible] A[illegible] the [illegible] of jurisdiction in any part of Her Majesty [illegible] tork [illegible] by the High Court [illegible] meant to be subject to and not exclusive of the general legislative [illegible] of the Governor General in Council An[illegible] of legislative authority by the [illegible] Council whereby any place or territory is removed from the jurisdiction of the High Court [illegible] contemplated by this Statute and by the Letters Patent [illegible] under it—*Empress* v *B*[illegible] [illegible]

3 Provided always that the persons who at the time of the establishment of such High Court in any of the said Presidencies are Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency shall be and become Judges of such High Court without further appointment for that purpose and the Chief Justice of such Supreme Court shall become the Chief Justice of such High Court

Certain existing Judges herein named to be the first Judges of the High Courts

4 All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty s pleasure provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor General of *India* in Council or Governor in Council of the Presidency in which such High Court is established

Tenure of Office of High Courts

5 The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court and except as aforesaid all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their Patents

Precedence of Judges of High Court

6 Any Chief Justice or Judge transferred to any High Court from the Supreme Court shall receive the like salary and be entitled to the like retiring pension and advantage as he would have been entitled to for and in respect of service in the Supreme Court if such Court had been continued his service in the High Court being reckoned as service in the Supreme Court and except as aforesaid it shall be lawful for the Secretary of State in Council of *India* to fix the salaries allowances furloughs retiring pensions and (when necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act and from time to time to alter the same Provided always such alterations shall not affect the salary of any Judge appointed prior to the date thereon

Salaries &c of Judges of the High Court

7 Upon the happening of a vacancy in the office of Chief Justice and during any absence of a Chief Justice the Governor General in Council or Governor in Council as the case may be shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court and has entered on the discharge of the duties of such office or until the Chief Justice has returned from such absence and upon the happening of a vacancy in the office of any other Judge of any such High Court and during any absence of any such Judge or on the appointment of any such Judge to act as Chief Justice it shall be lawful for the Governor General in Council or Governor in Council as the case may be to appoint a person with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court and has entered on the discharge of the duties of such office or until the absent Judge has returned from such absence or until the Governor General in Council or Governor in Council as aforesaid shall see cause to cancel the appointment of such acting Judge

Provision for vacancy of the office of Chief Justice or other Judge

High Courts Act

Abolition of Supreme Courts and Sudder Court

8 Upon the establishment of such High Court as aforesaid in the Presidency of *Fort William* in *Bengal* the Supreme Court and the Courts of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at *Calcutta* in the same Presidency shall be abolished

And upon the establishment of such High Court in the Presidency of *Madras* the Supreme Court and the Court of the Sudder Adawlut and Foujdarry Adawlut in the same Presidency shall be abolished

And upon the establishment of such High Court in the Presidency of *Bombay* the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Foujdary Adawlut in the same Presidency shall be abolished

And the records and documents of the several Courts so abolished in each Presidency shall become and be records and documents of the High Court established in the same Presidency

Jurisdiction and powers of High Courts

9 Each of the High Courts to be established under this Act shall have and exercise all such Civil Criminal Admiralty and Vice Admiralty Testamentary Intestate and Matrimonial Jurisdiction original and appelllate and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as Her Majesty may by such Letters Patent as aforesaid grant and direct subject however to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of *India* in Council the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

Subject and without prejudice to legislative powers of the Governor General in Council—See notes to cl. 44 of the Letters Patent *infra*

High Court to exercise same jurisdiction as Supreme Courts.

10 *Until the Crown shall otherwise provide under the powers of this Act all jurisdiction now exercised by the Supreme Courts of Calcutta Madras and Bombay respectively over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at Fort William Madras and Bombay shall be exercised by such High Courts respectively*

Repealed by 28 Vict c 15 s 2

Existing provisions applicable to Supreme Courts to apply to High Courts

11 Upon the establishment of the said High Courts in the said Presidencies respectively all provisions then in force in *India* of Acts of Parliament or of any Orders of Her Majesty in Council or Charters or of any Acts of the Legislature of *India* which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at *Fort William* in *Bengal Madras and Bombay* respectively or to the Judges of those Courts shall be taken to be applicable to the said High Courts and the Judges thereof respectively so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers in relation to the matters aforesaid of the Governor General of *India* in Council.

12 From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof and such proceedings and all previous proceedings in the said last mentioned Courts shall be dealt with as if the same had been had in the said High Court save that any such proceedings may be continued as nearly as circumstances permit under and according to the practice of the abolished Courts respectively

Provisions as to pending proceedings in abolished Courts

13 Subject to any laws or regulations which may be made by the Governor General in Council the High Courts established in any Presidency under this Act may by its own rules provide for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice

Power to High Courts to provide for exercise of jurisdiction by single Judges or Division Courts

14 The Chief Justice of each High Court shall from time to time determine what Judge in each case shall sit alone and what Judges of the Court whether with or without the Chief Justice shall constitute the several Division Courts as aforesaid.

Chief Justice to determine what Judge shall sit alone or in the Division Courts

15 Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction and shall have power to call for returns and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts and also to prescribe forms for every proceeding in the said Court for which it shall think necessary that a form be provided and also for keeping all books entries and accounts to be kept by the officers and also to settle tables of fees to be allowed to the Sheriff Attorneys and all clerks and officers of Courts and from time to time to alter any such rule or form or table and the rules so made and the forms so framed and the tables so settled shall be used and observed in the said Courts provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force and shall before they are issued have received the sanction in the Presidency of *Fort William* of the Governor General in Council and in *Madras* or *Bombay* of the Governor in Council of the respective Presidencie

High Court to superintend and to frame rules of practice for Subordinate Courts

16 It shall be lawful for Her Majesty if at any time hereafter Her Majesty sees fit so to do by Letters Patent under the Great Seal of the United Kingdom to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in *India* not included within the limits of the local jurisdiction of another High Court to consist of a Chief Justice and of such number of other Judges with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned as Her Majesty from time to time may think fit and appoint and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction powers and authority as under this Act is authorized to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and subject to the directions of such Letters Patent all the provisions of this Act having reference to the High Court established in any such Presidency and to the Chief Justice and other

Her Majesty may establish a High Court in the North Western Provinces

High Courts Act

Judges of such Court and to the Governor General or Governor of the Presidency in which such High Court is established shall as far as circumstances may permit be applicable to the High Court established in the said territories and to the Chief Justice and other Judges thereof and to the person administering the Government of the said territories

17 It shall be lawful for Her Majesty if Her Majesty shall so think fit at any time within three years after the establishment of any High Court under this Act by her Letters Patent to revoke and alter such parts or provisions as Her Majesty may think fit of the Letters Patent by which such Court was established and to grant and make such other powers and provisions as Her Majesty may think fit and as might have been granted or made by such first Letters Patent or without any such revocation as aforesaid by like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance

Other or supplementary Charters may be granted within three years after establishment of a Court

18 *It shall be lawful for Her Majesty from time to time by Her Order in Council to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty with the advice of Her Privy Council may seem meet*

Territorial limits of jurisdiction of Court may be altered by order in Council

Repealed by 28 Vict c 15 s 2

19 The word Barrister in this Act shall be deemed to include Barristers of *England* or *Ireland* or members of the Faculty of Advocates in *Scotland* and the words Governor General and Governor shall comprehend the officer administering the Government

Interpretation of terms

GOVERNMENT OF INDIA ACT, 1915

An Act to consolidate enactments relating to the Government of India

29th July 1915

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows

*   *   *   *

Part IX

The Indian High Courts

Constitution

Constitution of high courts

101 [Ch Act ss 2 19]—(1) The high courts referred to in this Act are the high courts of judicature for the time being established in British India by letters patent

(2) Each high court shall consist of a chief justice and as many other judges as His Majesty may think fit to appoint Provided as follows —

(i) the Governor General in Council may appoint persons to act as additional judges of any high court, for such period not exceeding two years as may be required, and the judges so appointed shall, whilst so acting have all the powers of a judge of the high court appointed by His Majesty under this Act,

(ii) the maximum number of judges of a high court, including the chief justice and additional judges shall be twenty

(3) A judge of a high Court must be—

(a) a barrister of England or Ireland or a member of the Faculty of Advocates in Scotland of not less than five years standing or

Ss 101-104

(b) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of a district judge, or

(c) a person having held judicial office, not inferior to that of a subordinate judge or a judge of a small cause court, for a period of not less than five years, or

(d) a person having been a pleader of a high court for a period of not less than ten years

(4) Provided that not less than one third of the judges of a high court, including the chief justice but excluding additional judges, must be such barristers or advocates as aforesaid and that not less than one-third must be members of the Indian Civil Service

(5) The high court for the North Western Provinces may be styled the high court of judicature at Allahabad, and the high court at Fort William in Bengal is in this Act referred to as the high court at Calcutta

Tenure of office of judges of high courts

102 [Ch Act s 4]—(1) Every judge of a high court shall hold his office during His Majesty's pleasure

(2) Any such judge may resign his office, in the case of the high court at Calcutta, to the Governor General in Council and in other cases to the local Government

Precedence of judges of high courts.

103 [Ch Act s 5]—(1) The chief justice of a high court shall have rank and precedence before the other judges of the same court

(2) All the other judges of a high court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their patents

Salaries &c of judges of high courts.

104 [Ch Act s 6]—(1) The Secretary of State in Council may fix the salaries allowances furloughs retiring pensions, and (where necessary) expenses for equipment and voyage, for the chief justices and other judges of the several

high courts, and may alter them, but any such alteration shall not affect the salary of any judge appointed before the date thereof

(2) The remuneration fixed for a judge under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein

(3) If a judge of a high court dies during his voyage to India, or within six months after his arrival there, for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, such a sum of money as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary

(4) If a judge of a high court while in possession of his office and after the expiration of six months from his arrival in India for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months' salary

Provision for vacancy in the office of chief justice or other judge

105 [Ch Act s 7]—(1) On the occurrence of a vacancy in the office of chief justice of a high court, and during any absence of such a chief justice, the Governor General in Council in the case of the high court at Calcutta and the local Government in other cases shall appoint one of the other judges of the same high court to perform the duties of chief justice of the court, until some person has been appointed by His Majesty to the office of chief justice of the court and has entered on the discharge of the duties of that office or until the chief justice has returned from his absence as the case requires

(2) On the occurrence of a vacancy in the office of any other judge of a high court and during any absence of any such judge, or on the appointment of any such judge to act as chief justice the Governor General in Council in the case of the high court at Calcutta and the local Government in other

Government of India Act

Ss 105, 106 cases, may appoint a person, with such qualifications as are required in persons to be appointed to the high court, to act as a judge of the court, and the person so appointed may sit and perform the duties of a judge of the court, until some person has been appointed by His Majesty to the office of judge of the court, and has entered on the discharge of the duties of the office or until the absent judge has returned from his absence, or until the Governor General in Council or the local Government, as the case may be, sees cause to cancel the appointment of the acting judge

Upon the happening of a vacancy in the office of any other Judge of any such High Court —These words refer to a Judge appointed to be ... *by His Majesty* and not a person appointed under the section to act as a Judge (1)

Time for appointment of acting Judge —There is no limit of time ... in this section within which the appointment of an acting Judge is to be made ... an appointment therefore is not invalid because it was not made immediately ... or within a reasonable time after the occurrence of the vacancy which it supplied (

Jurisdiction

106 [Ch Act, s 9]—(1) The several high courts are courts of record and have such jurisdiction, original and appellate including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the court, and power to make rules for regulating the practice of the court as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdiction powers and authority as are vested in those courts respectively at the commencement of this Act

Jurisdiction of high courts

(2) [21 Geo 3 c 70]—The high courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force

Sub section (2) —This sub-section reproduces in effect the provisions of ... of the Statute 21 Geo 3 c 70 relating to the Supreme Court of Calcutta cl ... of the Charter of the Supreme Court of Madras 1800 and cl 30 of the Charter of the ...

(1) Q ... Emp ... v Ca ... pa Lam (1 ...) 16 All. 136 ... (a) ... [illegible]

Court of Bombay 1823 There was no such provision in the High Courts Act 1861 nor in any of the High Courts charters See Despatch from Secretary of State cl 17

The High Court has power under the Specific Relief Act 1 of 1877 s 45 to make an order requiring the Chief Revenue authority to state a case and refer it to the High Court under s 51 of the Income Tax Act 7 of 1918 the power not being the exercise of original jurisdiction in any matter concerning the revenue so as to be excluded by sub sec (2) (b)

Revenue —Income tax is revenue within the meaning of this section (c) And so money derived from the sale of smuggled goods which have been seized and confiscated (d)

Powers of high courts with respect to subordinate courts

107 [Ch Act s 15]—Each of the high courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,—

(a) call for returns,

(b) direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction,

(c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts,

(d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts, and

(e) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts

Provided that such rules forms and tables shall not be inconsistent with the provisions of any Act for the time being in force, and shall require the previous approval in the case of the high court at Calcutta of the Governor General in Council, and in other cases of the local Government

Power of superintendence Civil proceedings —The High Courts have under this section not only administrative but judicial power In the exercise of its power of superintendence a High Court may direct a Subordinate Court to do its duty and this power is not limited to cases in which the Subordinate Court declines to hear or determine a suit or application within its jurisdiction But a High Court is not competent in the exercise of this power to interfere with and set right the orders of a Subordinate

(b) *[illegible] & Co Ltd* v *[illegible]* (1923) 50 I A 47 Bom [illegible] 51 C 3 [illegible] 138 The decision to the contrary in *[illegible] Commissioner of Income Tax* v *[illegible] Gold Mines Ltd* (1921) 44 Mad [illegible] 718 64 I C 6 (1921) A I R [illegible] no longer good law

(c) *[illegible] Ltd* v *Collector of Madras* (1918) 35 Mad L J 3

(d) *[illegible]* v *Secretary of State* (19[illegible]) 50 Mad 449 105 I C 5[illegible] A I R [illegible]

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S 107 Court on the ground that the order of the Subordinate Court has proceeded on an error of law or an error of fact (*e*) A High Court in the exercise of its superintending power will not ordinarily interfere except in cases of grave and otherwise irreparable injustice (*f*)

The power of revision conferred upon a High Court by s 115 of the Civil Procedure Code *is limited to cases in which no appeal lies to the High Court* There is no such limitation upon the power of superintendence conferred upon a High Court by the present section (*g*) All that is necessary is that the Court over which the power of superintendence is sought to be exercised should be subject to its appellate jurisdiction If the Subordinate Court is one from which an appeal lies to the High Court though in certain specified cases only then it is subject to the appellate jurisdiction of the High Court and that is sufficient to attract the power of superintendence conferred by this section and that power may therefore be exercised over the Subordinate Court even in cases where a direct appeal does not lie (*h*) Under this power a High Court can direct a transfer of an inquiry under sec 14 of the Legal Practitioners Act into the conduct of a pleader (*i*)

Insolvency proceedings —The Insolvency Judge in the High Court has no power under this section to stay insolvency proceedings in a District Court (*j*)

Power of superintendence Criminal proceedings —In the exercise of its power of superintendence the High Court will interfere with an order under s 145 of the Criminal Procedure Code 1898 when the Magistrate has acted without jurisdiction or has exceeded his jurisdiction or where there has been a material irregularity in the proceedings which amounts to a refusal to exercise jurisdiction or to an usurpation of jurisdiction or which has prejudiced a party to the proceedings (*k*) In case of a difference of opinion the senior Judge s opinion will prevail (*l*)

The High Court has power under this section to stay the trial of a criminal case by a Magistrate pending the decision of a civil suit between the parties (*m*) and to set aside an order by a Collector directing a prosecution (*n*)

Agency Courts —Under rule 14 of the Rules of 1920 framed under the Ganjam and Vizagapatam Agency Courts Act 24 of 1839 and under the present section the High Court has power to transfer to its file cases pending before the Agency Commissioner (*o*) The High Court has power under this section to transfer a case from the Mewas Agent to the District Court Khandesh (*p*)

(*e*) *Tej Ram* v *Harsukh* (1876) 1 All. 101 *Muhammad Salim* v *Fatima* (18[illegible]) 9 All 104 *Abdullah* v [illegible] (1896) 18 All 4 [illegible] (1899) 21 All 181 [illegible] *of Calcutta* v *Bhupati* [illegible] *Radha* v *Hukum Chand* (1914) 41 C[illegible] 835 [illegible] 868 *Adya Sa*[illegible] (1924) 46 All [illegible] [illegible] (1923) 45 All [illegible] (Legal Practitioners Act 18 of 1879 s 36 [illegible])

(*f*) [illegible] (19[illegible]) 31 Bom 139 [illegible] (1909) 15 C[illegible] W N [illegible] 101 [illegible] (1909) 15 Cal W N 353 [illegible] (1919) [illegible] 47 [illegible] (19[illegible]) [illegible] 37

(*g*) [illegible] (1[illegible]) 14 All 4 7

(*h*) [illegible] (191[illegible]) [illegible] *Bhat Roy* (1914) 41 [illegible] 1915 [illegible] 843 [illegible] W R. 430

(*i*) *Lakshmi* [illegible] (19[illegible]) [illegible] 700 [illegible] 197

(*j*) *Sa*[illegible] (19[illegible]) 31 Ca[illegible] W N 81 1041 [illegible] 311 [illegible]

(*k*) [illegible] L J 336 [illegible] 801 [illegible] A [illegible] 33 [illegible] (19[illegible]) [illegible] W N [illegible] A [illegible] 95 [illegible] W N 9 543 [illegible]

(*l*) *Mo*[illegible] v *M*[illegible] (1919) [illegible] W [illegible] [illegible] (19[illegible]) 3 Cal L J 31 [illegible] 603

(*m*) [illegible] (19[illegible]) [illegible] J 61 [illegible]

(*n*) [illegible] v *K*[illegible] *Emperor* (19[illegible]) [illegible] 415 [illegible]

(*o*) [illegible] (19[illegible]) 48 Mad [illegible] A M 691

(*p*) [illegible] *Collector of* [illegible] *Khandesh* [illegible] I Bom 416 101 [illegible]

Defence of India Act 1915 —The High Court has no jurisdiction to superintend the proceedings of commissioners appointed under the Defence of India Act 1915 (*q*)

Rent Act —It has been held by the High Court of Calcutta that it has power under this section to revise the orders of the Rent Controller under the Calcutta Rent Act (*r*) The High Court of Rangoon has held that it has no power to interfere with the orders of the Rent Controller under the Rangoon Rent Act (*s*)

Land Acquisition Act —The High Court has no power under s 115 of the Civil Procedure Code or this section to interfere with an order of the Collector refusing to make a reference under s 18 of the Land Acquisition Act (*t*) See notes to s 115 above Subordinate Court

Municipal Commissioner —A Municipal Commissioner sitting as an Election Court is not subject to the superintendence of the High Court under this section nor is he subject to the appellate jurisdiction (*u*)

When present section to be resorted to —The special power of superintendence conferred by this section is not as a rule to be exercised in cases where there is an adequate remedy by other proceedings such as appeal or revision (*v*) That power is as a rule exercised in the following cases —

(1) where there is no remedy by revision or appeal (*w*)

(2) where it is doubtful whether the High Court has the power to revise under s 115 of the Code of Civil Procedure (*x*)

(3) where the order passed is of an extraordinary character and there has been a gross failure on the part of the Subordinate Court to do its duty (*y*)

Appeal —No appeal lies under cl 15 of the Letters Patent from an order made by a High Court in the exercise of the power of superintendence under this section See cl 15 of the Letters Patent as amended in 1919

Exercise of jurisdiction by single judges or division courts

108 [Ch Act ss 13 14]—(1) Each high court may by its own rules provide as it thinks fit for the exercise, by one or more judges, or by division courts constituted by two or more judges of the high court of the original and appellate jurisdiction vested in the court

(2) The chief justice of each high court shall determine what judge in each case is to sit alone and what judges of the

(*q*) [illegible] (1918) 3 Pat L J 581 46 I C 9

(*r*) [illegible] (19[illegible]) 48 Cal 5[illegible] [illegible] Co v [illegible] (19[illegible]) 4[illegible] Cal 931 [illegible] [illegible] (19[illegible]6) 50 Cal W N 36 93 I C 56 [illegible]

(*s*) [illegible] (19[illegible]5) 3 Ran 410 91 I C 61 [illegible] 33 (F B)

(*t*) [illegible] The Collector of [illegible] (19[illegible]3) 4 Bom 6[illegible] [illegible] Deputy Collector (19[illegible]4) 4 Mad 3[illegible] 84 I C 616 [illegible] A M 44 [F B]

(*u*) [illegible] (19[illegible]5) 4 All 13[illegible] I C 51 [illegible]

(*v*) [illegible] Lal (1906) [illegible] Emperor [illegible] L J 581 59 59[illegible] 46 I C 9[illegible]

(*w*) See [illegible] (19[illegible]) [illegible] 848 (191[illegible]) [illegible] 46 I C 9 supra

(*x*) See [illegible] (1[illegible]22) [illegible] (19[illegible]0) 4 All 6[illegible] I C [illegible] passed by a Munsif [illegible] to show [illegible] be proceeded [illegible] [illegible] of Court

(*y*) See [illegible] v Salim [illegible] 93 I C [illegible]

Government of India Act

Ss 108-110 court, whether with or without the chief justice, are to constitute the several division courts

Original Jurisdiction —See notes to s. 115 above Appeal.

Rules —An order made by a judge in excess of the jurisdiction delegated to him by rules framed by the High Court under this section is a nullity ( )

109 [28 & 29 Vict c 15 ss 3, 4, 6]—(1) The Governor General in Council may, by order, transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the high courts, and authorise any High Court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the high court was established, and also to exercise any such jurisdiction in respect of Christian subjects of His Majesty resident in any part of India outside British India

Power of Governor General in Council to alter local limits of jurisdiction of high courts

(2) The Governor General in Council shall transmit to the Secretary of State an authentic copy of every order made under this section

(3) His Majesty may signify, though the Secretary of State in Council, his disallowance of any such order, and such disallowance shall make void and annul the order as from the day on which the Governor General notifies that he has received intimation of the disallowance, but no act done by any high court before such notification shall be deemed invalid by reason only of such disallowance

110 [13 Geo III c 63, ss 15 17 21 Geo III c 70 s 1 37 Geo III c 142 s 11 39 & 40 Geo III c 79 s 3 4 Geo IV c 41 s 7]—(1) The Governor General, each Governor and each of the members of their respective executive councils shall not—

Exemption from jurisdiction of high court

(a) be subject to the original jurisdiction of any high court by reason of anything counselled, ordered or done by any of them in his public capacity only, nor

(1) Narayan v Jaskwal (191) 37 Bom 60 [illegible]

(b) be liable to be arrested or imprisoned in any suit or proceeding in any high court acting in the exercise of its original jurisdiction, nor

(c) be subject to the original criminal jurisdiction of any high court in respect of any offence not being treason or felony.

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the chief justices and other judges of the several high courts.

Written order by governor general justification for act in any court in India.

111 [21 Geo. III c. 70 ss. 2, 3, 4.]—The order in writing of the Governor General in Council for any act shall, in any proceeding, civil or criminal, in any high court acting in the exercise of its original jurisdiction, be a full justification of the act, except so far as the order extends to any European British subject, but nothing in this section shall exempt the governor-general, or any member of his executive council, or any person acting under their orders, from any proceedings in respect of any such act before any competent court in England.

Law to be administered

Law to be administered in cases of inheritance and succession.

112 [21 Geo. III c. 70, s. 17; 37 Geo. III c. 142, s. 13.]—The high courts at Calcutta, Madras and Bombay in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall in matters of inheritance and succession to lands rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom and when the parties are subject to different personal laws or customs having the force of law decide according to the law or custom to which the defendant is subject.

Additional High Courts

Power to establish additional high courts.

113 His Majesty may if he sees fit by letters patent establish a high court of judicature in any territory in British India whether

or not included within the limits of the local jurisdiction of another high court and confer on any high court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any high court existing at the commencement of this Act, and where a high court is so established in any area included within the limits of the local jurisdiction of another high court, His Majesty may, by letters patent, alter those limits and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration

Advocate General

114 [53 Geo III, c 255, s 111 21 & Vic, c 106 s 29]—

Appointment and powers of Advocate General

(1) His Majesty may, by warrant under His Royal Sign Manual, appoint an Advocate General for each of the presidencies of Bengal, Madras and Bombay

(2) The Advocate General for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty s Attorney General in England

Savings

131 Nothing in this Act shall affect the power of the Governor General in Legislative Council to repeal or alter any of the provisions mentioned in the Fifth Schedule to this Act, or the validity of any previous exercise of this power

DESPATCH FROM SECRETARY OF STATE

SIR CHARLES WOOD'S DESPATCH ACCOMPANYING FIRST LETTERS PATENT OR CHARTER

Judicial No 4

INDIA OFFICE
London 14*th May* 1862

To

HIS EXCELLENCY THE RIGHT HONOURABLE
THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

MY LORD

I HEREWITH transmit to you the Letters Patent or Charter (a) under the Royal Sign Manual for the High Court of Judicature to be established in Bengal in accordance with the provisions of the Act 24 and 25 Victoria Chapter 104 for establishing High Court of Judicature in India and request that you will take immediate measure for instituting the Court the first Judges of which including those appointed under the 3rd section of the Act are designated in the second clause of the Charter Those appointed by the Crown will be severally informed by me of their appointments to the Court

2 This Charter will accomplish the great object which has so long been contemplated of substituting for the Supreme and Sudder Courts abolished by the Act of High Court of Judicature possessing the combined powers and authorities of the abolished Courts and exercising jurisdiction both over the Provinces under the Sudder Court and over the Presidency Town which forms the local jurisdiction of the Supreme Court

3 Before I review the provisions in detail it is necessary that I should direct your attention to the general scope and main provisions of the Act in question

4 It abolishes in the first place (as soon as the Charter shall issue) the Supreme Court and the Court of Sudder Dewany Adawlut It vests in the High Court (by the last provision of section 9) the powers and authorities of those Courts respectively except so far as the Crown may by such Charter otherwise direct And by (the first part of the same section) it invests the High Court with such Civil Criminal Admiralty Vice Admiralty Testamentary Intestate and Matrimonial Jurisdiction and all such powers and authority in relation to the administration of justice in the Presidency as the same Charter may confer With respect therefore to the fusion of the Supreme and Sudder Courts it appears obvious that the Act itself speaks and that to assume and effect the same purpose by affirmative declaration in the Charter would be superfluous It has been consequently deemed unnecessary that the Charter should exhibit on the face of it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion as would have been the proper course if these powers and jurisdiction had been entirely new Recourse has been had in some places in lieu of such explicit statement to reference to statutory provisions and in others to the Charter of the Supreme Court when the object of clearness appeared to require it But wherever the Charter does not otherwise specify the High Court will use powers and administer the jurisprudence appertaining to those Courts respectively to whose authority it now succeeds

(a) The Letters Patent, dated the 14th May 1862 forwarded with this despatch were afterwards revoked by further Letters Patent dated th December 1865 for which see post.

Despatch from Secretary of State

5 But the Charter is intended positively to declare all such Civil Criminal and other jurisdictions above specified as the Crown thinks proper by this Charter to confer on it supplementary or additional to its main purpose namely the fusion of the aforesaid Courts

6 Moreover the words giving authority to confer on the Court such jurisdiction and such powers and authorities for the administration of justice as the Crown may deem fit appear very large and such as in point of fact invest the Crown with extensive legislative powers so far as the administration of justice within the meaning of the sections may require It has been however thought best to use this power very sparingly and simply as ancillary to the real purpose of the Act namely the establishment of new Courts

7 Another reason for the form which the present Letters Patent assume is to be found in the provisions of section 17 of the Act of last Sessions By that section power is given to the Crown to recall the Letters Patent establishing the Court at any time within three years after its establishment and to grant other *Letters Patent in their stead* This provision was inserted in the Act mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court is to be permanently fixed On this point I request you will put yourselves in communication with the Judges of the Court and at any time previous to the expiration of two years from the date of establishment of the Court furnish me with any suggestions they may make or any amendments they may propose in the Letters Patent now transmitted and I shall be glad if in proposing alteration the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future Letters Patent

8 I proceed to notice in order such of the provisions of the Charter as appear to me to call for special remark

Clause 6

9 By clause 6 power is given to the Chief Justice to appoint the officers of the Court and to fix their salaries subject however in both cases to the approval and confirmation of the Governor General in Council This provision does not refer to the setting of tables of fees where fees are allowed which under section 15 of the Act is required to be done by the Court

10 The Supreme Court exercise an authority entirely independent of the Government in regard to its ministerial officers The Government however has always considered itself at liberty to receive representations from any of the officers of the Subordinate Courts who felt themselves aggrieved by the orders of the Judicial Authorities and to express its opinion on the propriety or otherwise of the proceedings of the Courts in such cases It will be expedient for you to take the question in a very consideration and after communication with the Court to adopt some rule in regard to it which of course must be uniformly applicable to all the officers of the Court Constituted as the High Court will be it will merit all the confidence you can repose in it but as a question of policy the extension of the liberty of application to the Government to those who have not hitherto enjoyed it appears to me preferable to taking it away from those who have heretofore been permitted to avail themselves of it as a mode of obtaining redress against proceedings alleged by the applicants to be unjust and oppressive

Despatch from Secretary of St

11 In regard to the admission of Advocates Vakeels and Attorneys the recommendations of the Law Commissioners have been followed

Clauses 7 10

Under the existing practice the Advocate pleads and the Attorney acts for the suitors of the Supreme Court and the Vakeel both pleads and acts for the suitors of the Sudder Court of which Court the Advocate and Attorney of the Supreme Court are *ex officio* Vakeels The e terms are employed in the Charter simply to express the functions of these several classes of practitioners The Advocate and Attorney will respectively plead and act in the High Court and the Vakeel will both plead and act in the High Court as he did in the Sudder Court Any per on may apply to be admitted either as an Advocate or Vakeel or Attorney under the rules which the Court is authorised by the Charter to make and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakeels of the High Court should the Judges consider such a course to be expedient

12 The provi ions in the Act section 2 clause 4 which declares that Pleader of the Sudder Court who shall have been admitted as Pleaders of the High Court shall be eligible under certain condition to the Bench of the Court implies that a discretionary power may be exerci ed as to the admi sion of the present Pleaders of the Sudder Court to the Bar of the High Court This enactment will account to you for the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Court I conclude however that unless in any special case there are strong rea ons to the contrary the Court will admit the whole of the practitioners in the aboli hed Courts at the date of their abolition to be the first Advocates Vakeels and Attorneys of the High Court

13 With reference to the concluding sentence of clause 10 it is to be ob erved that the Letters Patent contain no provision re erving to the Attorneys of the present Supreme Court the right of pleading after the issue of this Charter in the Insolvent Court as newly regulated by clau e 17 No such provision however is necessary as the Insolvent Court is a separate tribunal not affected by the Act authorising the Letters Patent and will continue a separate Court though for the future presided over by a Judge of the High Court The Attorneys therefore will as heretofore practise in accordance with the rules of the Insolvent Court itself

Clause 10

14 By the important provisions contained in the clau es of the Charter 11 to 38 inclusive effect is given to the 9th section of the Act respecting the juri dictions and powers to be exercised by the High Court

15 The original civil juri diction now exercised by the Supreme Court within the limits of the Presidency Town will henceforth be exercised under the Charter by the High Court includin ... term (Clau e 36 of the Charter) a Judge or Division ... of the High Court appointed or constituted under the provisions of the 13th ... the Act

Civil Jurisdiction Clause 11

16 As it is very de irable that every suit should be instituted in the Court ... district in which the property forming the subject of dispute is situated or ... cau e of action has its origin or in which the defendant resides or carries ... the juri diction hitherto exercised by the Supreme Court (on the ground of ... inhabitancy or otherwi e) over persons and property beyond the local ... Presidency Town but within the limits of the Presidency or Divi ... authority of the High Court has not been vested in the High Court ...

Despatch from Secretary of State

provision of clause 11 provides that the exercise of the ordinary original civil jurisdiction of the Court shall be confined to the local limits of the Presidency Town, with power however to the Court under clause 13 to call for and try any suit instituted in any Court subject to its superintendence when for reasons to be recorded it shall think proper to do so

Clause 1

17 The terms of clause 12 defining the original jurisdiction of the High Court as to suits are nearly similar to those employed in section 5 of the Code of Civil Procedure (Act VIII of 1859) and are intended to include every description of case over which the Mofussil Courts have jurisdiction By the 8th section of the 21st George III C 70 the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue Further a decision * of the Judicial Committee of the Privy Council pronounced in April 1856 ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians and even expressed some hesitation as to whether that Court should administer a remedy in such cases on the Civil side It is one object of the present Charter to do away with all such restrictions and limitations as far as this can be done without trenching on the proper province of legislation. It has therefore been sought to invest the High Court in the exercise of its original civil jurisdiction with as ample powers in receiving and determining cases of every description and in applying a remedy to every wrong as are exercised by the Courts not established by Royal Charter and *thus to place the Courts of first instance in the Presidency Towns and in the interior of* the country in this respect as nearly as may be on the same footing

Ardaseer Cursetjee v Perozeboye

18 I shall be glad to be furnished with your opinion after consultation with the Judges of the Courts as to the concluding portion of clause 12 excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta in which the debt or damage or value of the property sued for does not exceed 100 Rupees Hitherto I believe there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court but should it appear that under the new system the time of the High Court is unnecessarily taken up with trying cases which *might be instituted in the Small Cause Court* it may become a question for consideration whether the sum excluding the jurisdiction of the High Court might not be raised to say 300 or 500 Rupees

19 *It has been suggested that the Small Cause Court* should be placed on the same footing as a Zillah Court in its subjection to the High Court as a Court of appeal and general superintendence But I do not consider that it was the purpose of the Act of Parliament of last Session that the Crown in framing a Charter under it for the High Court should interfere with the present position and jurisdiction of other and *independent* Courts This subject if desirable is properly to be attained by legislation. Should you be of opinion that the Small Cause Court ought to be placed in the same relation to the High Court as any other Court subject to its *appellate jurisdiction* and general control the measure can be carried into effect by an Act of the Governor General in Council

Clause 13

20. As already observed the effect of clause 12 will be to confine the ordinary original civil *jurisdiction of the High Court* within narrower limits than the civil jurisdiction exercised by the Supreme Court By Clause 13 however the High Court is empowered

* Reported in 6 Moo I.A 348

to call for and to try as a Court of first instance any suit which the law requires to be instituted before some other tribunal By the exercise of the power thus conferred on it the High Court will be enabled to obviate all reasonable ground of complaint when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which but for the change in the system might have been instituted in the Supreme Court

21 The introduction of the words whether within or without the Bengal Division of the Presidency of Fort William in this and in several other clauses may appear to require explanation The Court about to be established is called in section 2 of the Act 24 and 25 Victoria C 104 a Court for the Bengal Division of the Presidency of Fort William That title is of course preserved in the Charter By sec 8 the Supreme and Sudder Courts are abolished and by section 9 all their jurisdiction power and authority except when otherwise provided are vested in the High Court But the Supreme Court has various original jurisdiction extending over the whole of the Presidency of Fort William and also over some of the Non Regulation Provinces under the Government of India and the Sudder Court has various appellate jurisdictions extending over the Bengal Division of the Presidency and also over the Province of Assam and others which are not properly parts of the Presidency The result is that the High Court for the Bengal Division succeeding to the powers of both the Supreme and the Sudder Courts has in several respects jurisdictions in territories not within the Bengal Division As this is the result of the Act it might not have been necessary to notice it in the Charter But for the sake of clearness and in order to show distinctly that the Charter is meant to apply to these extra local jurisdiction as well as to the strictly local jurisdiction within the Bengal Division it has been deemed advisable to introduce these words

22 Clauses 14 and 15 give effect to the recommendation of the law Commissioners that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewany Adawlut and a new appellate jurisdiction and civil cases from the Courts of original jurisdiction constituted by one or more of its own Judges except that in the case of a decision which has been passed by a majority of the full number of the judges of the Court the appeal shall lie to Her Majesty in Council

Clauses 14 and 15

23 It will appear from a subsequent clause of the Letters Patent that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India of which Act XXIII of 1861 forms a part By section 23 of the last mentioned Indian Act provision has been made for a difference of opinion on the hearing of an appeal A difficulty however may occur when two Judges constituting a Division Court for the trial of cases in the exercise of original jurisdiction, differ as to the judgment to be given For such a case the Code of Civil Procedure which is adapted to Courts of first instance presided over by single Judges only contain no provision. To call in a third Judge and to re try the case with a view to a judgment from which there may be an appeal to the High Court under clause 14 would be productive of unnecessary delay and expense to the parties and I am of opinion that the Court should make provision for such a contingency by a rule made under the 13th section of the Act of Parliament providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court or that the final judgment shall be entered *pro forma* according to such opinion such judgment being a judgment for the purpose of an appeal against the same but not for any other purpose

Despatch from Secretary of State

Clauses 18 19 and 20

24 The substantive civil law to be administered by the High Court in the jurisdiction of the Supreme and Sudder Court respectively will until otherwise provided continue as at present. This, as I have said, it was no part of the purpose of the Act of Parliament or Charter to effect. And the clauses on which I am now commenting are perhaps superfluous. But they have been introduced to obviate any apprehension which might have been entertained that in fusing the two Courts together it was intended to fuse also the law which they have respectively hitherto administered and thus to make a substantial innovation not only in the tribunals for administration of the law but of the law itself. I trust however that measures may be taken ere long for effecting great improvements in this respect by enacting for the British possessions in India a body of substantive law by which all classes shall be governed and all transactions shall be regulated except in cases to which our Judicatures are required to apply the personal laws of any classes of our Indian subjects

Clauses 1 ? and 38

25 Under clauses 21 22 and 38 no change will be effected by the Charter in the administration of criminal justice in the Presidency Town or in respect of persons subject to its criminal jurisdiction residing in the interior of the country. It appears however to Her Majesty's Government that some modification of the existing practice both at the capital and in the provinces is necessary and on these points I shall address you in a separate despatch

Clause 23

26 The Sudder Court exercises no original jurisdiction but by clause 23 original criminal jurisdiction throughout the territories subject to its authority has been given to the High Court, the principal object being to enable the Judges to hold trials for offences committed out of the Presidency Town at which from their importance or for other specific cause it may be expedient that a Judge or Judges of the High Court should preside

Clauses 24 ?8

27 The remaining clauses of the Letters Patent on the subject of the criminal jurisdiction of the High Court do not call for any particular notice. They contain no special provisions respecting the transfer to that Court of the criminal jurisdiction exercised by the Supreme Court over inhabitants of such parts of India as are not comprised within the local limits of the Letters Patent that having been fully provided for by section 10 of the Act under the authority of which the High Court is established

28 As in the case of the Small Cause Court you will consult the Judges in regard to the relation in which the High Court is to stand to the Magistrates of Calcutta

Clause 30

29 Clause 30 respecting the exercise of the jurisdiction by the High Court elsewhere than at its ordinary place of sitting is a very important provision and one which I have no doubt if judiciously carried into effect will materially tend to the greater efficiency of all the judicatories subject to the superintendence and authority of the High Court. Circumstances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest expediency. ... the clause under consideration will enable the Government to provide by deputing one or more Judges from the High Court who would avail themselves of the opportunity thus afforded them of making a searching inquiry into the manner in which the local Courts were performing their duties

Despatch from Secretary

30 With reference to this clause it has been considered whether the precedence of section 14 of the Act of Parliament should not be followed and the authority to make the nece sary arrangement for exercise of the Court s juri diction out of the usual place of sitting vested in the Chief Justice On the whole it wa thought that acts partaking so much of an administrative character might be more perfectly performed by the Governor General in Council But it is scarcely for me to add that Her Majesty s Government entertain full confidence that the Chief Justice will be the authority habitually consulted in the matter

Clauses 31 and 3

31 The Supreme Court exercises at pre ent Admiralty Jurisdiction under its Charter The Chief Justice has Vice Admiralty Jurisdiction under the commission of the 19th July 1822 and all or any of the Judges of the Supreme Court may be appointed Commissioners under the provisions of 39 and 40 George III C 9 section 25 for the trial and adjudication of prize causes and other maritime questions arising in India By the present Charter the whole of the e jurisdictions and power will be vested in the High Court and as in the A t above cited by the expression other maritime que tions in general mention is made of all the juri dictions conferred as above mentioned in the clau es of the Charter providing both for the civil and criminal maritime jurisdiction of the High Court

Clauses 33 and 34

32 The clauses respecting te tamentary and intestate juri diction do not call for any remark

Clause 3

33 Her Majesty s Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court as to matters matrimonial in general as they now are under the Supreme Court and this they believe to be effected by clause 35 of the Charter But they consider it expedient that the High Court should pos ess in addition the power of decreeing divorce which the Supreme Court does not possess in other words that the High Court should have the same juri diction as the Court for Divorce and Matrimonial Causes in England established in virtue of 20 and 21 Vic C 85 and in regard to which further provisions were made by 22 and 23 Vic C 61 and 23 and 24 Vic C 144 The Act of Parliament for establishing the High Court however does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act and some of them the Crown clearly could not so import such for instance as tho e which prescribe the period of re-marriage or tho e which exempt from punishment clergymen refusing to re marry adulterers All these are in truth matters for Indian legislation and I request that you will immediately take the subject into your con ideration and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England one of the provisions of which should be to give an appeal to the Privy Council in those ca es in which the Divorce Court Act gives an appeal to the House of Lords.

34 The object of the proviso at the end of clause 35 is to obviate any doubt that may po sibly arise as to whether by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England it was intended to take away from the Courts within the divi ions of the Presidency not established by Royal Charter any jurisdiction which they might have in matters Matrimonial as for instance in a suit for alimony between Armenians or Native Christians With any such jurisdiction it is not intended to interfere

Despatch from Secretary of State

35 Clause 36 refers to the powers of single Judges and Division Courts appointed or constituted under the provisions of the 13th section of the Act By section 14 of the Act the power of determining from time to time what Judge in each case shall sit alone and what Judges shall constitute Division Courts is placed in the hands of the Chief Justice It will be observed that the law does not require that a Judge selected from the Bar shall necessarily form a part of every Division Court and it will be for the Chief Justice to consider whether in cases exclusively between natives it will not be desirable to follow as far as possible the course which has already been resolved upon in regard to the cases under appeal to the Sudder Court at the time of its abolition and to constitute the Division Court of Judges trained in the country whose knowledge of the Native language will obviate the expense and delay of translating the proceedings

Clause 36

36 Clause 37 is a very important one and there is little doubt will prove a very salutary provision. It has therefore been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Court not established by Royal Charter and thus accomplishes the object so far contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its common law equity and admiralty jurisdiction) which have been in operation in the Supreme Court since the date of its establishment

Clause 37

37 In regard to the rules respecting appeals to the Privy Council the object has been to avoid unnecessary innovation where so much of change with its necessary inconvenience is unavoidable The existing rules which regulate these appeals are therefore left in force with one or two additions only which experience in the Court of the Judicial Committee has found advisable. For instance clause *40 is introduced*, as it had been commonly introduced of late years in the appeal rules of other *dependencies* of Great Britain in order to remove all doubts as to the power of the High Court to allow an appeal to the Council from interlocutory judgments

38 It will however be obvious to you that the rules as now framed will be liable to the reproach of confusion and perhaps of uncertainty They will be compounded of those contained in the Charter and those already in force which will necessitate reference to several documents You will agree with me that a simple and intelligible Code of Rules to regulate appeals to the Privy Council from the new High Courts or rather from the High Courts in general which may be constituted under the Act of Parliament would be of great advantage to the suitors and the public *I should wish therefore* that one of the first objects of the Judges as soon as the amount of labour thrown on them by their new position may allow it might be to prepare suggestions for such a Code of Rules which might then be reduced into a complete shape by the authority of the Privy Council at Home

39 In forwarding the Letters Patent to the Judges of the High Court you are requested to furnish them with a copy of this despatch. I trust that the Letters Patent taken in connection with the Act for establishing the Court will be found to contain everything requisite for enabling the Court to proceed at once to the discharge of its important duties. It is possible that omissions may be discovered by the local authorities in India which may impede the proper action of the Courts and should the Judges represent to you that such *is* the case you *will* take *immediate steps for supplying* what is wanting by such legislative measures as you may consider most expedient for remedying the defects brought under your consideration.

Despatch from Secretary of

40 I cannot conclude this despatch without expressing the deep interest felt by Her Majesty s Government in the success of this important measure The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the Chief Court of Justice in India which in the trained learning of the Judges selected from the Bar and in the knowledge of the language feelings and habits of the Natives of that country possessed by the other members of the Court combines the most material elements of success And Her Majesty s Government look with confidence to the zealous exertions and cordial co operation of the Judges to place the administration of Justice in India under the controlling authority of the Court in such a state of efficiency as will render it in every respect adequate to its ends and satisfactory to the people and to the Government

I have the honour to be

My Lord

Your Lordship s most obedient humble Servant

(Signed) C WOOD

APPENDIX II

Letters Patent for the High Court of Calcutta

(*December* 28, 1865)

[*N B—The Letters Patent for the High Courts of Madras and Bombay are mutatis mutandis in almost the same terms*]

Recital of Acts 24 & 25 Vic c 104

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith To all to whom these presents shall come, greeting Whereas by an Act of Parliament passed in the twenty fourth and twenty fifth years of Our reign, entitled "An Act for establishing High Courts of Judicature in India" it was, amongst other things, enacted that it shall be lawful for Her Majesty by Letters Patent under the Great Seal of the United Kingdom to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, and that such High Court should consist of a Chief Justice and as many judges, not exceeding fifteen as Her Majesty might, from time to time, think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta in the said Presidency, should be abolished

And that the High Court of Judicature so to be established should have and exercise all such Civil, Criminal, Admiralty

and Vice Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, original and appellate and, all such powers and authority for, and in relation to, the administration of justice in the said Presidency as Her Majesty might by such Letters Patent as aforesaid, grant and direct subject however to such directions and limitations as to the exercise of original, civil and criminal jurisdictions beyond the limits of the Presidency Town as might be prescribed thereby and save as by such Letters Patent might be otherwise directed subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts (a)

Revocation of Letters Patent of 186

1 Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge and mere motion, have thought fit to revoke and do by these presents (from and after the date of the publication thereof as hereinafter provided and subject to the provisions thereof) revoke Our said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty two, except so far as the Letters Patent of the fourteenth year of His Majesty King George the Third dated the twenty-sixth March, one thousand seven hundred and seventy four, establishing a Supreme Court of Judicature at Fort William in Bengal were revoked or determined thereby

High Court at Fort William to be continued

2 And We do by these presents grant, direct and ordain that notwithstanding the revocation of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, the High Court of Judicature, called the High Court of Judicature at Fort William in Bengal, shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, and that the said Court shall be and continue a

(a) Cert in paragraph of th Preamble which follow here have been omitted

Let Pat [Cal, Bom, and Mad]

Cls 2-5 Court of record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court, immediately before the date of the publication of these Letters Patent, shall continue in force, except so far as the same are altered hereby, until the same are altered by competent authority

Judges of the said High Court to be continued

3 And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of those Letters Patent, be the Chief Justice or Judges, or acting Chief Justice or Judges, if any, of the said High Court of Judicature at Fort William in Bengal, shall continue to be the Chief Justice and Judges or acting Chief Justice or Judges, of the said High Court, until further or other provisions shall be made by Us or Our heirs and successors in that behalf, in accordance with the said recited Act for establishing High Courts of Judicature in India

Clerks &c of the said High Court to be continued

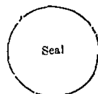
4 And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty two, shall continue to hold and enjoy his office and employment with the salary thereunto annexed until he be removed from such office and employment, and he shall be subject to the like power of removal, regulations, and provisions as if he were appointed by virtue of these Letters Patent

Declaration to be made by Judges

5 And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office shall make and subscribe the following declaration before such authority or person as the Governor General in Council may commission to receive it —

"I, *A B*, appointed Chief Justice [or a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment"

6 And We do hereby grant, ordain and appoint that the said High Court of Judicature at Fort William in Bengal shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same with this inscription, "The Seal of the High Court at Fort William in Bengal" And We do further grant, ordain, and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 7 of the recited Act and We do further grant, ordain and appoint that whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand seize, and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, or their possession



Writs &c to issue in name of the Crown and under the Seal

7 And We do hereby further grant, ordain, and appoint that all writs, summons, precepts, rules, orders and other mandatory process to be used, issued or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us or of Our heirs and successors, and shall be sealed with the Seal of the said High Court

Appointment of Officers

8 And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor General in Council, to

Cls 8-10 appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of Justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent (b) And it is our further will and pleasure, and We do hereby for Us, Our heirs and successors, give, grant, direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall from time to time appoint for each office and place respectively, and as the Governor General in Council shall approve of Provided always and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long they shall hold their respective offices, but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said rules

Admission of Advocates, Vakeels and Attorneys

Powers of High Court in admitting Advocates Vakeels and Attorneys

9 And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit and enrol such and so many Advocates, Vakeels and Attorneys as to the said High Court shall seem meet, such Advocates, Vakeels and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors according as the said High Court may by its rules and directions determine, and subject to such rules and directions

In making rules for the qualifications &c of Advocates Vakeels and Attorneys

10 And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualifications and admission of proper persons to be Advocates, Vakeels and

(b) The words And we do hereby ordain that every such appointment shall be ... submitted to the approval of the Governor-General in Council and shall be either confirmed or ... allowed by the Governor General in Council which occurred in this clause were omitted by the Amending Letters Patent dated 11th March 1919

Attorneys at Law of the said High Court, and shall be empowered to remove, or to suspend from practice, on reasonable cause, the said Advocates, Vakeels or Attorneys at Law, and no person whatsoever but such Advocates, Vakeels, or Attorneys shall be allowed to act or to plead for, or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co suitor Cl 10

Bar Councils Act —The powers of a High Court under clauses 9 and 10 of the Letters Patent are subject to the provisions of the Indian Bar Councils Act See s 19 (2) of Act 38 of 1926 A complaint of misconduct by an advocate must first be referred for inquiry to the Bar Council (c)

Power to remove or suspend on reasonable cause —The words on reasonable cause are not confined to purely professional misconduct but embrace all causes which may afford reasonable ground for suspension or removal (d) As to what is reasonable cause see the undermentioned cases (e) The Madras High Court has held that negligence is not professional misconduct (f)

An attorney is an officer of the Court and any person aggrieved by the misconduct of an Attorney has the right to invoke the disciplinary jurisdiction of the Court (g)

Proceedings in the disciplinary jurisdiction are not of a criminal nature and the rules of Criminal Procedure such as filing a written statement by the accused do not apply (h)

Professional etiquette affecting counsel —It is unprofessional for counsel to cross examine a witness as to facts about which he has no instructions but are within his personal knowledge When counsel during the hearing of a case calls for the production of a book which is produced and handed to him by his opponent with certain pages marked as those only to which he may refer in respect of the subject matter of his cross examination it is improper for counsel who calls for the book to inspect any of the other pages There is nothing unprofessional in counsel giving evidence in a case in which he appears as counsel though as a general practice it is undesirable (i) Where

(c) *In th m tte of a Vak l of A mgarh* (19 3) 6 All I J 1039 11 I C 14 (8) A A 439 1 B

(d) *L Me sers Wajid* (190) 9 Cal 890 906

(e) *Sa adh cary in r* (1907) 34 I A 41 [libel on Judge] *In Ad ocate in r* (1906) 4 Cal I J 2,9 [Accepting st are of property s d f r as a f e) *I bati in e* (1835) 17 All 498 I A 193 [writing l tters to \ kil [ra ti ing in di tricts ff ring to h re with them f e of work int nce l by th m] *Jage i a Nath in re* (1900) 2 All 49 [co viction for fraud] ntiv u ing as g nuine a docum t known to be f rged] (ernme t I eader v 4 n (1913) 37 B m 354 19 I C 5 9 [a ca e u ter Bombay R gul ti n II of 18 7 s 56] See also *Foma j e (oxa j In re* (1907) 31 I A 55 [advi ing clie t to bribe a witn] *I the matter of a Val l of th H gh Co rt* (1917) 40 M d 69 39 I C 9 [he tin tt ll nt] *In the mat er of a 1 kil* (19 0) 4 All 450 56 I C 501 *In re Jivanlal Varajray* (19 0) 44 Bom 418 54 I C 6 9 [ledging a pledge to disobey an A t] G ment I leal v I inay k (19 3) 47 I m 117 61 (8 ( ) A B 361 [e lll t m of proc edl pending in a Co rt of J tl e] *In th m tte of an Ad ocate* (19 3) 46 M d 903 76 I C 873 (4) A M 6 [disbarment by Ben h rs of H I n pu d by ubsequ nt good cond t] *I Attorn v* (19 4) 6 Bom L R 6 7 84 I C 3 3 ( ) A B 1 [dis losure of con fid ntial comm ation] *In re Attorney* (19 5) 5 Cal 95 91 I C 1 (5) A C 1084 [soli ito d ta ting I nt from a th r li itor repre itl L t n t suffi t t e n) A 1 1 e (2) A C 690 (F B) (co t nt tri kery of his lerk nd st t t apper)

(f) *A I I in re* (19 6) 49 Mad 5 3 96 I C 6 5 (6) A M 56

(g) *In At rn y In the matter of* (1914) 41 Cal 113 19 I C 993

(h) *In e Abd I I A d* (19 3) 4 Lah. 1 6 I C. 3 (4) A L 1 3

(i) *W tson v I ry Mohan Dass* (19 3) 40 Cal. 898 3 I. C. 3

Let Pat [Cal, Bom, and Mad]

Cls 10-12

counsel accepts brief to appear at the trial of a case and is paid the consultation fee and the fee for attending the trial he should return both the fees if after holding consultation he leaves for another place and is unable to attend the trial of the case as the consultation must be deemed to be held with a view to his attending the trial (j)

Appeal —See notes to clause 39 below

Civil Jurisdiction of the High Court

Local limits of the ordinary original jurisdiction of the High Court

11. And We hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law made by competent legislative authority for India and until some local limits shall be so declared and prescribed within the limit declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council, on the 10th day of September, in the year of Our Lord, one thousand seven hundred and ninety four and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction (k)

Local limits —Power is given by s 109 of the Government of India Act to the Governor General in Council to alter the local limits of the jurisdiction of High Courts

Issue of warrant.—The High Court has no power in the exercise of its ordinary original civil jurisdiction to issue a warrant against the person of a judgment debtor and appoint a special bailiff to execute it against the judgment-debtor *wherever he might be found in the Presidency* (l) Such an order however may be made for the arrest of a defendant who has been guilty of a contempt of Court (m) The reason is that an order for attachment for contempt is not an order made in exercise of the High Court s civil jurisdiction (n)

Original jurisdiction as to suits

12 And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction shall be empowered to receive try, and determine suits of every description, if, in the case of

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(j) *An Ad le in re* (191) 44 Cal 741 4 I C 63 [practice for seniors to name their juniors and for juniors to name their seniors condemned]

(k) In the Madras and Bombay Letters Patent the words are by any law made by the Governor in Council In the same Letters Patent for the words within the limits declared and prescribed &c are substituted within the limits of the local jurisdiction of the said High Court of [...] at the date of the publication of these presents

(l) *Rajah of [...]mnad* v *Seetharam* (18) 4 Mad 1 0

(m) *Hari[...]allubhdas* v *Utamchand* (18) 7 Bom H C 17

(n) *Narrahoo* v *Narolamdas* (1883) 7 Bom 3

suits for land or other immoveable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits, except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta in which the debt or damage, or value of the property sued for does not exceed one hundred rupees Cl 1[illegible]

Scope of the clause—Barring certain suits specified at the end of this clause the High Courts of Calcutta Madras and Bombay are empowered to try the following suits in the exercise of their ordinary original civil jurisdiction namely—

I *Suits for land or other immovable property*—

(a) if the land or property is situated *wholly* within the local limits of the ordinary original civil jurisdiction of the said High Courts or

(b) where the land or property is situated in *part* only within the said limits if the leave of the Court shall have been first obtained (*o*) See notes below Suit for land of which a part is within jurisdiction

II *Suits other than those for land*—

(a) if the cause of action has arisen *wholly* within the said limits or

(b) where the cause of action has arisen *in part* only within the said limits if the leave of the Court shall have been first obtained or

(c) if the defendant at the time of the commencement of the suit dwells or carries on business or personally works for gain within such limits

Suits for land or other immovable property—The High Court of Calcutta has held that a suit for land within the meaning of this clause is a suit *substantially* for land that is for the purpose of acquiring title to or possession of land (*p*) or for declaring an interest in land (*q*) A agrees in Calcutta to sell to B land situated outside the original jurisdiction of the Calcutta High Court If A fails to perform his contract and B sues A for *specific performance* the suit is one for land and it will not be entertained by the Court the land being situated outside its jurisdiction. But if B fails to perform his contract and A sues B for specific performance the suit is not one for land, and hence the suit will lie in the Calcutta Court (*r*) Similarly a suit by a mortgagee for specific performance of an agreement to execute a mortgage of land is a suit for land and it will not be entertained by the Calcutta Court if the land is situated beyond the original jurisdiction of the Court (*s*) And it has been laid down by the same High Court that

(*o*) *I l ram* v *Ram k ndra* (1 9) 2 [illegible] 9 5

(*p*) *D [illegible] A L [illegible] on I a k* v *Word e* (18 6) 1 Cal 19 63 *[illegible] Indian [illegible] ay Co* v *[illegible]* (1 6) 1 Cal 9 *[illegible] Lall* v *[illegible]* (18) [illegible] 315

(*q*) *[illegible]* v *[illegible]* (1 9) 19 Cal 301 365

(*r*) *Land M rtgage [illegible]* (1 [illegible]) 19 Cal 35 *[illegible] jendra [illegible]* (19) 49 Cal 6 0 [illegible] 9[illegible] ([illegible]) A C 413

(*s*) *Sreenath [illegible]* v *Casy Das* (18 0) 5 Cal 8 *[illegible] Land Co [illegible]* (19 1) [illegible] Cal [illegible] 601 [illegible] A C 3 [illegible]

Let Pat [Cal , Bom , and Mad]

Cl 12 *suits* for *redemption or foreclosure or for sale of mortgage property* are all suits for land, and they will not be entertained by that Court if the land is situated beyond its or jurisdiction (*t*) also that a suit by a lessee for a declaration that a lease was a subsisting lease and for rents and profits is a suit for land, and it will not be entertained if the land *is situated beyond its jurisdiction* (*u*) *A suit fo a share in the sale pr ceeds of land* without jurisdiction is not a suit for land (*v*) Page J in the case last cited said that the term suits for land or other immovable property means suits in which having regard to the issues raised in the pleadings the decree or order will affect directly the proprietary or possessory title to land or other immovable property The learned Judge observed that this construction conformed to the rule that que tions relatin to title or ownership of land should be determined not only by the lex situs but also in the forum situs In short the Calcutta High Court would appear to hold that suits of the kind mentioned in cls (a) to (e) of s 16 of the Code are all suits for land (*w*) The same view was taken until recently by the Madras High Court (*x*) In *Vellappa Chettiar* v *Govinda Dass* (*y*) a Full Bench of the Madras High Court held that a suit by a purchaser of land situate outside Madras for specific performance of a contract to sell made in Madras against the vendor who resides in Madras is not a suit for land and is cognisable by the High Court of Madras In the view taken by Coutts Trotter C J a suit in which the plaintiff asks for a decree which if passed, would compel the defendant to do or abstain from doing something which the Court orders him to do would not be a suit for land but a suit in which a plaintiff asks for a decree which, if passed would bring about *proprio vigore* an immediate change in the ownership of property would be a suit for land (*z*) Thus a suit for maintenance in which the plaintiff prays that the amount may be charged on specific land is a suit for land for if a charge is created by the decree it can be enforced by a *sale* of the land (*a*)

The High Court of Bombay gives a very restricted meaning to the expression suit for land Sir Charles Sargent in *Hollar* v *Dadabhai* (*b*) held that the Court had jurisdiction to try a suit for specific performance of an agreement to execute a mortgage made in Bombay of land situate outside the original jurisdiction. The *ratio decidendi* was that the expression suit for land was intended to exclude from the Court's jurisdiction only such suits relating to land as if brought in England, the Courts would refuse to entertain on the ground that the land was situate abroad. This case was followed, though sometimes with evident reluctance for many years Farren C. J in an unreported case (*c*) passed a foreclosure decree on a mortgage of land outside jurisdiction, and this was followed by Strachey J in *Sorabji* v *Ruttonji* (*d*) In *Hunsraj* v *Runchordas* (*e*) a purchaser s suit for specific performance of an agreement to sell land situate beyond the local limits of jurisdiction was entertained although the prayer was that the defendant be ordered upon making out a marketable title to execute a conveyance thereof to the plaintiff In *Venkatrao* v *Khimji* (*f*) a suit for sale was decreed on a mortgage of land outside jurisdiction and Scott C J said that such a suit was not a suit for land as it was not a suit to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land. This case was followed ...

(*t*) *Kanti Chunder* v *Kis ory Mohun Roy* (189) 19 Cal 361 at p 365

(*u*) *Eb h m v P o as Chu der* (1909) 36 Cal 59 1 I C 47

(*v*) *Gocul v C ganlal* (19 7) 54 Cal 655 101 I C 7 1 (7) A C 789

(*w*) *Sud md h Coal C v Empire Coal Co* (1915) 4 Cal 942 951 95 31 I C 581

(*x*) *Val m v Kri hnas umy* (1904) 27 Mad 157 161

(*y*) (19 9) 52 Mad 809

(*z*) (19 9) 5 M d 809 815

(*a*) *Sundara Bai* v *Tirumal* (1910) 33 Mad 11 3 I C 930

(*b*) (1890) 14 Bom 353

( ) *Keersoji* v *Khimji* ult No. 91 of 1 92

(*d*) (1898) Bom 701

( ) (1905) 7 Bom L. R. 319

(*f*) (19 4) 6 Bom L. R. 535 80 I. C. 44

much hesitation by Shah J and *Jasraj* v *Akubai* (g) which was also a suit for sale by a mortgagee On the other hand Jenkins C J in *Vaghoji* v *Camaji* (h) correctly summarised the principles on which the Courts in England exercise jurisdiction in suits relating to land abroad and refused to make a declaration of title to land outside jurisdiction This was followed in *Pranlal* v *Goculdas* (i) where Pratt J held that the Court had no jurisdiction to make a declaration as to which of two mortgages of land outside jurisdiction had priority In *Yeshwadabai* v *Janardhan* (j) Fawcett J held that a suit by a wife praying that her maintenance be secured by a charge on her husband's immovable property in Bombay was a suit for land The same learned Judge in *Rajah Kolakkal* v *Malabar Timber Co* (k) said that if the land is outside jurisdiction a suit to declare a charge on it is not a suit for land but resiled from this opinion in his judgment in *Hatimbhai* v *Framroz* (l)

Now as explained by Jenkins C J in *Vaghoji* v *Camaji* (m) the Courts in England do not entertain suits for land outside jurisdiction unless (1) the defendant is in England and (2) there is some privity between the parties on the ground of contract trust or fraud The defendant in *Holkar's case* did not reside or carry on business in Bombay and this fact appears to have been overlooked in the judgment The case was adversely criticized on this ground in previous editions of this commentary and that criticism was entirely accepted by a Full Bench of the Bombay High Court in *India Spinning and Weaving Co* v *Climax Syndicate* (n) In that case the plaintiff mortgagee had filed a suit against the defendant mortgagor who resided out of jurisdiction asking for the sale of the mortgaged properties which were also outside jurisdiction The mortgage had been executed in Bombay and though curiously enough the judgment does not refer to this fact that was the circumstance which brought the case within *Holkar* v *Dadabhai* Nevertheless the Court overruling *Holkar* v *Dadabhai* said the suit was not competent The Court entirely agreed with the Calcutta decisions and quoted with approval the dictum of Jenkins C J in *Sudamdih Coal Co* v *Empire Coal Co* (o) that regard must be had to the substance of the suit in deciding whether it was a suit for land.

But the Bombay High Court has again changed its mind and in *Hatimbhai* v *Framroz* (p) a Full Bench has held that a suit by a mortgagee to enforce his mortgage by sale of the land mortgaged is not a suit for land and that if the mortgagor lives within jurisdiction the High Court can entertain the suit even though the land is wholly outside the limits of its original civil jurisdiction The judgment does not proceed on the equitable jurisdiction wrongly claimed in *Holkar's case* but rests on two main grounds (1) that a suit for sale on a mortgage is a suit in personam to recover a debt and (2) that suits for land are suits the primary object of which is to obtain a declaration of title to or possession of land This view is inconsistent with the definition of mortgage in sec 58 of the Transfer of Property Act 1882 The same High Court has held (q) following *Hatimbhai's case* and dissenting from *Pranlal* v *Goculdas* (r) that the High Court has jurisdiction in a suit brought by an equitable mortgagee against the mortgagor for lands situate outside Bombay to implead a legal mortgagee residing out of Bombay and alleging a prior legal mortgage in his favour provided the legal mortgage is executed in Bombay

(g) (19 4) 6 Bom L R. 539 80 I C 1007 ('24) A B 419
(h) (1905) 9 Bom 49
(i) (19) 7 Bom L R 570 88 I C 9 ('25) A B 333
(j) (19 3) 5 Bom L R. 11 81 I C 7 6 ( ) A B 141
(k) (19) 48 Bom 6 5 80 I C. 1049 ( ) A B 41
(l) (19) 51 Bom 516 104 I C. 8 ( ) A B 8 B
(m) (1905) 9 Bom 49
(n) (19 6) 50 Bom 1 91 I C. 8 (6) A B 1 B
(o) (1915) 4 Cal 91 31 I C 31
(p) (19) 51 Bom 516 104 I C 8 ( ) A B 8 B
(q) *Sham Sundra* v *Lamchand* (19 9) 31 Bom L R 100
(r) (19) 2 Bom L R. 0 83 I C. 9 ( ) A B. 333

Let Pat [Cal, Bom, and Mad]

Cl 12 Suits for the partition of land and suits for a declaration of title to land are suits for land and will not be entertained if the land is outside jurisdiction (s) A suit for damages for trespass to land is a suit for land (t) Suits for the recovery of title deeds are according to the Calcutta High Court not suits for land (u) but the Bombay High Court has held that they are if a question of title to land is involved (v) This seems incorrect for as said in *India Spinning and Weaving Co* v *Climax Syndicate* (w) it is difficult to see how a suit to recover title deeds can be beyond the jurisdiction of the Court if the defendant is within the jurisdiction

The Bombay High Court has held that an administration suit is not a suit for land although there are immovable properties alleged to belong to the estate of the deceased beyond jurisdiction and the High Court therefore can entertain such a suit and determine the question whether they belonged to the deceased at the time of his death If the suit is otherwise within jurisdiction no leave under cl. 12 is necessary merely because the immovable properties or some of them are situated beyond jurisdiction (x) The High Court of Calcutta has held that a suit for administration, and as incidental to that suit for a declaration that certain leases granted by the executors of the estate cannot stand as against the plaintiff (the beneficiary) is not a suit for land (y). In a Privy Council case where a suit was brought by three out of four executors against the fourth executor for his removal from the office of trustee and executor and for accounts of the assets of the deceased and for administration of his estate it was held that the suit was not one for land, and that the High Court of Madras had jurisdiction to entertain the suit though the property left by the deceased was outside jurisdiction as a part of the cause of action had arisen within the jurisdiction, and the defendant was dwelling in Madras at the time of the institution of the suit (z) In a Calcutta case it was held that the High Court may entertain a suit by *an executor* for a declaration and *injunction* (though *not for possession*) in respect of the estate of the testator consisting of several immovable properties provided one at least of the properties is situated within its original jurisdiction and leave of the Court is obtained it is not necessary that the cause of action should arise within the local limits or be specifically with reference to that property which is situated within those limits (a)

Every suit which has *any* reference to land is not a suit for land (b) In *Land Mortgage Bank* v *Sudurudeen Ahmed* Trevelyan, J said I decline to hold that wherever land has anything to do with a suit it is therefore a suit for land (c) Thus a suit by a trustee against his co trustees to enforce his right under a deed of trust to act jointly with the defendants as shebait and manager of lands dedicated to an idol in which neither the plaintiff nor the defendants has *any beneficial interest* is not a suit for land, and may be entertained by the High Court though the lands may be situate outside the jurisdiction (d) So a suit for an account and dissolution of partnership is not a suit

(s) *D ll i d London Bank* v *W die* (18 6) 1 Cal 249 *E st Ind an Railway Co* v *Be gal C l Co* (18 6) 1 Cal 95 *Har Lall* v *Nuaml n* (190) 9 Cal 315 *N lum* v *I rishnasauem j* (1904) 27 Mad 1 7 161 *Ja am* v *Atmaram* (1880) 4 Bom 48 9 Bom 49 *supra*

(t) *Lodna Colli ry Co* v *Bipin* (1912) 39 Cal 739 17 I C 500 *Vaghoji* v *Camaji* (1905) 9 Bom 24 *Sud md h Coal Co* v *Emp re Coal Co* (1 1) 4 Cal 94 31 I C 3 *B itish South Africa Co* v *Companhia de Mocambique* (1893) A C 60

( ) *Jiggern th* v *Brij th* (18 9) 4 Cal 3

(v) *Zulek bai* v *Ebrahim* (1913) 37 Bom 491 17 I C 193

(w) (19 6) 50 Bom 1 91 I C 847 (6) A B 1

(x) *M homed lly* v *Abd l Hu* (19 1) 4 Bom 3 3 I C 4) ( ) A B *Mahomed A* v (19 *Abd l Hu ein* v *Mahomed A* ( ) A B 46 Bom 7 6 I C 16 ( ) A B

(y) *N t ini* v *Nunda Lal* (1903) 30 Cal 333

( ) *Sr nir a* v *Yankata* (1906) 9 Mad 34 I A 17 affirmed in 34 Mad followed in *Krishnadoss* v *Ghanshent* (19 5) 49 Mad L J 311 91 I C 3 (25) A M 1084

(a) *Ganoda Sundery* v *Nalini* (19) 36 Cal 1 I C 514

(b) *Jugod mba* v *Pudlomoney* (19 5) 15 B L R 318 3 9

(c) (189) 19 Cal 338 367

(d) *Jugod mba* v *Pudlomoney* (1) 15 B L R 318

for lan l l ecause one asset of the partnership happens to be a tea garden situate in the mufassal (e)

All other cases —suits for partition of movable and immovable property the latter being situated wholly outside jurisdiction —The words all other cases in this clause do not include cases of suits for immovable *plus* movable property They refer to cases in which immovable property is not involved Hence if *A* sues *B* for partition of movable and immovable property and the immovable property is situated wholly outside jurisdiction the suit must be dismissed as to such property even if the leave of the Court has been obtained. This is because the immov able property being situated *wholly* outside jurisdiction the Court has no power to grant leave to sue as regards such property (*f*) In such a case the plaint may be amended with the leave of the Court by omitting paragraphs which relate to immovable prop rty and the suit may be proceeded with so far as it relates to movable property (*g*)

Suit for land of which part is within jurisdiction —Where there are several immovable properties then if even one of them is situated within jurisdiction the Court can entertain a suit for a partition of all the properties includin, those situated outside jurisdiction provided the l ave of the Court has been first obtained. Such a case comes within the following words of cl 12 namely the said High Court shall be empowered to d termine suits of every description if in the case of suits for land, such land shall be situated either wholly *or in case the leave of the Court shall have been first obtained in part* within the local limits (*h*) But in *Hatimbhai* v *Framro* (*i*) some of the Judges were of opinion that the condition as to leave of the Court did not apply to suits for land where some part of the land was situate outside jurisdiction If some of the properties are situatc l within and some outside juris li tion but no leave is obtain d the Court can proceed only with the suit so far as it relates to the immovable properties situated within jurisdiction (*j*) Similarly if some of the properties included in a deed of mort gage are within and some outside the jurisdiction the Court has jurisdiction on leave to sue being obtaine l to entertain a suit on the mortgage in respect of all the properties including those situated outside jurisdiction (*k*) but not if the properties outside juris diction are the subject of a *separate* mortgage (*l*) The same rules apply where some of the properties are situated in British India and some outside British India (*m*) See notes above Scope of the clause

Leave of Court —The leave under this clause is a condition precedent to jurisdiction so that unless the condition is fulfilled by obtaining the necessary leave to sue the Court will have no jurisdiction to entertain the suit (*n*) Such leave affords the very foundation of the jurisdiction hence it mu t be obtained before the institution of the suit it cannot be granted after the suit has been in tituted. The leave granted is confined to the cau e or causes of action set forth in the pl int at the time when the leave was granted hen e the plaint cannot be amended so as to alter the cau e of action (*o*) But

(*e*) o *Kellie* F a er (18) Cal 445 464

(*f*) *Ja m* v *Alm ram* (18 0) 4 Bom 48 *Ha a L ll* v *Nilambi* (190) 3 Cal 315 *S hagiri* v *I ma l a* (1896) 19 M t 448

(*g*) *Abl l Karim* v *F Irudeen* (190) 5 M d 16

(*h*) *B hoo* v *N ai d s* (1914) 16 1 m L R 63 69 3 I C 91 a c on appeal to I C (1916) 43 I A 56 (1916) 40 Bom c 3 I C. 403 77 I C 934 (1) A B 3 8

(*i*) (19) 51 Bom 516 104 I C 8 (1927) A B 3 I B

(*j*) *I ttram* v *Ramch ndra* (1898) 2 Bom 9 9 5 *I acha un* v *Shib Ch nder* (188) 14 Cal 835

(*k*) *Ha draLal* v *H i Da* (1914) 41 I A 110 41 Cal 9 3 I C 63 *M t ga Coal C* v *Shraj Ld* (1911) 3 Cal. 6 1 13 I C. 4) *S nal Ch ndra* v *Saha r* (1910) 37 Cal 93 911 8 I C 114

(*l*) *A Ana K hore* v *Am rnath* (19 0) 24 C W N 633 56 I C. 3

(*m*) *G ndal* v *B lal* (19) 46 Bom 19 77 I C 934 (1921) A B 3 3 *P ma ch rya* v *Ananacharya* (1 21) 18 Bom 3 9 [a case under s 17 of the Code]

(*n*) *D Sou a* v *Col* (1 6) 3 M H C 3 4

(*o*) *I mpurtab* v *Premsukh* (1 81) 15 Bom 93

Let Pat (Cal, Bom, and Mad)

Cl 12 if the cause of action is not altered there is no objection to an amendment (*p*) If a suit is brought in a Chartered High Court with leave of the Court but there is nothing on the face of the plaint to show that any part of the cause of action arose within its jurisdiction, the plaintiff may be allowed to prove by evidence that part of the cause of action arose within the jurisdiction and if it is necessary to amend the plaint by adding a statement that part of the cause of action arose within the jurisdiction the amendment may be allowed for such an amendment does not alter or add to the original cause of action (*q*). Where a defendant who does not reside within the jurisdiction and against whom the cause of action has arisen *in part* only within the jurisdiction is added after the institution of the suit leave under this clause must be obtained at the time of the application for *adding him as a party though leave was obtained when the suit was originally filed* (*r*). The force of an order granting leave to institute a suit is exhausted when the suit is instituted in pursuance of the order Hence if the suit is withdrawn with liberty to bring a fresh suit upon the same cause of action and a fresh suit is brought there is nothing to prevent the Court from granting fresh leave to institute the fresh suit (*s*)

The leave under this section must be distinctly applied for and obtained. It cannot be implied from the fact that the plaintiff was granted leave to sue as a pauper (*t*) or from the fact that a defendant is added who does not reside within the jurisdiction (*u*) Nor can it be presumed from the fact that the Court orders a third party notice to be served on a party resident outside its jurisdiction. The defendant taking out such notice must apply for leave under Clause 12 and the leave must be endorsed on the notice as it is on a plaint (*v*) The granting of leave under this clause is discretionary (*w*).

Cause of action—See notes to s 20 of the Code Cause of action, Cause of action in suit on contracts and Cause of action in other suits above

If the cause of action shall have arisen in part.—It has been said in two Bombay cases that the words if the cause of action shall have arisen *in part* refer to a *material* part of the cause of action (*x*) There is nothing it is submitted in the language of this clause to warrant such a construction though the Court may in the exercise of its discretion refuse to grant leave to sue if a material part of the cause of action did not arise within its jurisdiction. The High Court of Madras has held that in dealing *with applications for leave to sue under* this clause the Court is not precluded from taking the question of convenience into consideration (*y*)

For other cases see notes to s 20 of the Code Cause of action in suits on contracts, and Cause of action in other suits above

Defendant—The word defendant in this clause means all the defendants where there are two or more defendants to a suit It is not sufficient that one of the defendants dwells or carries on business within the jurisdiction (*z*)

Jurisdiction over non resident foreigners—See notes to s 20 of the Code Suits against non resident foreigners above

The question whether the fact of carrying on business through an agent within the local limits of jurisdiction would give the Court jurisdiction over a non *resident foreigner*

(*p*) *Foolibai* v *Pamp rtab* (1893) 17 Bom 46
(*q*) *F nk* v *Buld o Da s* (1899) 26 Cal 715
(*r*) *Lamp t b* v *Foolibai* (1896) 20 Bom 767 *Lamp rtab* v *Ca sha ka* (19 3) Bom L R 7 85 I C 461 (‘21) A B 109
(*s*) *Sabh p thi* v *Lak hmu* (1901) 24 Mad 293
(*t*) *Jai m* v *Atm ram* (1880) 4 Bom 482
(*u*) (1896) 20 Bom 767 *s p a*
(*v*) *K rim Elahi* v *Sher Ahmed* (19 0) 45 Bom I 59 I C 28 reversing *Held & Co* v *Sher Mahomed* (1919) 21 Bom L R 59 I C 18
(*w*) *Walk ns* v *Laxmi araye* (19‥) 23 Bom L R 131 100 I C 948 (‘2) A B 6‥
(*x*) *Ke ou* v *La hmidas* (1 9) 13 Bom ‥ *J g j s* v *Doulatram* (1‥) 11 Bom 257 267
(*y*) *Seshagiri* v *Askur Jung* (19‥) 3 M ‥
(*z*) *Hadj e Ismail* v *Hadjee Mahomed* (1‥) 13 B L R 91

was raised before the Privy Council but was not decided (a) The Madras High Court has held that it does (b)

Dwell —See notes to s 20 of the Code Dwell within the meaning of clause 12 of Letters Patent

Carries on business —See notes to s 20 of the Code above under the same head

Personally works for gain —See notes to s 20 of the Code

Suits against companies —See notes to s 20 Suits against corporation Explanation II

Suits of every description —This expression has been held to confer upon the Court matrimonial jurisdiction over Jews (c)

Ordinary jurisdiction —The ordinary jurisdiction of the High Court embraces all such as is exercised in the ordinary course of law and without any special occasion or special order being necessary therefor (d)

Appeal —The leave under this clause is granted on an ex parte application If an order is made granting leave the defendant may apply to have the order set aside or he may wait until the hearing or the legality of the order may be called in question as a separate issue for trial at the hearing of the suit (e) If the defendant does not wait until the hearing and applies to have the order granting the leave set aside and if the application is rejected he may appeal from the order rejecting the application (f) Similarly if the plaintiff applies for leave and leave is refused the plaintiff may appeal from the order (g) The appeal would be one under cl 15 of the Letters Patent

The order granting or refusing leave by one Judge cannot be superseded by another Judge *except on appeal* from the order (h)

Waiver —There are two classes of cases to be considered under this head, namely —

(1) where the plaintiff in his plaint alleges that *part* of the cause of action arose outside the local limits of the ordinary original civil jurisdiction and fails to obtain leave and the case comes on for trial

(2) where the plaintiff in his plaint alleges that the *whole* cause of action arose within the local limits of the ordinary original civil jurisdiction but it turns out at the trial that part of the cause of action arose within and part outside the local limits of the ordinary original civil jurisdiction.

In case (1) the defendant may by appearing and pleading waive the objection to the jurisdiction Thus it was held by the High Court of Calcutta (i) following *Moore* v *Gamgee* (j) in a case where the plaintiff alleged in his plaint that *part* of the cause of action had arisen within the local limits of the ordinary original civil jurisdiction but no leave was obtained by the plaintiff under clause 12 and the defendant without raising any objection to the jurisdiction filed his written statement and applied subsequently for a commission to examine witnesses that the defendant had waived his objection to the jurisdiction The e decisions proceeded on the ground that the absence of leave under

(a) 4 m L v M ruga a (1903) 6 M 1 544 30 I A 238

(b) J oo H v J t k (19 3) 45 M 1 L J 4 1 6 1 C 75 (4) A M 158

(c) J p m v J j m (19 6) 50 1 m 360 94 I C 59 (6) A B 169

(d) v ticahoo v T ener (1 91) 16 I A 1 6

(e) Ke sowj v L km d (18 9) 13 I m 404 Vagam y v J nak m (1 9) 1 M d 14

(f) Vagh j v Lamaj (190) 29 1 m 49 40 H jee I m I Hadje Mah med (1 4) 13 1 L 1 91

(g) De v Col (186) 3 M H C 1 1 (A I ga v C ndasawmy (1) 6 M H C 1

(h) 1 (A I ya v C d sawmy (18 5) 8 M H C 1

(i) K g v errt ry of t for I d a (1908) 35 Cal 394 rimat v rimat (1913) 1 C W N 1

(j) (1 90) 25 Q B D 44 But see p t of the I port

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Cls 12, 13 this clause did not go to the root of the jurisdiction of the Court They are in accord with the observations of Sir Richard Couch in *Hadjee Ismail* v *Hadjee Mahomed* (k), where the learned Judge said that an order granting leave under clause 12 was not a mere formal order or an order merely regulating the procedure in the suit but one that has the effect of giving jurisdiction to the Court which it otherwise would not have and the judgment of Telang J in *Rampurtab* v *Premsukh* (l) in which it was said that leave under cl 12 affords the very foundation of the jurisdiction The Rangoon High Court has followed the Calcutta view (m)

As to case (2) it has been held that where the plaintiff sets up a complete jurisdiction in the Court to try the case and it turns out at the trial that the Court had not complete jurisdiction the defendant cannot be held bound by the doctrine of estoppel (n)

As to the application of s 21 of the Code see notes on that section

Suits against Secretary of State —The Secretary of State does not dwell or carry on business or personally work for gain within the meaning of the clause He cannot accordingly be sued in a Chartered High Court unless the whole cause of action has arisen within the jurisdiction of that Court or part of the cause of action has arisen within the jurisdiction and leave of the Court has been obtained (o)

13 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court

Extraordinary original civil jurisdiction

When the High Court shall think proper to do so —In a suit for immovable property instituted in the Dinagepur Court the defendant applied for its transfer to the Calcutta High Court under this clause the grounds of the application being (1) that questions of difficulty arose in the suit (2) that the defendant's witnesses lived in Calcutta and that it would be impossible for her to go to Dinagepur and take her witnesses there owing to the expenses (3) that the agreement upon which the suit was brought was executed in Calcutta and (4) that even the plaintiff resided and carried on business in Calcutta It was held that the case was a proper one for transfer to the High Court (p)

Subject to its superintendence —Note that the words used in this clause are subject to its superintendence while those used in sec 15 of the Charter Act [s 107 of the Government of India Act 1915] are subject to its appellate jurisdiction

(k) (1874) 13 Beng L R 91
(l) (1891) 15 Bom 93
(m) *Mohamed* v *Mohamed* (1928) 6 Rang 680 115 I C 898 (1928) A I R 61
(n) *Shama Kanta (Ch..) d Co* v *K..* (1917) 44 Cal 10 38 I C 5 1
(o) *Doya Narain* v *The Secretary of State* (188) 14 Cal .. 6 ; *Holrock* v *Secretary of State* (1913) 40 Cal 308 15 I C .. ; *Coringa .. raj .. v Secretary of State* .. 40 Mad 449 .. 689
(p) *Hemanda Lall* v *Sarrama ..* (1) .. Cal 183

The power of transfer contained in sec. 15 of the Charter Act has nothing to do with the power of removal conferred by the present clause and the Letters Patent make superintendence not appellate jurisdiction the condition of the exercise of the power of removal conferred by this clause. It has accordingly been held that the Court of the Political Resident at Aden being a Court *subject to the superintendence* of the High Court of Bombay within the meaning of the present clause the High Court of Bombay has power to remove a suit from that Court to itself for trial and determination though the Aden Court is not subject to the *appellate* jurisdiction of the High Court (q)

Suit.—A contested probate proceeding is a suit and can be transferred under this clause (r)

Transfer of suit from Presidency Small Cause Court to High Court.—The High Court has power to transfer to itself a suit from the Presidency Small Cause Court and the order for such transfer can be made if allowed by the rules of the High Court by a single Judge of that Court (s)

Powers of High Court in dealing with suits transferred under this clause.—The powers of the High Court in dealing with suits transferred under this clause would seem to be confined to the powers which but for the transfer might have been exercised by the Court from which the suit is transferred (t). The Court will consider the balance of convenience (u). See Cl. 20 below

Jurisdiction of High Court to receive plaints in suits cognisable by mofussil courts.—The High Court has no power to receive a plaint which ought to be filed in a Mofussil Court and pass interim orders even if the plaint cannot be filed in that Court owing to its being closed for the summer recess (v)

Transfer of petition from Provincial Insolvency Court.—The High Court has no power under this clause to transfer to its Original Side an insolvency petition pending in a Provincial Insolvency Court (w). Further the Original Side of the High Court has no jurisdiction to transfer an Insolvency case pending in one Provincial Insolvency Court to another such Court (x)

Appeal.—No appeal lies from an order under this clause (y)

Joinder of several causes of action.

14 And We do further ordain that, where plaintiff has several causes of action against a defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit and to make such order for trial of the same as to the said High Court shall seem fit

(q) M ... (1906) 30 ... 46 ... Emperor (1918) ... 581 ... 60 ... 40 ... 9

(r) ... Darpoka ... (19) 54 Cal ... 100 ...

(s) ... Bombay ... (1875) ... L R 143 ... The Bombay ... and Central India Ry Co (1) 8 Bom H C 59

(t) ... (1915) 38 Mad 80 ... 8 ... 41 I A 314 ...

(u) ... Lakshmoni (19) 54 ... 60 ... I C ...

(v) ... (19) ... 5 ... 113 I C 41 ... A M

(w) ... (19) ... Mad 5 ... A M ...

(x) ... Ahmed Brothers ... (19 6) ... 100 I C ... A R 61

(y) ... Darpokari ... supra

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Cls 14, 15 Joinder of several causes of action —The word several means separate. *Under this clause it is necessary that one cause of action at least should arise within the* original jurisdiction of the High Court ( ) Where a suit is founded upon two causes of action one of which is alleged to have arisen *partly within* the jurisdiction of the *Bombay High Court* and the other *wholly outside* the jurisdiction the High Court has power after granting leave to sue in respect of the former cause of action und[er] clause 12 to allow the plaintiff to join the latter in the same suit There is nothing in the present clause to show that the power of the Court to make such an order under this clause is limited to cases where one of the causes of action has arisen *wholly within* the jurisdiction (*a*) The jurisdiction of the High Court to pass an order under this clause in regard to joinder of cause of action is not taken away by the plea of want of jurisdiction which the defendant may raise in respect of a cause of action so joined (*b*)

Such causes of action not being for land —This expression means exclu[din]g any cause of action which is for land (*c*)

15 And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 10[8] of the Government of India Act, made [on or after the first day of February, 1929] in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall

Appeal to the High Court from Judges of the Court

(z) *Sir Tul j a v Sowk bai* (19 9) 3 B m 1 11 I C 4 4 ( ) A I R 100
(a) *Dot n v Th Kri hna Mill Ld* (1910) 34 Bom 64 8 I C 618
(b) (19 9) 3 Bom 51 11 I C ( ) A I R 100 *supra*
(c) (19) 3 Bom 1 117 I C ( ) A I R 100 *supra*

be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided

Amendment —The above clause except the words enclosed in rectangular brackets is clause 15 as amended by the Letters Patent of 1928 which came into force on the date of publication in Calcutta on the 11th January 1928 in Bombay on the 27th January 1928 and in Madras on the 13th January 1928 Clause 10 of the Allahabad Letters Patent clause 13 of the Rangoon Letters Patent clause 10 of the Lahore Letters Patent and clause 10 of the Patna Letters Patent have been similarly amended and they came into force respectively on the 28th January 1928 2nd February 1928 8th February 1928 and 30th January 1928 The previous Letters Patent were as follows —

And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act 1915 or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court pursuant to section 13 of the said recited Act and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court or of such Division Court whenever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being but that the right of appeal from other judgments of the Judges of the said High *Court or of such Division Court shall be to Us Our heirs or successors in Our or Their* Privy Council as hereinafter provided

The effect of the amendments made in 1928 is—

(1) the exclusion of a right of appeal from a judgment passed by a single Judge sitting in second appeal unless the Judge who passed the judgment grants a certificate that the case is a fit one for appeal There is no question of grant of certificate that the case is a fit one for appeal in the case of two Judges composing a Division Bench differing in opinion (*d*)

(2) the exclusion of a right of appeal when the Judges of a Division Bench are equally divided in opinion This case is provided for by the amendment of clause 36

There is as before an unqualified right of appeal from the judgment of a single Judge on the original side

As to amendment no (1) it was held by the High Court of Calcutta that it had no retrospective effect and that it could not apply to suits filed before the amended Letters Patent came into force (*e*) The clause was therefore again amended by adding the words in rectangular brackets namely on or after the first day of February 1929 The result is that there is no right of appeal from the judgment of a single Judge sitting in second appeal in cases where the judgment is pronounced after the 1st February 1929 whatever may be the date when the suit was filed unless a certificate is granted declaring that the case is a fit one for appeal (*f*)

(*d*) *I m Chi v H mid* (1929) 56 Cal 0
(*e*) *I H v D m Jd a* (19) 6 Cal 51 113 I C 49 ( ) A C 640.

(*f*) *Math rkha v Nad ad C y M pa y* (1929) 31 Bom L R 4 3 11 I C (1929) A B 41

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Cl 15

Meaning of "judgment" as used in this clause —

1 *Calcutta High Court*—The leading case on the subject is that of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co* (g) decided by the High Court of Calcutta so far back as 1872 In that case Couch, C J said "We think judgment in cl 15 means a decision which *affects the merits of the question between the parties by determining some right or liability* It may be either *final or preliminary or interlocutory*, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined. This definition is now of some antiquity and is rapidly becoming, if it has not already become, almost classical (h) The point actually decided in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co* was that no appeal lies under this clause from an order directing the issue of a mandamus to the Justices of the Peace for Calcutta to compel them to refer to arbitration a question of compensation The above decision was followed by a decision of the same Court in *Hadjee Ismail* v. *Hadjee Mahomed* (i) where it was held that an appeal lies under this clause from an order refusing to set aside an order granting leave to sue to the plaintiff under cl 12 of the Letters Patent Referring to the said order Couch, C J said "It is not a mere formal order or an order *merely regulating the procedure in the suit* but one that has the effect of giving a *jurisdiction* to the Court which it otherwise would not have And it may fairly be said to *determine some right* between them, viz the right to sue in a particular Court and to compel the defendants who are not within its jurisdiction to come and defend the suit, or if they do not, to make them liable to have a decree passed against them in their absence In a later case Garth, C.J said "I think that the word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or *order of an interlocutory character* which merely decides some isolated point not affecting the merits or the result of the entire suit (j) In a recent case Rankin, C J said "The mere circumstance that an order puts in peril the finality of a decision given in the respondent's favour does not of itself make that order a judgment (k)

The definition of 'judgment' in the case of *Justices of the Peace for Calcutta* was adopted by a majority of the same High Court in a later case where it was held that an appeal lies under this clause from an order made by a single Judge of that Court under O 45, r 15 refusing to transmit for execution an Order of His Majesty in Council (m) The decision was affirmed on appeal to the Privy Council (n) Referring to the judgment of the majority their Lordships said "These learned Judges held (and their Lordships think rightly) that whether the transmission of an order under r 15 [now O 45, r 15] would or would not be a merely ministerial proceeding, Mr Justice Pontifex [whose order was appealed from] had in fact exercised a judicial discretion and had come to a decision of great importance which, if it remained, would conclude any rights of Kalisunders for an execution in this suit They held, therefore, that it was a judgment within the meaning of cl 15 In a later case [illegible] C J said that the definition of 'judgment' given by Couch C J had never been regarded as absolutely exhaustive and that in every case where the Court was called

(g) (1872) 8 B L R 433, 17 W R 364
(h) [illegible] Comm. of [illegible] (1901) 5 Cal W N 81 91
(i) (1874) 13 Beng L R 91
(j) [illegible] v. [illegible] (1878) 4 Cal 531
(k) [illegible] (19[illegible])

6 C L J 13 114 I C 84 (1929) A C [illegible]
(l) (19[illegible]) 8 Ben L R 452
(m) *Kali* [illegible] v. [illegible] 6 Cal 594
(n) [illegible] v. [illegible] 10 I A [illegible]

upon to decide whether the decision under appeal was or was not a judgment' regard must be had to the nature of the order (o)

2 *Bombay High Court*—The definition of judgment as given in the two Calcutta cases cited above has been adopted by the High Court of Bombay In *Miya Mahomed v Zorabi* (p) Scott C J referring to the above Calcutta cases said For a considerable number of years in this Court those two decisions (q) have to my knowledge been regarded as the leading decisions to be followed on the question whether an order in any particular case is a judgment within the meaning of clause 15 of the Letters Patent The leading Bombay case is *Sonbai v Ahmedbhai* decided in the year 1872 (r)

3 *Madras High Court*—Turning now to the Madras decisions the earlier leading case on the subject was *De Souza v Coles* (s) decided in the year 1868 The modern leading case is that of *Tuljaram v Alagappa* (t) decided by a Full Bench of that Court in 1910 In the former case Bittlestone J said The word judgment cannot be limited to the final judgment in the suit but must be held to have the more general meaning of *any decision or determination affecting the rights or the interest of any suitor or applicant* When the language giving the appeal is so general in its terms as that contained in the 15th clause of the Charter it is we think *impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from* This definition has now been rejected as too wide and instead thereof we have another definition of the term judgment laid down in *Tuljaram's case* In that case White C J said as follows —

The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made *If its effect* whatever its form may be and whatever be the nature of the application on which it is made is *to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect if it is not complied with is to put an end to the suit or proceedings I think the adjudication is a judgment within the meaning of the clause* An adjudication on an application which is *nothing more than a step* towards obtaining a final adjudication in the suit is not in my opinion a judgment within the meaning of the Letters Patent I think too an order on an *independent* proceeding which is ancillary to the suit (not instituted as a step towards judgment but with a view to rendering the judgment effective if obtained)—*e g* an order on an application for an interim injunction or for the appointment of a receiver is a judgment within the meaning of the clause

It will be seen that the definition of judgment as stated by White C J is wider than that in *Justice of the Peace for Calcutta* and narrower than the one in *De Souza v Coles* Referring to the former case White C J said that he was not prepared to say as was said in that case that judgment within the meaning of this clause must be a decision which affects the merits by determining some right or liability The learned Chief Justice added I think the decision may be a judgment for the purposes of the clause though

( ) [illegible] (192) 44 ([illegible] 815 [illegible] 46 [illegible] (1918) 45 ([illegible] 111 [illegible] 41 [illegible] 914 [illegible] (1916) 43 ([illegible] 85 [illegible] 31 [illegible] 634 [illegible]

(p) (1909) 11 Bom [illegible] 11 [illegible] 15 See [illegible] (19 1) 4 [illegible] 533 ([illegible] 370

(q) [illegible] 433 [illegible] *Hadjee Ismail v Hadjee Mahomed* (18 4) 13 [illegible] L R 91

(r) (1 [illegible]) 9 Bom H [illegible] 53 [illegible] 1 m 555

( ) (156) 3 M [illegible] H C [illegible]

(t) (191) 35 M [illegible] C. 31)

Let Pat [Cal, Bom, and Mad]

Cl 15 it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding The result is that some orders which have been held not to be appealable by the Calcutta High Court have been held to be appealable by the Madras High Court e g an order under cl 13 of the Letters Patent transferring a suit from a subordinate Court to the High Court (u) Such an order of transfer is appealable in Madras as it puts an end to the suit as it stood in the Court from which it was transferred while an order refusing a transfer is not appealable as the proceedings are allowed to go on (v) Referring to the definition of judgment in *De Souza v Coles* the learned Chief Justice said that it was too wide

4 *Allahabad High Court*—L P cl (10)—In Allahabad it has been generally held that no order which is appealable under s 104 and O 43 r 1 is appealable under the present clause (w) And further no appellate order from which a second appeal is excluded under section 104 can be appealed from under this clause (x) Conversely an order from which an appeal is allowed under s 104 and O 43 r 1 to the High Court from a subordinate Court is an order from which an appeal will lie under this clause (y) The only definition hitherto given by that Court of the word judgment is that it must be such a judgment on the part of all the learned and honourable Judges who may constitute a Bench *as disposes of the suit* or the appeal before it (z) See notes to s 104 Letters Patent appeal

5 *Lahore High Court*—L P cl (10)—The High Court of Lahore has adopted the definition of judgment as given by White C J in *Tuljaram's case* referred to above under the head Madras High Court (a) In a recent case it was held that the expression judgment in this clause is not synonymous with the word decree as defined in sec 2 of the Code (b)

6 *Rangoon High Court*—L P cl (13)—In a recent Full Bench case (c) the High Court of Rangoon held that the word judgment in cl 13 of the Letters Patent is intended to cover an order as well as a decree but the effect of the judgment must be such as to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect if it is not complied with is to put an end to the suit or proceeding If it has this effect the adjudication is a judgment otherwise not The decision of an issue which has the effect of allowing a suit to proceed does not affect the merits or result of the whole suit in that it does not decide the case one way or another and is therefore not a judgment The decision of a Judge upon a preliminary issue is not binding on his successor and the Judge himself can change *his mind on more mature consideration*

Interlocutory Order—All the High Courts are now agreed that no appeal lies under this clause from an order *merely regulating procedure* in a suit or from an order

(u) *Khatizan v Sonai am* (19 0) 47 Cal 1104 60 I C 963 [not appeal ble] *Kr sh a v Tha ka Jala* (19 4) 47 M 1 136 73 I C 10 4 (–4) A M 90 [appealable]

(v) *Narsa Pedli v H j T r M hom d* (19 3) 51 Mad 3 0 107 I C 806 (–8) A M 219

(w) *I o F b v Mehd H ai* (1889) 11 All 3 *M hammad v Ih an ullah* (189) 14 All 2 6 *Mansab Al v Nih l Cha d* (1 93) 15 All 359 *Ban dhar v G lab* Kun (1904) 16 All 443 448

(x) *Pr t Lal v Mai n Lal* (191) 39 All 191 39 I C 460

(y) *Sadiq Ali v An a Al* (1923) 45 All 66 1 7 0 I C 80 (3) A A 44

(z) *Gha Ram v Naraj* (19 6) 1 All 31 see also [illegible] 438 44 [illegible] (19 3) 45 All 66 [illegible] 44 see also *Ishwari v* [illegible] 48 All 684 96 I C [illegible]

(a) *Puldu Singh v* [illegible] 188 191 196 67 I C [illegible] see also [illegible] (1920) 1 Lal 318 55 I C [illegible]

(b) *Sh tla Mal v I P Narn* (19) 111 I C 2 4 (–) A L [illegible]

(c) *P K P V E Ch* [illegible] (1928) 6 Rang. 03, 114 I C [illegible] A R 41

on an application which is *nothing more than a step towards obtaining a final adjudication in the suit* It has thus been held that no appeal lies from the following orders namely an order directing a party to produce and give inspection of documents (*d*) an order directing the issue of a commission for the examination of witnesses (*e*) an order refusing to try certain issues as preliminary issue (*f*) an order refusing to frame an issue asked for by one of the parties (*g*) an order amending the title of a plaint so as to convert a summary suit into a short cause (*h*) an order under cl 13 of the Letters Patent transferring a suit from the Presidency Small Cause Court to the High Court (*i*) [though the contrary has been held on the last mentioned point by the High Court of Madras (*j*)] an order dismissing the defendant s application to take the plaint off the file on the ground that the suit was not for the benefit of the lunatic plaintiff (*k*) an order refusing to direct certain allegations in a party s pleading to be struck out as scandalous (*l*) an order refusing to give directions for the simultaneous trial of issues between the defendant and a third party (*m*) an order transposing a defendant as plaintiff (*n*) an order restoring a suit dismissed for default (*o*) an order settling the terms of a proclamation for sale (*p*) an order as to the sufficiency of security for stay of execution (*q*) an order under O 21 r 58 dismissing an objection to attachment (*r*) and an order for security under O 38 r 5 (*s*) The decision in an earlier Madras case (*t*) that an appeal lies under this clause from an order fixing a distant date for the hearing of a suit has been disapproved in later decisions of the same Court (*u*) such an order is one relating merely to the date of hearing and is not a judgment An order giving leave to defend on a summons under Chap 13 A of the original side rules of the Calcutta High Court is not a judgment (*v*) nor an order of a Judge in the exercise of insolvency jurisdiction referring a claimant to a regular suit (*w*) nor an order referring back a report of the Official Referee in Madras (*x*) nor an order transferring a suit (*y*) nor an order refusing to revoke leave to sue on the original side of the High Court (*z*) nor an order made under sec 195 of the Indian Companies Act 1913 directing the examination of

(*d*) S nlar v Ch iblas (187) 9 Bom H C 334 Ahm l v Aje l l (1903) 11 Bom L R 18 I C 167

(*e*) Miya M l l v Z l (1909) 11 L m L R 41 I C 157 T er R v J Lall (1910) 31 Cal L J 16 55 I C 66

(*f*) J h q v The Se t r f late (1909) 11 Bom L R 45 n t I C 150

(*g*) Tulj a n v Al j ppa (191) 3 Mad 1 8 I C 340 Ib h v Fickru ssa (1918) 4 C 1 31

(*h*) M l l v M l l (19) Bom L R 09 86 I C 100 (5) A B 139

(*i*) Abl l n v So m (1919) 47 C 1 1104 60 I C 913

(*j*) Kri h n v Tha ka h la (1914) 47 Mad 136 3 I C 10 ( ) A M 90

(*k*) G l M A v Nov (1911) 6 C W N 69 I C 915 ( ) A C 1

(*l*) S v I am inatha (19 5) 49 M d L J 63 91 I C 566 (6) A M 61

(*m*) Ch d v Chh q l l (1911) 45 Bom 4 S 53 I C 533 (21) A B 3

(*n*) Offi l A m v J m l mpp (19 6) 49 Mad 533 94 I C 456 (6) A M 534

(*o*) Maharaj K ho e v K n S hi (19) 49 Cal 616 69 I C 8 0 ( ) A C 40

(*p*) To cker v Harsook l (19 3) 45 M d L J 611 76 I C 1 ( ) A M 3 6 Aa er v M hta (19) 46 Mad L J 71 5 I C 901 ( ) A M 31

(*q*) Muchj e Dh rs y d Co v Moolla (19) 3 Rang 55 88 I C 740 ( ) A R

(*r*) Jamal Br v Ch p Moh (19 7) 5 Rang 481 104 I C 330 (7) A R

(*s*) Menzla S ha (19 5) 3 Rang 07 90 I C 9 ( ) A 1 67

(*t*) P v I (1891) 14 Mad 88

(*u*) T lja m v Ilag ppa (191) 35 Mad 1 16 I 8 I C 340

(*v*) Mejhie v K lceram (19 6) 53 Cal 6 96 I C 1 (6) A C 84

(*w*) v O l l me (19) 6 Ran 363 111 I ( ) A R 216

(*x*) M e v Hadua (19) 51 Mad 35 10 I C 63 ( ) A M 0

(*y*) I M d F v Sh Jam (19) 8 Lah. 681 I C 843 ( ) A L 4

(*z*) M k re f Ittkapu m v P m P (19) M d I ( ) (A M 846

Let Pat [Cal , Bom , and Mad]

Cl 15 some of the directors of the company as to their dealings in respect of the affairs of the company (a) nor an order granting leave to file a suit in forma pauperis (b).

But an appeal lies from the following orders namely an order directing a plaintiff to give security for costs (c) an order in appeal staying proceedings of the trial Court subsequent to the passing of a preliminary decree (d) an order refusing or granting a stay of execution (f) an order rejecting an application to set aside the abatement of a suit or appeal (g) an order refusing to stay execution of a decree of a Mufassal Court pending an appeal therefrom to the High Court (h) an order directing payment to a party of a certain sum per month for his maintenance pending the suit (i) an order that the receiver is entitled to commission (j) an order made by a single judge of the Calcutta High Court dismissing a suit for want of prosecution under Chapter 10 rule 3 of the High Court Rules (k) an order giving plaintiffs leave to withdraw from the suit with liberty to take such action thereafter as they may be advised (l) an order for attachment (m) an order setting aside an abatement of suit (n) an order appointing a receiver (o) an order giving leave to defend under chapter 13A of the Original Side Rules of the Calcutta High Court directing that if a security was not furnished a decree should be drawn up (p) and an order rejecting an application under O 41 r 19 (q)

Whether wrong exercise of discretion may be a ground of appeal—It has been held by the High Court of Allahabad that the fact of a matter being within the discretion of the original Judge is a ground for refusing to entertain the appeal (r). On the other hand it has been held by the High Court of Madras that the fact that the making of an order was a matter of discretion is not a ground for refusing to entertain an appeal though it may be a good reason for declining to interfere with that discretion in appeal (s)

Orders in suits and appeal—We have already noted in their proper place what orders made under the Code are appealable under this clause and what orders are not so appealable The following is a list of such orders —

S 115 [revision]—see notes Appeal above

O 1 r 3 [joinder of defendants]—see notes Appeal above

(a) *M lan G p l v Sa l nd a Nath* (19 8) 5 Cal 6 104 I C 64 (8) A C 9
(b) *M i Tha v M ung Pa* (19 6) 4 Ran 0 I C 5 3 (6) A R 110
(c) *Sesh g ri v Nar h Asku* (1903) 26 Mad 0 v *aba* v *Tribho and s* (1904) 3 Bom 60
(d) *Sh bia Mal v Pup Nar n* (19 9) 111 I C 4 (29) A I 904
(e) *Br j Coo ree v I amr k D s* (1900) 5 C W N 81 *T lja am* v *Al g ppa* (191) 35 Mad 1 8 19 0 8 I C 310 *G kal Ch nd* v *r l Das* (19 0) 1 Lah 348 5 I C 933 *ona hal m* v *A ma r lu* (19 4) 47 Mad 316 79 I C 109 (4) A M 97 *Co d r v Krish nch l* (19 7) 50 Mad 3 0 100 I C 157 (27) A M 98
(f) *I ethaperumal v Chid mb* (19 7) 5 M L J 6 0 10 I C 396 (27) A M 9
(g) *Sad q Ali v A wa Ali* (19 3) 45 All 66 0 I C 80 (23) A A 44
(h) *So h i m v K ma rel* (19 4) 4 Mad 316 I C 109 (4) A M 597
(i) *Syed v S bha* (19 3) 48 M d L J 333 I C 903 ( ) A M 443
(j) *Ma Hm a v Offic al Rece er* ( ) A R 301
(k) *Udoy Cha d v Khetr das* (19 1) 51 Cal 8 81 I C 1048 (24) A C 10 5
(l) *Na da v Sh nath I* (19 0) F m L R 101 8 I C 1 0
(m) *Ha Moh m n & Co v F dern J* Tr i g Co (19) 53 Cal 15 9 I C 1 (3) A C 6 9
(n) *Sa t Ch dra v Ma har* 51 & L (19) 5 Cal 6 87 I C 91 ( ) A C 333
(o) *Ar majam v Kanappa* (19) 3 P & W 101 I C 91 ( ) A 159
(p) *Ch tu Lal v Mare* (19) 9 C W N 4 98 I C 83 (4) A C
(q) *Mohar Cha d v Ha d* (25) A L 41 I C 95
(r) *Wall v Howa d* (1 9) 17 All 4 4
(s) *T la m v Alagappa* (191) 35 M 1 1 17 I 8 I C 34

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O 6 r 17 [amendment of pleadings]—see notes Appeal above

O 9 r 9 [restoring of suit]—see notes Appeal above

O 9 r 13 [ex parte decree]—see notes Appeal above

O 11 r 18 [inspection]—see notes Appeal above

O 14 r 3 [issues]—see notes Appeal above

O 20 r 15 [accounts]—see notes Letters Patent Appeal above

O 21 r 58 [claims to property under attachment]—see notes Appeal above

O 22 r 9 [abatement]—see notes Letters Patent Appeal above

O 22 r 10 [abatement]—see notes Letters Patent Appeal above

O 23 r 1 [withdrawal from suit]—see notes Letters Patent Appeal above

O 25 r 1 [security for costs of suit]—see notes Appeal above

O 26 r 4 [evidence on commission]—see notes Appeal above

O 33 r 5 [leave to sue as a pauper]—see notes Letters Patent Appeal above

O 37 r 3 [leave to defend in a summary suit]—see notes Appeal above

O 39 r 1 [injunction]—see notes Appeal above

O 41 r 5 [stay of execution pending appeal]—see notes Appeal above

O 41 r 10 [striking out appeal for failure to deposit security for costs]—see notes Appeal from order dismissing petition etc above

O 41 r 23 [remand]—see notes Letters Patent Appeal above

O 41 r 25 [order directing trial of issue]—see notes Appeal above

O 44 r 1 [leave to appeal in forma pauperis]—see notes Appeal above

O 4 r 3 [leave to appeal to Privy Council]—see notes Appeal above

O 45 r 7 [security for costs of appeal to Privy Council]—see notes Appeal above

O 45 r 13 [stay of execution pending appeal to Privy Council]—see notes Appeal above

O 45 r 15 [execution of order of Privy Council]—see notes Letters Patent Appeal above

O 4 r 7 [review]—see notes Appeal above

Orders in proceedings other than suits and appeals—A judgment within the meaning of this clause need not be an adjudication in a *suit* or *appeal* as technically understood. An adjudication which terminates what may be called an original petition like an application for the custody of a minor may be a judgment so as to be appealable under this clause The following is a list of such adjudications —

1 *Habeas corpus*—An appeal lies under this clause from an order deciding the claim of relatives to the custody of a minor on a writ of *habeas corpus* (t).

(t) *Narro ... Dh ... the m ... er of* (1890) 14 Bom 555

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Cl 15

2 *Leave to sue under cl 12 of the charter* —An appeal lies from an order refusing to set aside an order granting leave to sue under cl 12 of the Letters Patent and also from an order refusing to grant leave to sue See notes to cl 12 above Appeal

3 *Administrator General's Act* 3 *of* 1913 —An appeal lies from an order allowing to the Administrator General commission at a certain rate (*u*).

4 *Probate and Administration Act* 1881 s 90 [now Indian Succession Act 39 of 1925 s 307] —An appeal lies from an order purporting to be made under s 90 of the Probate and Administration Act at the instance of a beneficiary in a case in which there is *no* restriction imposed by the will on the power of the executor to sell immovable property forming part of the estate of the deceased. Such an order is really one made without jurisdiction (*v*) An appeal also lies from an order granting probate (*w*)

5 *Limitation Act s 5* —It has been held by the High Court of Calcutta that no appeal lies from an order refusing to excuse the delay in filing an appeal or application (*x*) The High Court of Bombay has held that an appeal does lie from such an order (*y*)

6 *Mandamus* —It has been held by the High Court of Calcutta in the leading case of *The Justices of the Peace for Calcutta* v *The Oriental Gas Co* (*z*) that no appeal lies from an order which directs a mandamus to issue to a public body to compel them to refer a question of compensation to arbitration, the reason given being that such an order does not determine any question whatever between the parties but only initiates proceedings by which the liability of the public body to make compensation is to be ascertained and determined. This decision was dissented from by White C J in the Madras case of *Tuljaram* v *Alagappa* (*a*)

7 *Contempt* —An appeal lies from an order of committal for contempt (*b*) as well as from an order refusing an application to commit for contempt of Court (*c*)

8 *Vice Admiralty jurisdiction* —An appeal lies from the decision of a single Judge of a Chartered High Court exercising Admiralty or Vice Admiralty jurisdiction (*d*)

9 *Arbitration Act* 9 *of* 1899 —An appeal lies under this clause from an order refusing to enlarge time for the submission of an award remitted to the umpire (*e*) or to set aside an award made and filed under the Arbitration Act (*f*) There is a conflict of opinion whether an order refusing to stay proceedings under sec 17 of the Arbitration Act is a judgment it being held in some cases that it is (*g*) while in some that it is not (*h*) An order returning an award under the Arbitration Act for notice of filing to be given to the parties is not a judgment (*i*)

(*u*) *Somasundaram* v *Administrator General* (1916) 1 Mad 148
(*v*) *In the goods of Chandi Singh* (1926) 3 Cal 5
(*w*) *Em... a Ch... d* v *L... draba* (1891) 1 All 4 5
(*x*) *C... da Lal* v *Sh... b Das* (1906) 33 Cal 13 3
(*y*) *I... mehad...* v *Mahad...* (1918) 4 Bom 60, 44 I C 913 *Nag... das* v *N... laj* (1914) 48 Bom 44 ... I C 56 (1924) A I R 39 See also *K... ra M... l* v *I... m N... th* (1906) 8 All 414
(*z*) (18...) 8 Beng L R 433
(*a*) (191...) 3 Mad ... 8 I C 340
(*b*) *N... r... hoo* v *Na... m Das* (1... 3) ... Bom 5
(*c*) *Moh... nd a Lall* v ... *nd Coome* (1...) ... Cal 236
(*d*) *Cha... p... o... the matter of the ...* (1...) ... Cal 66
(*e*) *M... rt... o... s* v ... (19...) 51 ... 103 109 I C ... (19...) A M ...
(*f*) *Campbell & Co* v *Je... raj* (192...) ... Cal ... 46 I C 657 ... 1 Rang 661 ... I C ... (19...) A R ...
(*g*) *J... yl... & C...* v *G... piram* (19...) ... 8 I C
(*h*) ... *Kr... y* v ... *d al* v *C... em* (19...) ... Rang 481 ( ) A R ...
(*i*) ... 6 Rang 3 ... A R ...

10 *Land Acquisition Act* 1 *of* 1894 —See notes below Land acquisition appeal

11 *Indian Companies Act* 6 *of* 188? —No appeal lies from an order refusing an application under s 169 of the Indian Companies Act for extension of time for serving notice of an appeal under that Act (*j*) An order depriving a creditor of his right to establish his claim in winding up proceedings is appealable (*k*)

12 *Income Tax Act* 1922 —No appeal lies from the decision of a single Judge in a Reference under s 66 of the Income Tax Act (*l*)

Orders made in the exercise of revisional jurisdiction —The words not being an order made in the exercise of revisional jurisdiction were added into this clause by the Amended Letters Patent of 11th March 1919 The addition of these words makes it clear that no appeal lies under this clause from orders made in the exercise of revisional jurisdiction (*m*) An interlocutory order on a civil revision petition is made in the exercise of revisional jurisdiction and is not appealable (*n*) See notes to s 115 Appeal

Orders made in the exercise of the power of superintendence —The words not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section one hundred and seven of the Government of India Act 1915 were added into this clause by the Amended Letters Patent of 11th March 1919 The addition of these words makes it clear that no appeal lies under this clause from orders made in the exercise of the power of superintendence under s 107 of the Government of India Act 1915

Declares that the case is a fit one for appeal —The requisition of a certificate of fitness for appeal only applies in the case of a judgment of a single Judge in the exercise of appellate jurisdiction (*o*) The Bombay High Court has held that this provision is retrospective (*p*) On the other hand the Allahabad High Court considers that no certificate is necessary if the judgment appealed from was delivered before publication of the amending Letters Patent (*q*) The Calcutta High Court in a Full Bench has held that it only applies to suits filed on or after the date of publication of the amendment (*r*) and the Madras High Court has taken the same view (*s*)

Points on which appeal may be heard —It has been held by the High Courts of Allahabad (*t*) Patna (*u*) and Lahore (*v*) that an appellant is not entitled in an appeal under this clause to be heard on points which have not been raised before the Judge from whose judgment the appeal is preferred (*w*)

(*j*) *Wall* v *Howard* (180?) 17 All 438

(*k*) *Le*[illegible] *mar* (19) 31 Cal W N 804 103 I C 6 9 (7) A I C 6 9

(*l*) [illegible] *Emperor* (19) 5 Cal 546 87 I C 6 3 ( ) A I C 598 [illegible] v *Collector of Lahore* (19) 6 Lah 30 84 I C 5 0 ( ) A I 336 [illegible] v [illegible] (19 3) 50 I A [illegible] Bom [illegible] I C 461 (3) A I C 148 [cl 43 of the Letters Patent]

(*m*) [illegible] v [illegible] (19 1) 34 Cal L J 4 9 64 I C ? 9 (1) A I C 1

( ) [illegible] v *Mahomed Haneefh* (19 8) 51 Mad 103 10 I C 813 ( ) A M 169

(*o*) [illegible] v [illegible] (19 9) 6 Cal 50 (9) A I C 819 (F B)

(*p*) [illegible] (19) 5 Bom 53 30 Bom L R 91 ( ) A I B 3 1

(*q*) [illegible] v *Dool*[illegible] (19) 0 All 865 110 I C 719 (8) A A [illegible]

(*r*) [illegible] (19 3) 3 C W N 1130 113 I C 49 ( ) A I C 640 F B

(*s*) [illegible] (19 9) 5 M L J 361 115 I C 811 ( ) A M 381

(*t*) [illegible] v [illegible] (19) 2 All [illegible]

(*u*) [illegible] *Malhi* (1916) 1 Pat L J 4 5 490 3 I C [illegible]

( ) [illegible] (19) Lah L J 1 5 I C 9 3

(*w*) (19) 0 All [illegible]

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Cls 15-17 The appeal given to the Full Court under this clause is not confined to the p… on which the Judges of the Division Court differ the whole appeal is open bef… the Court for decision (x)

Land acquisition appeal —The decision of the High Court in a land acqu… tion appeal is not a judgment within the meaning of this clause so as to entitle a party to file a further appeal to the High Court under this clause (y) See notes to cl 39 The decision must amount to a judgment decree or order

Sentence or order in the exercise of criminal jurisdiction —An order granting sanction under s 195 (1) of the Criminal Procedure Code is one made in the exercise of criminal jurisdiction and is not a judgment within the meaning of this clause ( ) See the undermentioned case (a)

Review —It is competent to the High Court to review judgments in appeals preferred under cl 15 above (b)

Appeal from Courts in the Province

16 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force

Jurisdiction as to infants and lunatics

17 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, within the Bengal Division of the Presidency of Fort William, as that which is now vested in the said Supreme Court at Calcutta

Within the Bengal Division of the Presidency of Fort William —See the argument of counsel in *Besant v Narayaniah* (c)

Jurisdiction of Supreme Courts as to infants and lunatics —See cl … of the Charter of the Calcutta Supreme Court cl 32 of the Charter of the Madras Supreme Court and cl 42 of the Charter of the Bombay Supreme Court

(x) *Ram Dial v Ram Das* (1876) 1 All 181 *Bhimrey d … v B… choo* (19 4) 48 Bom 691 87 I C 199 (…5) A B 118 *Upendra Nath v Binde…* (1915) … Cal L J 45 … I C 468 *Gop… v Hem Chandra* (19 0) 31 Cal L J 447 57 I C 2 6 *Punjab … Co v Ogilvie* (19 6) 7 Lah 179 93 I C 344 (6) A L 65

(y) *Manavikraman v Coll… of the Nilgiris* (1918) 41 Mad 943 49 I C 7 … *Dial v Secret… of State* (19…) 3 Lah 4 0 69 I C 4 8 ('23) A L 2 5

(z) *M… v Pafaratnam* (19…) 45 Mad 9…8 71 I C 1 6 (…) A M 495

(a) *Desik… re* (1916) 39 Mad 5… 5 7 A … *Aiyar re* (1914) … 561 29 I C 109 *Appad v Appad…* 39 Mad 47 … I C 66

(b) *Venkata Subbarayudu v …* (1917) 40 Mad 631 32 I C …

(c) (1914) 41 I A 314 38 M J 807 24 I C …

18 And We do further ordain that the Court for relief of Insolvent Debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, within the Bengal Division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction, and otherwise, as are constituted by the laws relating to insolvent debtors in India

Provision with respect to the Insolvent Court

Laws relating to insolvent debtors in India—The law relating to insolvent debtors in the presidency towns is now contained in the Presidency towns Insolvency Act 1909 Note that cl 12 does not control the provisions of this clause so as to limit the insolvency jurisdiction of the Court *(d)*

Law to be administered by the High Court of Judicature at Fort William in Bengal

19 And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued

By the High Court in the exercise of ordinary original civil jurisdiction

Law or equity to be applied to each case—See the undermentioned case *(e)* See also Pollock and Mulla s Indian Contract Act 5th ed. pp The present clause is to be read with cl 44 below

Law or equity administered by the Supreme Courts—See cl 13 17 and 18 of the Charter of the Supreme Court of Calcutta cls 21 and 31 of the Charter of the Supreme Court of Madras and cls 28 29 and 41 of the Charter of the Supreme Court of Bombay

Quære whether the English law should be applied in cases arising within the original jurisdiction of the High Courts though contrary to the rule of justice equity and good conscience *(f)*

(d) Abdul Khader v The Official Assignee of Madras (1916) 40 M 810 36 I C 5 4 In the matter of Krishna I (19) 51 M d 54 11 I C 149 ( ) A M 3

(e) Madh b Ch der v I soom r Doo (18 4) 14 Beng L R 6 at p 83

(f) G rasam Ch nd (18) 5 Mad 3 Mod Ch d v A r Chetty (1916 39 Mad 548 5 553 9 I C 2 3

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ls 20-22

In the exercise of extraordinary original civil jurisdiction

20 And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its extraordinary original civil jurisdiction such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein

The law which would have been applied by any local Courts."—See note to cl 13 above Powers of High Courts in dealing with suits transferred under this clause

By High Court in the exercise of appellate jurisdiction

21 And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal to each case, coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

Criminal Jurisdiction

Ordinary original jurisdiction of the High Court

22 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these Presents (*g*)

(*g*) And also in respect of all such persons beyond such limits or over whom the said High Court of Judicature at Madras/Bombay shall have criminal jurisdiction at the time of publication of these presents — *Madras and Bombay Letters Patent*

Jurisdiction as to persons

23 And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

Extraordinary original criminal jurisdiction

24 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate General, or by any Magistrate or other officer specially empowered by the Government in that behalf

No appeal from High Court exercising original jurisdiction

Court may reserve points of law

25 And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original Criminal Jurisdiction, which may be constituted by one or more Judges of the said High Court But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

High Court to review on certificate of the Advocate-General

26 And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate General, that in his judgment there is an error in the decision of a point or points of law decided by the Court of original Criminal Jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right

Let Pat [Cal, Bom, and Mad]

ls 20-22 **20** And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its extraordinary original civil jurisdiction such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein

In the exercise of extraordinary original civil jurisdiction

The law which would have been applied by any local Courts —See note to cl 13 above Powers of High Courts in dealing with suits transferred under this clause

21 And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal to each case, coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

By High Court in the exercise of appellate jurisdiction

Criminal Jurisdiction

22 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at Fort William in Bengal, shall have criminal jurisdiction over at the date of the publication of these Presents (*g*)

Ordinary original jurisdiction of the High Court

(*g*) And also in respect of all such persons beyond such limits of other such High Court of Judicature at Madras/Bombay shall have criminal jurisdiction at the time of publication of these presents — Mad as and Bombay Letters Patent

23 And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

Jurisdiction as to persons

24 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate General, or by any Magistrate or other officer specially empowered by the Government in that behalf

Extraordinary original criminal jurisdiction

25 And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original Criminal Jurisdiction, which may be constituted by one or more Judges of the said High Court But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

No appeal from High Court exercising original jurisdiction

Court may reserve points of law

26 And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate General, that in his judgment there is an error in the decision of a point or points of law decided by the Court of original Criminal Jurisdiction or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right

High Court to review on certificate of the Advocate-General

Let Pat [Cal , Bom , and Mad]

Cls 26-29 **Review on certificate of Advocate General**—See the undermentioned case (h) If there is no error of law the High Court cannot deal further with the case and consider the question of alteration of sentence (i) But if there is an error of law the High Court has to decide the case finally on review (j)

Appeals from Criminal Courts in the Provinces

27 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force

Subject to its superintendence—Note that the words used in s 15 of the Charter Act [now s 107 of the Government of India Act 1915] are "subject to its appellate jurisdiction" while those in the present sections are "subject to its superintendence" (k) Compare cl 13 above

Hearing of referred cases and revision of criminal trials

28 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officer now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision, by the said High Court

Now subject to reference to or revision by the said High Court—The High Court cannot under this clause revise an order of a Secretary to Government issuing a warrant under the Goondas Act (Bengal Act 1 of 1923) as such Secretary was not an officer possessing criminal jurisdiction in 1865 when the Letters Patent were issued (l)

High Court may direct the transfer of a case from one Court to another

29 And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction and also direct the

(h) Emperor v Fateh Chand (191) 44 Cal [illegible] 54 I C 945

(i) King Emperor v [illegible] (1923) [illegible] C W N [illegible] 81 I C 3 3 [illegible] A I C [illegible]

(j) Emperor v [illegible] Das (19 0) [illegible] Cal [illegible]

[illegible] A I C [illegible]

(k) [illegible] v King-Emperor (19[illegible]) [illegible] 44 I C [illegible]

(l) [illegible] v Emperor (19[illegible]) [illegible] I C 300 [illegible] A I R [illegible]

preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such belongs, in ordinary course, to the jurisdiction of some other Officer or Court

Offenders to be punished under Indian Penal Code

30 And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal, reference or revision charged with any offence for which *provision is made by Act No XLV of 1860, called the 'Indian* Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents shall be liable to punishment under the said Act or Acts, and not otherwise

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court

Judge may be authorized to sit ... of circuit or special commission

31 And We do further ordain that whenever it shall appear to the Governor General in Council convenient that the jurisdiction and power by these Our Letters Patent or by the recited Act vested in the said High Court of Judicature at Fort William in Bengal should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Admiralty and Vice Admiralty Jurisdiction

Civil

32 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice Admiralty,

Let Pat [Cal, Bom, and Mad]

Cls 32-34 and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India as may now be exercised by the said High Court

Admiralty jurisdiction of Supreme Courts—See cl 26 of the Charter of the Calcutta Supreme Court cl 41 of the Charter of the Madras Supreme Court and cl 33 of the Charter of the Bombay Supreme Court

Necessaries supplied to a ship—It was settled to be the law in England that *prior to* the passing of 3 and 4 Vict c 65 the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship though perhaps it occasionally purported to exercise the jurisdiction where not prohibited (*m*) The same view has obtained in India (*n*) but there is a difference of opinion as to whether the extended powers under 3 and 4 Vict c 65 and 24 Vict c 10 became vested in the Indian High Court by virtue of the several Letters Patent (*o*) Assuming that the High Court in its Admiralty jurisdiction had no jurisdiction over claims for maritime necessaries under any previous enactment such jurisdiction would now rest on the Colonial Courts of Admiralty Act 1890 which vests in it the power described in sec 5 of the Admiralty Act 1861 [24 Vict c 10]. The effect of the two Acts is to invest the Indian High Courts with jurisdiction over claims for necessaries supplied to a ship elsewhere than in the port to which the ship belongs unless it is shown to the satisfaction of the Court that at the time of the institution of the suit the owner is domiciled in British India or Burma (*p*)

33 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice Admiralty, or otherwise in connection with maritime matters or matters of prize

Criminal

Testamentary and Intestate Jurisdiction

34 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority as that which may now be lawfully exercised by the said High Courts, except within the limits of the jurisdiction for that purpose of any other High Court established by Her Majesty s Letters Patent, *in relation to* the granting of probates of last wills and testaments, and letters of administration of the goods chattels, credits, and all other effects

Testamentary and intestate jurisdiction

(*m*) *The Two F* [illegible] (1 [illegible]) 4 I C 116 *The He* [illegible] *Bjorn* (1 [illegible] 6) 11 A C 270

(*n*) [illegible] *La gford* (18[illegible]) 1 Fulton 9 [illegible] 131 *The* [illegible] (1 68) 5 Bom H C O C 64

(*o*) *The* [illegible] (1 [illegible]) 6 [illegible] *Bom* [illegible] (18[illegible]) 5 Bom H C [illegible] *The* [illegible] (1 [illegible]) 10 [illegible]

(*p*) *Mad as* [illegible] (1913) 4 [illegible] for d [illegible]

whatsoever of persons, dying intestate, whether within or without the said Bengal Division (q), subject to the order of the Governor General in Council, as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for which it was established Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration

Ecclesiastical jurisdiction of Supreme Courts—See cl 22 of the Charter of the Supreme Court of Calcutta cl 37 of the Charter of the Supreme Court of Madras and cl 47 of the Charter of the Supreme Court of Bombay

35 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have jurisdiction, within the Bengal Division of the Presidency of Fort William, in matters matrimonial between Our subjects, professing the Christian religion Provided always that nothing therein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof

Matrimonial Jurisdiction

Our subjects professing the Christian religion —The High Court has no jurisdiction under this clause to grant a decree for restitution unless both parties are Christians It has therefore no jurisdiction under this clause to grant such a decree when the petitioner is a Christian but the respondent is a Parsi Nor is any such jurisdiction conferred upon it in suits for *restitution of conjugal rights* by the Indian Divorce Act 1869 (r) See Indian Divorce Act s 4

Respondent not within the Presidency—The High Court has no jurisdiction to grant a decree for restitution against a respondent who was absent from the Presidency at the time the suit was instituted and remains absent But *residence* at date of suit of *both* spouses *whatever the domicile* is sufficient to give jurisdiction in suits of this nature (s)

(q) And we do further ordain that the said High Court of Judicature at [illegible] shall have the like power and authority as that which may now lawfully be exercised by the said High Court in relation to the granting of probates of last wills and testaments and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate whether within or without the Presidency of [illegible] —*Madras and Bombay Letters Patent*

(r) [illegible] (1914) [illegible] See [illegible] (1869) 6 M [illegible] 34

(s) *Ibid*

Let Pat [Cal, Bom, and Mad]

Cl 36 *Powers of single Judges and Division Courts*

Single Judges and Division Courts

36 And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge or by any Division Court thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915 (*t*), and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any points, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it"

When the Judges are equally divided —The words in the last clause [illegible] words equally divided were substituted for the words the opinion of the senior [illegible] shall prevail by the amended Letters Patent of 19.8 See note Letters P[illegible] Appeal under sec 98 Under the former Letters Patent it was held that this clause [illegible] controlled by s 98 of the Code and if the Judges are equally divided the opinion of the senior Judge prevails (*u*) From the decree passed in conformity with the opinion of the senior Judge an appeal lies under cl 15 and the whole appeal is open on appeal and not merely the points on which the Judges differed (*v*) But now the procedure in case of a difference of opinion is the same as under sec 98 except that (1) under sec 98 reference [illegible] is optional while under this clause it is obligatory and ( ) under sec 98 reference [illegible] on a point of law while under this clause a difference both of law and of fact can be referred. The clause as amended applies to an appeal which was pending at the time the amendment came into force (*w*) See notes to s 98 of the Code Letters P[illegible]

(*t*) The words in pursuance of section one hundred and eight of the Government of India Act 1915 were substituted for the words under the provision of the thirteenth section of the aforesaid Act of the Twenty four and Twenty fifth years of Our reign by the amended Letters Patent of 11th March 1919

(*u*) *Khalil* [illegible] *v* *Jal G* [illegible] (19[illegible]1) 45 Bom 18 [illegible] I A 181 60 I C 8 (1) A I C 6

[illegible] *Hull* [illegible] *Fraser* [illegible] *v Prasad* (19[illegible]) Cal [illegible] I A C 843 (F B)

(*v*) *F* [illegible] *v Barkoo* (19[illegible]) [illegible] 199 [illegible] A [illegible] 114 [illegible] 6 9 ([illegible]) A [illegible] 3 [illegible]

(*w*) *Government Pitts v* [illegible] Mad [illegible] ([illegible]) A M 47

Appeal When an application is made to the High Court under s 195 clause (6) **Cls** of the Criminal Procedure Code to revoke a sanction granted by lower Court or to give a sanction refused by it and the Judges composing the bench hearing the application are equally divided in opinion the case is governed by the present clause and not by s 42 or s 439 of that Code (x)

A Full Bench of the Madras High Court (y) has recently held that in the case of an equal division of opinion between the Judges of the High Court in an appeal preferred to it under the Code of Civil Procedure the procedure to be adopted by the High Court is governed by cl 36 of the Code of Civil Procedure and not by sec 98 of the Code of Civil Procedure See notes to sec 98 above Letters Patent Appeal.

Civil Procedure

Regulation of proceedings—civil cases

37 And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, respectively Provided always that the *said High Court shall be guided in making such rules* and orders as far as possible by the provisions of the Code of Civil Procedure being an Act passed by the Governor General in Council, and being Act No VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India

Regulation of proceedings—criminal cases

38 And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication subject to any law which has been or may be made in relation thereto by competent legislative authority for India

(x) *Bapu* ... (1911) 38 Mad 730 14 I C 353 (F B) ... (1941) 48 ... I R 470 85 I C ... A B 118 ... *Chandra* ... *Kanai* ... (1910) 51 Cal 663 ... I C 679 ... A C 855 (F B)

(y) *Dhanaraj* ... (1932) ... M ... 563 116 I C 345 ... A M 641

Let Pat [Cal, Bom, and Mad]

Cls 38 39 and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor General in Council and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid

Appeals to Privy Council

Power to appeal

39 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors in Our or Their Privy Council in any matter not being of criminal jurisdiction from a final judgment, decree or order of the said High Court of Judicature at Fort William in Bengal made on appeal and from any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the last clause of these presents Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rupees 10,000, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than Rupees 10,000, or from any other final judgment, decree or order made either on appeal or otherwise aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors in Our or Their Privy Council Subject always to such rules and orders as are now in force, or may, from time to time, be made respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf

Decisions appealable to the Privy Council—No appeal lies to His Majesty in Council under this clause unless—

(i) the decision from which an appeal is sought to be preferred is a *judgment decree or order*

(ii) the decision is a *final* one and

(iii) the decision is passed *on appeal* or in the exercise of *original* ...

The decision must amount to a judgment decree or order —A decree of a High Court in a testamentary matter is appealable to His Majesty in Council if the case is one which if it were an ordinary civil case would fulfill the conditions of sections 109 and 110 of the Civil Procedure Code ( ) But no appeal lies to the Privy Council from an *award* made by a High Court on appeal from a District Court under s 54 of the Land Acquisition Act 1894 Such an award is not a judgment decree or order within the meaning of this clause (a) Similarly no appeal lies from a decision of the High Court upon a case referred by the Chief Revenue Authority under s 1 of the Income Tax Act 1918 The judgment given on such a reference is merely advisory ( )

The judgment decree or order must be final —See notes to s 109 of the Code under the head Final s 288 above

The final judgment decree or order must be one made on appeal or in the exercise of original jurisdiction —Cl 10 of the Charter empowers the High Court to deal with professional misconduct by suspension or removal An order made under that clause is not in the exercise either of the original or appellate jurisdiction of the High Court and is not therefore appealable to His Majesty in Council ( ) But an order made in the exercise of the power of superintendence under s 15 of the High Courts Act (*d*) [now s 107 of the Government of India Act 1915] or in the exercise of revisional jurisdiction under section 115 of the Code (*e*) is appealable to the Privy Council. It may here be stated that cl 15 of the Letters Patent was amended by the Amended Letters Patent of 11th March 1919 by adding into the clause certain words which make it clear that no appeal lies to the *High Court* under that clause from an order made in the exercise of revisional jurisdiction or from an order made in the exercise of the power of superintendence under s 107 of the Government of India Act 1915 But if the order in revision is made by a single Judge section 111 of the Code bars an appeal to the Privy Council (*f*)

"**Made on appeal**" —An order made by the High Court rejecting an application to amend a decree passed by that Court on appeal is not an order made on appeal within the meaning of this clause (*g*) nor is an order made by the High Court rejecting an application to review a judgment passed on appeal (*h*) Such an order is not an order made *on appeal* against the judgment sought to be reviewed it is an order *in the appeal* in which the judgment sought to be reviewed was given ( )

( ) *Pa ami v Puh mm l* (1926) 49 Mad 9 4 9 I C 836 ( ) A M 9 6

( ) *Special Officer Salt v Dos H* (1913) 37 Bom 06 1 I C 9 affirmed on app to I C (1913) 1 C W N 4 1 0 I C 63 *Ra goo A Cu g Co Ld v Coll ct f Ra goo* (1913) 4 Cal 1 3 I A 1 16 I C 188 *M rikram n v Coll ctor f the V iz ra* (1918) 41 Mad 943 4 I C

(*b*) *T ron d St I C v Ch f Reve A thority* (1923) 4 Bom 4 50 I A 1 4 I C 46 (3) A I C 145 f ll wed in *I qi Shah v Collector f Lah r* (1925) 6 Lah 30 88 I C 5 0 ( ) A L 335

(*c*) *A Attorney* in th matter of (1914) 41 Cal 34 I C 3 4 *I am A dra v The I ident of I abile A sociat* (1916) 3 Mad 1 9 I C 8 9 *G S D v Gover ment Pleader* (19) Bom 306 *P Kishor v K g Emper* (1913) 4 Pat L J 423 5 I C 99 In *Lagh ra I di* (19) 43 Mad L J 6 I C ( ) A M 440

(*d*) *H d v Gr ll n* (18 4) 1 Beng L R 1 3 *P t see S d Koer v Chau dhr* (190) 3 C L J 9 at pp 681

( ) *Secret y of S te v I Al ha Seam Na g t o Co* (1911) 13 C L J 90 9 I C 1

(*f*) *Satw Narayana v Venk a* (1923) 46 Mad 9 I C 604 ( ) A M 3

(*g*) *S der Koer v Chandishea* (18) 30 Cal 6 9

(*h*) *Soud mon e v M haraj Dheraj* (1866) 6 W R [Misc R] 10

(*i*) *Rajah Enaet v I ne Pourshun* (1868) 10 W R (P B) 1 at pp 2 3

Appeal from interlocutory judgment

40 And We do further ordain that it shall be lawful [illegible] the said High Court of Judicature at F[illegible] William in Bengal, at its discretion [illegible] motion, or if the said High Court b[illegible] sitting, then for any Judge of the said High Court upon th[illegible] petition of any party who considers himself aggrieved b[illegible] preliminary or interlocutory judgment, decree, order or s[illegible]tence of the High Court, in any such proceeding as afores[illegible] not being of criminal jurisdiction, to grant permission t[illegible] such party to appeal against the same to Us, Our heirs a[illegible] successors, in Our or Their Privy Council, subject to th[illegible] same rules, regulations, and limitations, as are herein expre[illegible] respecting appeals from final judgments, decrees, orders a[illegible] sentences

Appeal from interlocutory judgment—No appeal lies to the [illegible] from an interlocutory judgment or order of a Judge of a High Court until such j[illegible] or order has been subjected to an appeal to the High Court under cl 15 except in th[illegible] cases in which by reason of the number of Judges who have made such order an a[illegible] under cl 15 is given directly to the Privy Council (j) The High Court will n[illegible] in the exercise of its discretion under this clause grant leave to appeal to the P[illegible] Council upon a mere question of practice such as an order for inspecti[illegible] of docum[illegible] or an order refusing the appointment of a receiver in a suit (l) But an order m[illegible] the High Court of Bombay under cl 13 of the Letters Patent transferring to i[illegible] from the Court of the Resident at Aden raises a question of jurisdiction as d[illegible] from practice and leave may be granted from such an order to appeal to th[illegible] Council (m) But for this clause no appeal would lie from an interlocutory j[illegible] or order (n)

Appeal in criminal cases

41 And We do further ordain that, from any judgm[illegible] order or sentence of the said High C[illegible] of Judicature at Fort William in Beng[illegible] made in the exercise of original cri[illegible] jurisdiction, or in any criminal case where any point or p[illegible] of law have been reserved for the opinion of the said H[illegible] Court in manner hereinbefore provided, by any Court wh[illegible] has exercised original jurisdiction, it shall be lawful for t[illegible] persons aggrieved by such judgment order or sente[illegible] appeal to Us, Our heirs or successors in Council, provided t[illegible]

(j) [illegible] v [illegible] (1[illegible]1) 9 Bom H C 39[illegible]
(k) [illegible] v [illegible] (18[illegible]1) 9 Bom H C [illegible]
(l) [illegible] Padmanand (18[illegible]) [illegible] Cal [illegible]
(m) [illegible]
(n) [illegible] (19[illegible]) [illegible] [illegible] 5 A C 3[illegible]

said High Court shall declare that the case is a fit one for such **Cls 41**
appeal and under such conditions as the said High Court may establish or require subject always to such rules and orders as We may with the advice of Our Privy Council, hereafter make in that behalf

Appeals in Criminal cases — See the undermentioned case (o)

42 And We do further ordain that in all cases of appeal made from any judgment, order, sentence or decree of the said High Court of Judicature at Fort William in Bengal, to Us Our heirs or successors in Our or Their Privy Council a true and correct copy of all evidence, proceedings judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court, and that the said High Court shall also certify and transmit to Us, Our heirs and successors in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court or by any such Judges for or against the judgment or determination appealed against

Rule as to transmission of copy of evidence and other documents

And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute or cause to be executed, such judgment and orders as We Our heirs or successors in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court should or might have been executed

Calls for Records, &c, by the Government

43 And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns, and statements in such form and manner as such Government may deem proper

High Court to comply with requisitions from Government for records, &c

(o) B [illegible] das v Emperor (19 3) 5 I A 40 5 Cal 197 83 I C 47 (2.) A I C 1

Let Pat [Cal, Bom, and Mad]

Cl 44

Powers of the Indian Legislature preserved

44 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor General in Legislative Council and also of the Governor General in Council under section seventy one of the Government of India Act, 1915, and also of the Governor General in cases of emergency under section seventy two of that Act and may be in all respects amended and altered thereby

Alterations in this clause—This clause was substituted for the [illegible] clause 44 by the Amending Letters Patent of 11th March 1919 The material alteration consists in substituting the words powers of the Governor General in Legislative Council and also of the Governor General in Council for the words powers of the Governor General in Council

Legislative powers of the Governor General in Council.—The powers of the Governor General in Council to make laws are derived from the Indian Councils Act of 1861 (24 and 25 Vict c 67) By sec 22 of that Act the Governor General in Council is given power to make laws in the manner provided including power to repeal or amend existing laws and including the making of laws for all Courts of justice and for all persons whatever British or Native foreigners or others But a proviso to that section enacts that there is to be no power to repeal or in any way affect any Act passed in the same session of Parliament with the Indian Councils Act. The High Courts Act of 1861 (24 and 25 Vict c 104) is such an Act and the Governor General in Council therefore has no power to alter its provisions unless such power is expressly given by the Act Thus the Governor General in Council has no power to affect the provisions of that Act as to the qualifications of the judges of the High Courts (see [illegible] or the provisions of sec 15 thereof giving the High Courts superintendence over the Courts which are subject to its appellate jurisdiction (p) But the Governor General in Council has power to remove any place or territory from the jurisdiction of a High Court the reason being that such power is distinctly recognized by sec 9 of the said Act and is also consistent with the Letters Patent (cl 44) as required by the said sec 9 (q)

Further there is a proviso to sec 22 of the Indian Councils Act which enacts that there is to be no power to repeal or in any way affect any provision of the Government of India Act of 1858 Sec 65 of the latter Act provides that all persons shall have and take the same suits remedies and proceedings against the Secretary of State for India in Council as they could have done against the East India Company [illegible] Government of India Act 1858 a British subject could sue the East India Company [illegible] his claim to any right over land. The Governor General in Council has [illegible] power under the Indian Councils Act to pass an Act taking away the right of a [illegible]

(p) Q v Meer [illegible] (18[illegible]4) 21 Beng L R 106 11[illegible] | [illegible] James C[illegible] the [illegible]
(q) Empress v B[illegible] (18[illegible]9) 4 Cal [illegible] 1 17[illegible] | (1896) [illegible] 405 [illegible]

subject to sue the *Secretary of State* in a Civil Court to determine his claim to any right over land (r) See now the Government of India Act 1915 s 106 (2) Cls

An order made in revision by a single Judge is final since the amendment of cl 15 and would therefore be appealable to Privy Council under cl 39 but as Letters Patent are subject to Imperial Legislation that appeal is taken away by Section 111 of the Code (s)

Provisions of former Letters Patent inconsistent with these Letters Patent to be void

45 And it is Our further will and pleasure that these Letters Patent shall be published by the Governor General in Council, and shall come into operation from and after the date of such publication, and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty, King George The Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty two, and is inconsistent with these Letters Patent, shall cease, determine and be utterly void, to all intents and purposes whatsoever

In Witness thereof We have caused these Our Letters to be made Patent Witness Ourself at Westminster, the twenty-eighth day of December, in the twenty ninth year of Our reign

(Sd) C ROMILLY

(r) *Secretary of State* v *Moment* (191) 40 I A 48 18 I C

(s) *S tya N ayana* v *Ve lata* (19 3) 46 Mad 9 8 75 I C 604 (4) A M 399

Letters Patent for the High Court of Allahabad

(*March* 17, 1866)

Cls 1, 2 [The two first paragraphs of the Preamble are similar to those of the Calcutta Letters Patent of 1865.]

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India not included within the limits of the local jurisdiction of another High Court to consist of a Chief Justice and such number of other Judges with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the said Presidencies as We from time to time might think fit and appoint and that subject to the directions of the Letters Patent all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts and to the Governor General or Governor of the Presidency in which such High Courts were established shall as far as circumstances may permit be applicable to any new High Court which may be established in the said territories and to the Chief Justice and other Judges thereof and to the persons administering the Government of the said territories

And whereas We did upon full consideration of the premises think fit to erect and establish and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland bearing date at Westminster the fourteenth day of May in the twenty fifth year of Our reign in the year of Our Lord one thousand eight hundred and sixty two did accordingly for Us Our heirs and successors erect and establish at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal and did thereby constitute the said Court to be a Court of Record

1 Now know ye that We upon full consideration of the premises and of Our special grace certain knowledge and mere motion have thought fit to erect and establish and by these presents We do accordingly for Us Our heirs and successors erect and establish for the North Western Provinces of the Presidency of the Fort William aforesaid a High Court of Judicature which shall be called the High Court of Judicature for the North Western Province and We do hereby constitute the said Court to be a Court of Record

Establishment of High Court for the North Western Provinces

2 And We do hereby appoint and ordain that the High Court of Judicature for the North Western Provinces shall until further or other provisions shall be made by Us or Our heirs and successors in that behalf in accordance with the said recited Act consist of a Chief Justice and five Judges the first Chief Justice being Walter Morgan Esquire and the five Judges being Alexander Ross Esquire William Edward Esquire William Roberts Esquire Francis Boyle Pearson Esquire and Charles Arthur Turner Esquire being respectively qualified as in the said Act is declared

Constitution and first Judges of the High Court

[Powers of Crown to appoint a sixth puisne Judge—A question have arisen as to the validity of the appointment of a *sixth puisne judge* it was held that

under clau es 1 and 2 it was quite competent to th Crown to appoint a sixth pui ne udge (t) See High Courts Act 1861 s 16]

3 And We do ordain that the Chief Justice and every Judge of the said High Court of Judicature for the North Western Provinces previou ly to entering upon the execution of the duties of his office shall make and subscribe the following declaration before such authority or person as the Governor General in Council may commi ion to receive it —

Declaration to be made by Judges

I A B appointed Chief Ju tice [or a Judge] of the High Court of Judicature for the North We tern Province do solemnly declare that I will faithfully perform the duties of my office to the best of my ability knowledge and judgment

4 8 [These clau es are similar to clauses 6 to 10 of the Calcutta Letters Patent of 1865]

Civil Jurisdiction of the High Court

9 And We do further ordain that the said High Court of Judicature for the North Western Provinces hall have power to remove and to try and determine as a Court of extraordinary original juris diction any suit being or falling within the juri diction of any Court subject to its superintendence when the said High Court shall think proper to do so either on the agreement of the parties to that effect or for purpose of justice the reasons for so doing being recorded on the proceedings of the said High Court

Extraordinary original civil jurisdiction

Original Jurisdiction —[Note that the High Court of Allahabad does not po sess ordinary original civil juri diction]

10 11 —Clau e 10 is the ame as the amended clau e 15 of the Calcutta Letters Patent See note to clause 15 of Calcutta Clau e 11 is the same as clau e 16 of the Calcutta Letters Patent 1865

12 And We do further ordain that the said High Court of Judicature for the North Western Province shall have the like power and authority with re pect to the per ons and estates of infants idiots and lunatics within the North Western Province as that which is exerci ed in the Bengal Divi ion of the Pre idency of Fort William by the High Court of Judicature at Fort William in Bengal but subject to the provi ions of any laws or regulations now in force

Jurisdiction to infants and lunatic

Hindu Joint Family —The juri diction of the Court of Chancery which de cended to the Supreme Court of Calcutta is conferred by this clau e on the High Court of Allahabad but the Court is reluctant to exerci e it in the ca e of a Hindu Joint family (u)

13 14 [The e clau es are imilar to clauses 20 and 21 of the Calcutta Letters Patent of 1865]

Criminal Juri dict on

15 And We do further ordain that the said High Court of Judicature for the North We tern Province shall have ordinary original criminal juri diction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort

Ordinary original jurisdiction of the High Court

(t) Emperor v Gh (1914) 36 All 168 I C 984 | (u) G d Pr d in re (1928) 0 All 09 11 I C 8 3 (8) A A 03

William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents and the criminal jurisdiction of the said last mentioned High Court over such persons shall cease at such date Provided nevertheless that criminal proceedings which shall at such date have been commenced in the said last mentioned High Court shall continue as if these presents had not been issued

Jurisdiction as to persons

16 And We do further ordain that the said High Court of Judicature for the North Western Provinces in the exercise of its ordinary original criminal jurisdiction shall be empowered to try all persons brought before it in due course of law

Extraordinary original criminal jurisdiction

17 And We do further ordain that the said High Court of Judicature for the North Western Provinces shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf

18 [This clause is similar to clause 25 of the Calcutta Letters Patent of 1865]

High Court to review cases on points of law reserved by one or more Judges of the said High Courts

19 And We do further ordain that on such point or points of law being so reserved as aforesaid the said High Court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right

Appeals from Criminal Courts in the Provinces

20 And We do further ordain that the said High Court of Judicature for the North Western Provinces shall be a Court of Appeal from the Criminal Courts of the said Provinces and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force

Hearing of referred cases and revision of criminal trials

21 And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to hear and determine all such cases referred to it by the Session Judges or by any other Officers now authorized to refer cases to the Court of Sudder Nizamut Adawlut of the North Western Provinces and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut

High Court may direct the transfer of a case from one Court to another

22 And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigations or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the jurisdiction of some other Officer or Court

23 [This clause is similar to clause 29 of the Calcutta Letters Patent of 1865]

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court

Judges may be authorized to sit in any places by way of circuit or special commission

24 And We do further ordain that whenever it shall appear to the Lieutenant Governor of the North Western Provinces subject to the control of the Governor General in Council convenient that the jurisdiction and power by these Our Letters Patent or by the recited act vested in the said High Court should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of any Sudder Dewany Adawlut or the Sudder Nizamut Adawlut of the North Western Provinces other than the usual places of sitting of the said High Court or at several such places by way of circuit the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Testamentary and Intestate Jurisdiction

Testamentary and intestate jurisdiction

25 And We do further ordain that the said High Court of Judicature for the North Western Provinces shall have the like power and authority as that which is now lawfully exercised within the said Provinces by the said High Court of Judicature at Fort William in Bengal in relation to the granting of probates of last wills and testaments and letters of administration of the goods chattels credits and all other effects whatsoever of persons dying intestate and that the jurisdiction of the said last mentioned High Court in relation hereto shall cease from the date of the publication of these presents Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last mentioned High Court shall continue as if these presents had not been issued Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India by which power is given to any other Court to grant such probates and letters of administration

26 27 [These clauses correspond with clause 35 of the Calcutta Letters Patent of 1865 and clause 36 of the Calcutta Letters Patent 1928]

Civil Procedure

Regulation of proceedings

28 And We do further ordain that it shall be lawful for the said High Court of Judicature for the North Western Provinces from time to time to make rules and orders for the purpose of adopting as far as possible the provisions of the Code of Civil Procedure being an Act passed by the Governor General in Council and being Act No VIII of 1859 and the provisions of any law which has been or may be made amending or altering the same by competent legislative authority for India to all proceedings in its testamentary intestate and matrimonial jurisdiction respectively

Criminal Procedure

Regulation of proceeding

29 And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court in the exercise of its ordinary original criminal jurisdiction shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal immediately before the publication of these presents subject to any law which has been or may be made

Let Pat [All]

Cls 29-30 in relation thereto by competent legislative authority for India and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor General in Council, and being Act No XXV of 1861 or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council

Power to appeal

30 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors in Our or Their Privy Council in any matter not being of criminal jurisdiction from any final judgment decree or order of the said High Court of Judicature for the North Western Provinces made on appeal and from any final judgment decree or order made in the exercise of original jurisdiction by the Judges of the said High Court or of any Division Court from which an appeal shall not lie to the said High Court under the provisions contained in the 10th Clause of these presents *Provided in either case* that the sum or matter at issue is of amount or value of not less than 10 000 rupees or that such judgment decree or order shall involve directly or indirectly some claim demand or question to or respecting property amounting to or of the value of not less than 10 000 rupees or from any other final judgment decree or order made either on appeal or otherwise as aforesaid when the said High Court shall declare that the case is a fit one for appeal to Us Our heirs or successors in Our or Their Privy Council subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Provinces except so far as the said existing rules and orders respectively are hereby varied and subject also to such further rules and orders as we may with the advice of our Privy Council hereafter make in that behalf

31 32 33 34 35 [These clauses are similar to clauses 40 41 42 43 and 44 of the Calcutta Letters Patent of 1865]

By Warrant under the Queen's Sign Manual

(Sd) C ROMILLY

Letters Patent for the High Court of Patna

(February 9, 1916)

GEORGE THE FIFTH by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith Emperor of India To all to whom these Presents shall come greeting WHEREAS by an Act of Parliament passed in the Twenty fourth and Twenty fifth Years of the Reign of Her late Majesty Queen Victoria and called the Indian High Courts Act 1861 it was amongst other things enacted by section one that it should be lawful for Her Majesty by Letters Patent under the Great Seal of the United Kingdom to erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William

Recital of Act 24 and 25 Vict c 104

and by section two that such High Court should consist of a Chief Justice and as many Judges not exceeding fifteen as Her Majesty might from time to time think fit to appoint who should be selected from among persons qualified as in the said Act was declared

and by section eight that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta in the said Presidency should be abolished

and by section nine that the High Court of Judicature so to be established should have and exercise all such civil criminal admiralty and vice admiralty testamentary intestate and matrimonial jurisdiction original and appellate and all such powers and authority for and in relation to the administration of justice in the said Presidency as Her Majesty might by such Letters Patent as aforesaid grant and direct subject however to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency town as might be prescribed thereby and that save as by such Letters Patent might be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council the High Court so to be established should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Letters Patent to erect and establish a High Court of a Judicature in and for any portion of territories within Our Dominions in India not included within the limits of the local jurisdiction of another High Court to consist of Chief Justice and such number of other Judges with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the Presidencies of Fort William in Bengal of Madras and of Bombay as We from time to time might think fit and appoint and that it should be lawful for Us by such Letters Patent to confer on any new High Court which might be so established any such jurisdiction powers and authority as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies and that subject to the directions of the Letters Patent all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Court and to the Governor General or Governor of the Presidency in which such High Court were established should as far as circumstances might permit be applicable to any new High Court which might be established in the said territories and to the Chief Justice and other

Let Pat. [Patna]

Judges thereof and to the persons administering the Government of the said territories

And whereas upon full consideration of the premises Her late Majesty Queen Victoria by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland bearing date at Westminster the Fourteenth day of May in the Twenty fifth Year of Her Reign in the Year of Our Lord One thousand eight hundred and sixty two did erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid and did constitute that Court to be a Court of Record.

Recital of establishment of High Courts at Fort William and Allahabad

And whereas Her late Majesty Queen Victoria by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland bearing date at Westminster the Twenty eighth day of December in the Twenty ninth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty five did revoke the said Letters Patent bearing date the Fourteenth day of May in the Year of Our Lord one thousand eight hundred and sixty two but notwithstanding that revocation did continue the said High Court of Judicature at Fort William in Bengal and declare that the Court should continue to be a Court of Pecord

And whereas upon full consideration of the premises Her late Majesty Queen Victoria by Letters Patent under that Great Seal of the United Kingdom of Great Britain and Ireland bearing date at Westminster the Seventeenth day of March in the Twenty ninth year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty six did erect and establish a High Court of Judicature for the North Western Provinces which said Court is situated at Allahabad in the Province of Agra and is now called the High Court of Judicature at Allahabad and did constitute that Court to be a Court of Record

And whereas by an Act of Parliament passed in the First and Second Years of Our Reign and calledthe Indian High Courts Act 1911 it was enacted amongst other things by section one that the maximum number of Judges of a High Court of Judicature in India including the Chief Justice should be twenty

Recital of Act 1 & 2 Geo 5 c 18

and by section two that Our power under section sixteen of the Indian High Courts Act 1861 might be exercised from time to time and that a High Court might be established under the said section sixteen in any portion of the territories within Our Dominions in India whether or not included within the limits of the local jurisdiction of another High Court and that where such a High Court was established in any part of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for Us by Letters Patent to alter the local jurisdiction of that other High Court and to make such incidental consequential and supplemental provisions as might appear to be necessary by reason of the alteration of those limits

And whereas the said Indian High Courts Acts 1861 and 1911 have been repealed and re enacted by an Act of Parliament passed in the Fifth and Sixth Years of Our Reign and called the Government of India Act 1915

Recital of Act 5 & 6 Geo 5 c 61

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were by proclamation made by the Governor General of India on the Twenty second day of March in the Year of Our Lord One

Recital of creation of Province of Bihar and Orissa

thousand nine hundred and twelve constituted a separate Province called the Province of Bihar and Orissa and are now governed by a Lieutenant Governor in Council

Establishment of High Court at Patna

1 Now know ye that We upon full consideration of the premises and of Our Special grace certain knowledge and mere motion have thought fit to erect and establish and by these presents We do accordingly for Us Our Heirs and Successors erect and establish for the Province of Bihar and Orissa aforesaid with effect from the date of the publication of these presents in the Bihar and Orissa Gazette a High Court of Judicature which shall be called the High Court of Judicature at Patna and We do hereby constitute the said Court to be a Court of Record

Constitution and first Judges of the High Court

2 And We do hereby appoint and ordain that the High Court of Judicature at Patna shall until further or other provision be made by Us or Our Heirs and Successors in that behalf in accordance with section one hundred and one of the said recited Government of India Act 1915 consist of a Chief Justice and six other Judges the first Chief Justice being Sir Edward Maynard Des Champs Chamier Knight and the six other Judges being Saiyid Shurf ud din Esquire Edmund Pelly Chapman Esquire Basanta Kumar Mullick Esquire Francis Reginald Roe Esquire the Honourable Cecil Atkinson and Jowala Persad Esquire being respectively qualified as in the said Act is declared

Declaration to be made by Judges

3 And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Patna previously to entering upon the execution of the duties of his office shall make and subscribe the following declaration before such authority or person as the Lieutenant Governor in Council may commission to receive it —

I A B appointed Chief Justice [or a Judge] of the High Court of Judicature at Patna do solemnly declare that I will faithfully perform the duties of my office to the best of my ability knowledge and judgment

Seal.

4 And We do hereby grant ordain and appoint that the High Court of Judicature at Patna shall have and use as occasion may require a seal bearing a device and impression of Our Royal arms within an exergue or label surrounding the same with this inscription The Seal of the High Court at Patna And We do further grant ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice and in case of vacancy of the office of Chief Justice or during any absence of the Chief Justice the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section One hundred and five of the Government of India Act 1915 and We do further grant ordain and appoint that whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant the said High Court shall be and is hereby authorised and empowered to demand seize and take the said seal from any person or persons whomsoever by what ways and means soever the same may have come to his her or their possession

Writs &c to issue in name of the Crown and under seal

5 And We do hereby further grant ordain and appoint that all writs summonses precepts rules orders and other mandatory process to be used issued or awarded by the High Court of Judicature at Patna shall run and be in the name and style of Us or of Our heirs and successors and shall be sealed with the seal of the said High Court

Let Pat [Patna]

Cls 6-9

Appointment of officers

6 And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Patna from time to time as occasion may require and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant Governor in Council to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Lieutenant Governor in Council and shall be either confirmed or disallowed by the Lieutenant Governor in Council And it is Our further will and pleasure and We do hereby for Us Our heirs and successors give grant direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may from time to time appoint for each office and place respectively and as the Lieutenant Governor in Council subject to the control of the Governor General in Council may approve of Provided always and it is Our will and pleasure that all and every the Officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long as they hold their respective offices but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rule prescribed from time to time by the Governor General in Council and to absent himself from the said limits during the term of such leave in accordance with the said rules

Admission of Advocates Vakils and Attorneys

Powers of High Court in admitting Advocates Vakils and Attorneys

7 And We do hereby authorize and empower the High Court of Judicature at Patna to approve admit and enrol such and so many Advocates Vakils and Attorneys as to the said High Court may seem meet and such Advocates Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act or to plead and act for the said suitors according as the said High Court may by its rules and directions determine and subject to such rules and directions

Powers of High Court in making rules for the qualification etc of Advocates Vakils and Attorneys

8 And We do hereby ordain that the High Court of Judicature at Patna shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates Vakils and Attorneys at Law of the said High Court and shall be empowered to remove or to suspend from practice on reasonable cause the said Advocates Vakils or Attorneys at Law and no person whatsoever but such Advocates Vakils or Attorneys shall be allowed to act or to plead for or on behalf of any suitor in the said High Court except that any suitor shall be allowed to appear plead or act on his own behalf or on behalf of a co suitor

Civil Jurisdiction of the High Court

Extraordinary original civil jurisdiction

9 And We do further ordain that the High Court of Judicature at Patna shall have power to remove and to try and determine as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence when the said High Court may think proper to do so either on the agreement of the parties to that effect or for purposes of justice the reasons for so doing being recorded on the proceedings of the said High Court

Appeal to the High Court from Judges of the Court

10 And We do further ordain that an appeal shall lie to the said High Court of Judicature at Patna from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act made in the exercise of appellate jurisdiction in respect of a decree or order made on or after the first day of February 1929 in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declare that the case is a fit one for appeal but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us Our Heirs or Successors in Our or Their Privy Council as hereinafter provided

Appeal from other Civil Courts in the Province of Bihar and Orissa

11 And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India

Jurisdiction as to Infants and Lunatics

12 And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority with respect to the persons and estates of infants idiots and lunatics within the Province of Bihar and Orissa as that which was vested in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents

Law to be administered by the High Court

By the High Court in the exercise of extraordinary original civil jurisdiction

13 And We do further ordain that with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Patna in the exercise of its extraordinary original civil jurisdiction such law or equity shall until otherwise provided be the law or equity which would have been applied to such case by any local Court having jurisdiction therein

By the High Court in the exercise of appellate jurisdiction

14 And We do further ordain that with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Patna to each case coming before it in the exercise of its appellate jurisdiction such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceeding in such case were originally instituted ought to have applied to such case

Let Pat [Patna]

Cls 15 21

Criminal Jurisdiction

Ordinary original criminal jurisdiction of the High Court

15 And We do further ordain that the High Court of Judicature at Patna shall have ordinary original criminal jurisdiction in respect of all such persons within the Province of Bihar and Orissa as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immediately before the publication of these presents

Jurisdiction as *to persons*

16 And We do further ordain that the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

Extraordinary *original* Criminal jurisdiction

17 And We do further ordain that the High Court of Judicature at Patna shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence and shall have authority to try at its discretion any such persons brought before it on charges preferred by any *magistrate* or other officer specially empowered by the Government in that behalf

No appeal from High Court exercising original jurisdiction

18 And We do further ordain that there shall be no appeal to the High Court of Judicature at Patna from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more judges of the said *High Court* But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

Court may reserve points of law

High Court to review cases on points of law reserved by one or more *Judges* of the High Court

19 And We do further ordain that on such point or points of law being so reserved as aforesaid the High Court of Judicature at Patna shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right

Appeals from other Criminal Court in the province of Bihar and Orissa

20 And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Criminal Court of the Province of Bihar and Orissa and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India

Hearing of referred cases and revision of criminal trials

21 And We do further ordain that the High Court of Judicature at Patna shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall *have power* to hear and determine all such cases referred to it by the Sessions Judges or by any other officers in the *Province* of Bihar and Orissa who were immediately before the publication of these presents authorized to refer cases to the High Court of Judicature at Fort William in Bengal

and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa as were immediately before the publication of these presents subject to reference to or revision by the High Court of Judicature at Fort William in Bengal

High Court may direct the transfer of a case from one Court to another

22 And We do further ordain that the High Court of Judicature at Patna shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the jurisdiction of some other officer or Court

Criminal Law

Offenders to be punished under Indian Penal Code

23 And We do further ordain that all persons brought for trial before the High Court of Judicature at Patna, either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal reference or revision charged with any offence for which provision is made by Act No XLV of 1860 called the Indian Penal Code or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents shall be liable to punishment under the said Act or Acts and not otherwise

Admiralty Jurisdiction

Civil

24 And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such civil and maritime jurisdiction as was exercisable there in immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions as was so exercisable by the High Court of Judicature at Fort William in Bengal

Criminal

25 And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty or otherwise in connection with maritime matters or matters of prize

Testamentary and Intestate Jurisdiction

Testamentary and intestate jurisdiction

26 And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Bihar and Orissa by the High Court of Judicature at Fort William in Bengal in relation to the granting of probates of last wills and testaments and letters of administration of the goods chattels credits and all other effects whatsoever of persons dying intestate Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction

Matrimonial Jurisdiction

27 And We do further ordain that the High Court of Judicature at Patna shall have jurisdiction, within the Province of Bihar and Orissa in matters matrimonial between Our subjects professing the Christian religion Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Letters Patent within the said Province which is lawfully possessed of that jurisdiction.

Powers of single Judges and Division Courts

Single Judges and Division Court.

28 And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge or by any Division Court, thereof appointed or constituted for such purpose in pursuance of section One hundred and eight of the Government of India Act 1915 and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point such point shall be decided according to the opinion of the majority of the Judges if there be a majority but if the Judges be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it

Amendment.—The words in the last clause after the words "equally divided" were substituted for the words the opinion of the senior Judge shall prevail by amended Letters Patent of 19.. See note under clause 36 of the Calcutta Letters Patent

Civil Procedure.

Regulation of proceedings.

29 And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adopting as far as possible the provisions of the Code of Civil Procedure being an Act No V of 1908 passed by the Governor-General in Council and the provisions of any law which has been or may be made amending or altering the same by competent legislative authority for India to all proceedings in its testamentary intestate and matrimonial jurisdiction, respectively

Criminal Procedure.

Regulation of proceedings.

30 And We do further ordain that the proceedings in all criminal cases which shall be brought before the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction shall be regulated by the procedure and practice which was in use in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure being Act No V of 1898 passed by the Governor General in Council or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council

31 And We do further ordain that any person or persons may appeal to Us Our heirs and successors in Our or their Privy Council in any matter not being of criminal jurisdiction from any final judgment decree or order of the High Court of Judicature of Patna made on appeal and from any final judgment decree or order made in the exercise of original jurisdiction by Judges of the said High Court or of any Division Court from which an appeal does not lie to the said High Cou t under the provision contained in the 10th clause of these presents Provided in either case that the sum or matter at issue is of the amount of value of not less than 10 000 rupees or that such judgment decree or order involves directly or indirectly some claim demand or question to or respecting property amounting to or of the value of not less than 10 000 rupees or from any other final judgment decree or order made either on appeal or otherwise as aforesaid when the said High Court declares that the case is a fit one for appeal to Us Our heirs or successors in Our or their Privy Council but subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa except so far as the said existing rules and orders respectively are hereby varied and subject also to such further rules and orders as We may with the advice of Our Privy Council hereafter make in that behalf

Power to appeal in civil cases

32 And We do further ordain that it shall be lawful for the High Court of Judicature at Patna at its discretion on the motion or if the said High Court be not sitting then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment decree or order of the said High Court in any such proceeding as aforesaid not being of criminal jurisdiction grant permission to such party to appeal against the same to Us Our heirs and successors in Our or their Privy Council subject to the same rules regulations and limitations as are herein expressed respecting appeals from final judgments decrees and orders

Appeal from interlocutory judgments

33 And We do further ordain that from any judgment order or sentence of the High Court of Judicature at Patna made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said Court in manner provided by the 18th clause of these presents by any Court which has exercised original jurisdiction it shall be lawful for any person aggrieved by such judgment order or sentence to appeal to Us Our heirs or successors in Council provided the said High Court declares that the case is a fit one for such appeal and that the appeal be made under such conditions as the said High Court may establish or require but subject always to such rules and orders as We [illegible] may from time to time be made respecting appeals to Ourselves [illegible] Courts of the Province of Bihar and Orissa

Appeal in criminal cases

34 And We do further ordain that in all cases of appeal made [illegible] decree order or sentence of the High [illegible] at Patna to Us Our heirs or successors [illegible] Council such High Court shall [illegible] Our heirs and successors in O[illegible] a true and correct copy of all evidence proceedings judgments [illegible] or made in such cases appealed, so far as the same have relation [illegible]

Rules as to transmission of copies of evidence and other documents

Let Pat [Patna]

Cal 34-38 such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us Our heirs and successors in Our or their Privy Council a copy of the reasons given by the Judges of such Court or by any of such Judges for or against the judgment or determination appealed against And we do further ordain that the said High Court shall in all cases of appeal to Us Our heirs or successors conform to and execute or cause to be executed such judgments and orders as We Our heirs or successors in Our or their Privy Council may think fit to make in the premises in such manner as any original judgment decree or decretal orders or other order or rule of the said High Court, should or might have been executed.

Exercise of jurisdiction elsewhere than at the usual place of sitting of the High Court

Judges to visit Orissa by way of circuit

35 And We do further ordain that unless the Governor General in Council otherwise directs one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa, by way of circuit whenever the Chief Justice from time to time appoints in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our *Letters Patent or by or under* the Government of India Act 1915 vested in the said High Court Provided always that such visits shall be made not less than four times in every year unless the Chief Justice with the approval of the Lieutenant Governor in Council otherwise directs Provided also that the said High Court shall have power from time to time to make rules with the previous sanction of the Lieutenant Governor in Council for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division and that the Chief Justice may in his discretion, order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division

Special commissions and circuits

36 *And We do further ordain that whenever it appears to the* Lieutenant Governor in Council subject to the control of the Governor General in Council convenient that the jurisdiction and power by these Our Letters Patent *or* by or under the Government of India Act 1915 vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court or at several such places by way of circuit one or more Judges of the Court shall visit such place or places accordingly

Proceedings of Judges on special commission or circuit

37 And We do further ordain that whenever any Judge or Judges of the High Court *of Judicature at Patna visit* any place under the 35th or the 36th clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Delegation of Duties to Officers

Power to delegate duties

38 The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar Prothonotary or Master or other official of the Court any Judicial, quasi judicial and non judicial duties

Cessation of Jurisdiction of the High Court of Judicature at Fort William in Bengal

Cessation of jurisdiction of the High Court of Judicature at Fort William over the Province of Bihar and Orissa

39 And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court

Provided first that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

(a) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order other then an order of an interlocutory nature has been passed or made by that Court or in which the validity o any such decree or order is directly in question * and

(b) in all proceedings (not being proceedings referred to in paragraph (a) of this clause pending in that Court on the date of the publication of these presents under the 13th 15th 22nd 23rd 24th 25th 26th 27th 28th 29th 32nd 33rd 34th or 35th clause of the Letters Patent bearing date at Westminster the Twenty eighth day of December in the Year of Our Lord One thousand eight hundred and sixty five relating to that Court and

(c) in all proceedings instituted in that Court on or after the date of the publication of these presents with reference to any decree or order passed or made by that Court

Provided secondly that if any question arises as to whether any case is covered by the first proviso to this clause the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal and his decision shall be final

Calls for Records etc by the Government

High Court to comply with requisition from Government for records etc

40 And it is Our further will and pleasure that the High Court of Judicature at Patna shall comply with such requisitions as may be made by the Lieutenant Governor in Council for records returns and statements in such form and manner as he may deem proper

Powers of Indian Legislatures

Powers of Indian Legislatures preserved

41 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative power of the Governor General in Legislative Council and also of the Governor General in Council under section Seventy-one of the Government of India Act 1915 and also of the Governor General in cases of emergency under section Seventy two of that Act and may be in all respects amended and altered thereby

In Witness whereof we have caused these Our Letters to be made Patent Witness Ourself at Westminster the Ninth day of February in the Year of Our Lord One thousand nine hundred and sixteen and in the sixth year of Our Reign

By warrant under the King's Sign Manual

(Signed) SCHUSTER.

* See *Ramgobind v Thakur Dayal* (1917) 2 Pat L J 6 3 43 I C 501

Letters Patent for the High Court of Lahore

March 21, 1919

Cls 1-3

GEORGE THE FIFTH by *the Grace of God* of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the *Seas* King Defender of the Faith Emperor of India *To all to* whom these Presents shall come greeting Whereas by an Act of Parliament passed in the Fifth and Sixth years of Our Reign and called the Government of India Act 1915 it was amongst other things enacted that it should be *lawful* for Us by Letters Patent to establish a High Court of Judicature in *any territory in* British India whether or not included within the limits of the local *jurisdiction* of another High Court and to confer on any High Court so established any *such jurisdiction* powers and authority as were vested in or might be conferred on any High *Court existing* at the commencement of that Act

And whereas the Provinces of the Punjab and Delhi are now subject to the Jurisdiction *of the Chief* Court of the Punjab which was established by an Act of the Governor General *of India in Council* being Act No XXIII of 1865 and was continued by later enactments *and no* part of the said provinces is included within the limits of the local jurisdiction of any High Court

Establishment of High Court at Lahore

1 Now know ye that We upon full consideration of the premises and of Our special grace certain knowledge and mere motion have thought fit to erect and establish and by these presents We do accordingly for Us Our heirs and successors erect and establish for the Province of the Punjab and Delhi aforesaid with effect from the date of the publication of these presents in the *Gazette of India* a High Court of Judicature which shall be called the High Court of Judicature at Lahore and We do hereby constitute the said Court to be a Court of Record

Constitution and first Judges of the High Court

2 And We do hereby appoint and ordain that the High Court of Judicature at Lahore shall until further or other provision be made by Us or Our heirs and successors in the behalf in accordance with section one hundred and one of the said recited Government of India Act 1915 consist of a Chief Justice and six other Judges the first Chief Justice being Sir Henry Adolphus Rattigan Knight and the six other Judges being William Chevis Esquire Henry Scott Smith Esquire Shadi Lal Esquire Rai Bahadur Walter Aubinle Rossignol Esquire Lewis [illegible] Hudson Leslie Jones Esquire and Alan Brice Broadway Esquire being respectively qualified as in the said Act is declared.

Declaration to be made by Judges

3 And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Lahore previously to entering in the execution of the duties of his office shall make and subscribe the following declaration before such authority or person as the Lieutenant Governor of the Punjab may commission to receive it —

I A B appointed Chief Justice [*or* a Judge] of the High Court of Judicature at Lahore do solemnly declare that I will faithfully perform the duties of my office to the best of my ability knowledge and judgment

4 And We do hereby grant ordain and appoint that the High Court of Judicature at Lahore shall have and use as occasion may require a Seal bearing a device and impression of Our Royal arms within an exergue or label surrounding the same with this inscription The Seal of the High Court at Lahore And We do further grant ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice and in case of vacancy of the Office of Chief Justice or during any absence of the Chief Justice the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section one hundred and five of the Government of India Act 191ↄ and We do further grant ordain and appoint that whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant the said High Court shall be and is hereby authorized and empowered to demand seize and take the said seal from any person or persons whomsoever by what ways and means soever the same may have come to his her or their possession

Seal

5 And We do hereby further grant ordain and appoint that all writs summonses precepts rules orders and other mandatory process to be used issued or awarded by the High Court of Judicature at Lahore shall run and be in the name and style of Us or of Our heirs and successors and shall be sealed with the seal of the said High Court

Writs etc to issue in name of the Crown and under seal

6 And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Lahore from time to time as occasion may require and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant Governor of the Punjab to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent And it is Our further will and pleasure and we do hereby for Us Our heirs and successors give grant direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may from time to time appoint for each office and place respectively and as the Lieutenant Governor of the Punjab subject to the control of the Governor General in Council may approve of Provided always and it is Our will and pleasure that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long as they hold their respective offices but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor General in Council and to absent himself from the said limits during the term of such leave in accordance with the said rules

Appointment of officers

Admission of Advocates Vakils and Attorneys

7 And We do hereby authorize and empower the High Court of Judicature at Lahore to approve admit and enrol such and so many Advocates Vakils and Attorneys as to the said High Court may seem meet and such Advocates Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act or to plead and act for the said suitors according as the said High Court may by its rules and directions determine and subject to such rules and directions

Power of High Court to admit Advocates Vakils and Attorneys

Let Pat [Lahore]

Cls 8-11

8 And We do hereby ordain that the High Court of Judicature at Lahore shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates Vakils and Attorneys at Law of the said High Court and shall be empowered to remove or to suspend from practice on reasonable cause the said Advocates Vakils or Attorneys at Law and no person whatsoever but such Advocates Vakils or Attorneys shall be allowed to act or to plead for or on behalf of any suitor in the said High Court except that any suitor shall be allowed to appear plead or act on his own behalf or on behalf of a co suitor

Powers of High Court in making rules for the qualifications etc of Advocates Vakils and Attorneys

Civil Jurisdiction of the High Court.

9 And We do further ordain that the High Court of Judicature at Lahore shall have power to remove and to try and determine as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence when the said High Court may think proper to do so either on the agreement of the parties to that effect or for purposes of justice the reasons for so doing being recorded on the proceedings of the said High Court

Extraordinary original civil jurisdiction

10 And We do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act made on or after the first day of February, 1929 in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us Our Heirs or Successors in Our or Their Privy Council as hereinafter provided.

Appeal to the High Court from Judges of the Court

11 And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents subject to appeal to the Chief Court of the Punjab by virtue of any law then in force or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

Appeal from other Civil Courts in the Provinces of the Punjab and Delhi

12 And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority with respect to the persons and estates of infants idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents

Jurisdiction as to Infants and Lunatics

Law to be administered by the High Court

13 And We do further ordain that with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Lahore in the exercise of its extraordinary original civil jurisdiction such law or equity shall until otherwise provided be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of extraordinary original civil jurisdiction

14 And We do further ordain that with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Lahore to each case coming before it in the exercise of its appellate jurisdiction such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

By the High Court in the exercise of appellate jurisdiction

Criminal Jurisdiction

15 And We do further ordain that the High Court of Judicature at Lahore shall have ordinary original criminal jurisdiction in respect of all such persons within the Provinces of the Punjab and Delhi as the Chief Court of the Punjab had such criminal jurisdiction over immediately before the publication of these presents.

Ordinary original criminal jurisdiction of the High Court

16 And We do further ordain that the High Court of Judicature at Lahore in the exercise of its ordinary original criminal jurisdiction shall be empowered to try all persons brought before it in due course of law

Jurisdiction as to persons

17 And We do further ordain that the High Court of Judicature at Lahore shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf

Extraordinary original criminal jurisdiction

18 And We do further ordain that there shall be no appeal to the High Court of Judicature at Lahore from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

No appeal from High Court exercising original jurisdiction

Court may reserve points of law

19 And We do further ordain that on such point or points of law being so reserved as aforesaid the High Court of Judicature at Lahore shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction and to pass such judgment and sentence as to the said High Court may seem right.

High Court to review cases on points of law reserved by one or more Judges of the High Court

Let Pat [Lahore]

Cls 20-24

Appeals from other criminal Courts in the Provinces of the Punjab and Delhi

20 And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Criminal Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents subject to appeal to the Chief Court of the Punjab by virtue of any law then in force or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India

Hearing of referred cases and revision of criminal trials

21 And We do further ordain that the High Court of Judicature at Lahore shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other officers in the Provinces of the Punjab and Delhi who were immediately before the publication of these presents authorized to refer cases to the Chief Court of the Punjab and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Provinces of the Punjab and Delhi as were immediately before the publication of these presents subject to reference to or revision by the Chief Court of the Punjab

High Court may direct the transfer of a case from one Court to another

22 And We do further ordain that the High Court of Judicature at Lahore shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the jurisdiction of some other officer or Court

Criminal Law

Offenders to be punished under Indian Penal Code

23 And We do further ordain that all persons brought for trial before the High Court of Judicature at Lahore either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a court of appeal reference or revision charged with any offence for which provision is made by Act No XLV of 1860 called the Indian Penal Code or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents shall be liable to punishment under the said Act or Acts and not otherwise

Testamentary and Intestate Jurisdiction

Testamentary and Intestate jurisdiction

24 And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Provinces of the Punjab and Delhi by the Chief Court of the Punjab in relation to the granting of probates of last wills and testaments and letters of administration of the goods chattels credits and all other effects whatsoever of persons dying intestate Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India by which power is given to any Court to grant such probates and letters of administration

Matrimonial Jurisdiction

Matrimonial jurisdiction

25 And We do further ordain that the High Court of Judicature at Lahore shall have jurisdiction within the Provinces of the Punjab and Delhi in matters matrimonial between Our subjects professing the Christian religion Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Letters Patent within the said Provinces which is lawfully possessed of that jurisdiction

Powers of single Judges and Division Courts

Single Judges and Division Courts

26 And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Lahore in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division Court thereof appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act 1915 and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point such point shall be decided according to the opinion of the majority of the Judges if there be a majority but if the Judges be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it

Amendment —The words in the last clause after the words equally divided were substituted for the words the opinion of the senior Judge shall prevail by the amended Letters Patent of 1928 See note under clause 36 of the Calcutta Letters Patent

Civil Procedure

Regulation of proceedings

27 And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adopting as far as possible the provisions of the Code of Civil Procedure being an Act No V of 1908 passed by the Governor General in Council and the provisions of any law which has been or may be made amending or altering the same by competent legislative authority for India to all proceedings in its testamentary intestate and matrimonial jurisdiction respectively

Criminal Procedure

Regulation of proceedings

28 And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Lahore shall be regulated by the Code of Criminal Procedure being an Act No V of 1898 passed by the Governor General in Council or by such further or other law in relation to criminal procedure as may have been or may be made by competent legislative authority for India

Appeals to Privy Council

Appeal to Privy Council in civil cases

29 And We do further ordain that any person or persons may appeal to Us Our heirs and successors in Our or their Privy Council in any matter not being of criminal jurisdiction from any final judgment decree or order of the High Court of Judicature at Lahore made on appeal and from any final judgment decree or order mad in th

Let Pat [Lahore]

Cls 29-32 exercise of original jurisdiction by Judges of the said High Court or of any Division Court from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents Provided in either case that the sum or matter at issue is of the amount or value of not less than 10 000 rupees or that such judgment decree or order involves directly or indirectly some claim demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees or from any other final judgment decree or order made either on appeal or otherwise as aforesaid when the said High Court declares that the case is a fit one for appeal to Us Our heirs or successors in Our or their Privy Council but subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi except so far as the said existing rules and orders respectively are hereby varied and subject also to such further rules and orders as We may with the advice of Our Privy Council hereafter make in that behalf

Appeal from interlocutory judgments

30 And we do further ordain that it shall be lawful for the High Court of Judicature at Lahore at its discretion on the motion or if the said High Court be not sitting then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment decree or order of the said High Court in any such proceeding as aforesaid not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us Our heirs and successors in Our or their Privy Council subject to the same rules regulations and limitations as are herein expressed respecting appeals from final judgments decrees and orders

Appeal in criminal cases

31 And We do further ordain that from any judgment order or sentence of the High Court of Judicature at Lahore made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner provided by the 18th clause of these presents by any Court which has exercised original jurisdiction it shall be lawful for the person aggrieved by such judgment order or sentence to appeal to Us Our heirs or successors in Council provided the said High Court declares that the case is a fit one for such appeal and that the appeal be made under such conditions as the said High Court may establish or require but subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi

Rule as to transmission of copies of evidence and other documents

32. And We do further ordain that in all cases of appeal made from any judgment decree order or sentence of the High Court of Judicature at Lahore to Us Our heirs or successors in Our or their Privy Council such High Court shall certify and transmit to Us Our heirs and successors in Our or their Privy Council a true and correct copy of all evidence proceedings judgments decrees and orders had or made in such cases appealed so far as the same have relation to the matter of appeal such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us Our heirs and successors in Our or their Privy Council a copy of the reasons given by the Judges of such Court or by any of such Judges for or against the judgment or determination appealed against And We do further ordain that the said High Court shall in all cases of appeal to Us Our heirs or successors conform to and execute or cause to be executed such judgments and orders

We Our heirs or successors in Our or their Privy Council may think fit to make in the premises in such manner as any original judgment decree or decretal orders or other order or rule of the said High Court should or might have been executed

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court

33 And We do further ordain that whenever it appears to the Lieutenant Governor of the Punjab subject to the control of the Governor General in Council convenient that the jurisdiction and power by these Our Letters Patent or by or under the Government of India Act 1915 vested in the High Court of Judicature at Lahore should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court or at several such places by way of circuit one or more Judges of the Court shall visit such place or places accordingly

Special commissions and circuits

34. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Lahore visit any place under the 3rd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Proceedings of Judges on special commission or circuit

Delegation of Duties to Officers

35 The High Court of Judicature at Lahore may from time to time make rules for delegating to any Registrar Prothonotary or Master or other official of the Court any judicial quasi judicial and non judicial duties

Power to delegate duties

Calls for records etc by the Government

36 And it is Our further will and pleasure that the High Court of Judicature at Lahore shall comply with such requisitions as may be made by the Governor General in Council or by the Lieutenant Governor of the Punjab for records returns and statements in such form and manner as he may deem proper

High Court to comply with requisitions from Government for record etc

Powers of Indian Legislature

37 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor General in Legislative Council and also of the Governor General in Council under section seventy one of the Government of India Act 1915 and also of the Governor General in cases of emergency under section seventy two of that Act and may be in all respects amended and altered thereby

Powers of Indian Legislatures preserved

In Witness thereof We have caused these Our Letters to be made Patent

Witness Ourself at Westminster the 21st day of March in the Year of Our Lord one thousand nine hundred and nineteen and in the ninth Year of Our reign.

By Warrant under the King s Sign Manual.

(Signed) SCHUSTER.

Admission of Advocates and Pleaders

Powers of High Court in admitting Advocates Pleaders and Attorneys

7 And We do hereby authorize and empower the High Court of Judicature at Rangoon to approve admit and enrol such and so many Advocates Pleaders and Attorneys as to the said High Court may seem meet and such Advocates Pleaders and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine and subject to such rules and directions

See *In the matter of certain First Grade Advocates (a)*

Powers of High Court in making rules for the qualifications etc of Advocates Pleaders and Attorneys

8 And We do hereby ordain that the High Court of Judicature at Rangoon shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Pleaders and Attorneys of the said High Court and shall be empowered to remove or to suspend from practice on reasonable cause the said Advocates Pleaders or Attorneys and no person whatsoever but such Advocates Pleaders or Attorneys shall be allowed to act or to plead for or on behalf of any suitor of the said High Court except that any suitor shall be allowed to appear plead or act on his own behalf or on behalf of a co suitor

Civil Jurisdiction of the High Court

Local limits of the ordinary original civil jurisdiction

9 And We do hereby ordain that the High Court of Judicature at Rangoon shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by the local legislature and until some local limits shall be so declared and prescribed within the limits of the ordinary original civil jurisdiction of the Chief Court of Lower Burma immediately before the publication of these presents and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction

Original jurisdiction as to suits.

10 And We do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction shall be empowered to receive try and determine suits of every description if in the case of suits for land or other immoveable property such land or property shall be situated or in all other cases if the cause of action shall have arisen either wholly or in case the leave of the Court shall have been first obtained in part within the local limits of the ordinary original civil jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Rangoon Small Cause Court.

Extraordinary original civil jurisdiction.

11 And We do further ordain that the High Court of Judicature at Rangoon shall have power to remove and to try and determine as a Court of extraordinary original civil jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence when the said High Court may think proper to do so either on the agreement of the parties to that effect or for purposes of justice the reasons for so doing being recorded on the proceedings of the said High Court.

(a) (1923) 1 Rang 14 4 I C. 913 ('24) A R. 1

Application for transfer —Application for transfer should be heard by a Judge sitting on the Original Side of the High Court (b) The original side of the High Court is not competent to transfer a proceeding under the Provincial Insolvency Act from one Court to another (c)

12 And We do further ordain that when the plaintiff has several causes of action against the defendant such causes of action not being for land or other immovable property and the High Court of Judicature at Rangoon shall have original jurisdiction in respect of one such cause of action it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit and to make such order for trial of the same as to the said High Court shall seem fit

Joinder of several causes of action

13 And We do further ordain that an appeal shall lie to the High Court of Judicature at Rangoon from the Judgment (not being a judgment made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction *by a Court subject to the superintendence of the said High Court* and *not being* an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act made in the exercise of appellate jurisdiction in respect of a decree or order made on or after the first day of February 1929 in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal that the right of appeal from other judgments of Judges of the said High Court of such Division Court shall be to Us Our Heirs or Successors in Our or Their Privy Council as hereinafter provided

Appeal to the High Court from Judges of the Court

14 And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Civil Courts of the Province of Burma for which immediately before the publication of these presents the Chief Court of Lower Burma or the Court of the Judicial Commissioner of Upper Burma was a Court of Appeal and from all other Civil Courts whether within or without the Province of Burma for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents subject to appeal to the Chief Court of Lower Burma or to the Court of the Judicial Commissioner of Upper Burma by virtue of any law then in force or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India

Appeal from other Civil Courts

(b) *J p ter General In ura ce Co Ltd v Abd l Aziz* (1923) 1 Rang °6 6 I C 4 9 (3) A R. 185

(c) *Oomer Ahmed Brother In the matter of* (19°6) 4 Rang 554 100 I. C. °65 (27) A. R 105

Let. Pat [Rangoon]

Cls. 14-20

Jurisdiction as to Infants and Lunatics

15 And We do further ordain that the High Court of Judicature at Rangoon shall have the like power and authority with respect to the persons and estates of infants idiots and lunatics within the Province of Burma as that which was vested in the Chief Court of Lower Burma and the Court of the Judicial Commissioner of Upper Burma immediately before the publication of these presents

Provision with respect to the Insolvent Court

16 And We do further ordain that the Court for relief of insolvent debtors at Rangoon shall be held before one of the Judges of the High Court of Judicature at Rangoon and the said High Court and any such Judge thereof shall have and exercise within the Province of Burma such power and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Burma

Law to be administered by the High Court in the exercise of ordinary original civil jurisdiction

17 And We do further ordain that with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these Letters Patent had not issued

Equity to be administered by the High Court in the exercise of ordinary original civil jurisdiction

18 And We do further ordain that with respect to the equity to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction such equity shall be the equity as nearly as may be which the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction is authorized to apply to such case

Law and equity to be administered by the High Court in the exercise of extraordinary original civil jurisdiction

19 And We do further ordain that with respect to the law or equity and rule of good conscience to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its extraordinary original civil jurisdiction such law or equity and rule of good conscience shall until otherwise provided, be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein

Law and equity to be administered by the High Court in the exercise of appellate jurisdiction

20 And We do further ordain that with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Rangoon to each case coming before it in the exercise of its appellate jurisdiction such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

CRIMINAL JURISDICTION

Ordinary original criminal jurisdiction of the High Court

21 And We do further ordain that the High Court of Judicature at Rangoon shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction and [illegible] in respect of all persons beyond such limits over [illegible] the Chief Court of Lower Burma had such criminal jurisdiction immediately before the publication of these presents.

22 And We do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original criminal jurisdiction shall be empowered to trv all persons brought before it in due course of law

Jurisdiction as to persons

23 And We do further ordain that the High Court of Judicature at Rangoon shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Government Advocate or by any magistrate or other officer specially empowered by the Government in that behalf

Extraordinary original criminal jurisdiction

24 And We do further ordain that there shall be no appeal to the High Court of Judicature at Pangoon from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court But it shall be at the discretion of any such Court to reserve anv point or points of law for the opinion of the said High Court

No appea from H gl Court exerci ing ori inal criminal jurisdiction

Court may reserve points of law

25 And We do further ordain that on such point or points of law being so reserved as afore aid or on its being certified by the Government Advocate that in his judgment there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction or that a point or points of law which has or have been decided by the said Court should be further considered the High Court of Judicature at Rangoon shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction and to pass such judgm nt and sentence as to the said High Court shall seem right

High Court to review on certificat of the Go ern ment Advocate

26 And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Criminal Courts for which immediately before the publication of these presents the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma was a Court of Appeal and from all other Criminal Courts whether within or without the Province of Burma for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents subject to appeal to the Chief Court of Lower Burma or to the Judicial Commissioner of Upper Burma by virtue of any law then in force or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India

Appeals from Criminal Court

27 And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other officers who were immediately before the publication of these presents authorised to refer cases to the Chief

Hearing of ref rred case and revision of criminal trial

Let Pat [Rangoon]

Cls 27-32 Court of Lower Burma or to the Judicial Commissioner of Upper Burma and to revise all such cases tried by any officer or Court possessing criminal jurisdiction as were immediately before the publication of these presents subject to reference to or revision by the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma.

High Court may direct the transfer of a case from one Court to another

28 And We do further ordain that the High Court of Judicature at Rangoon shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the jurisdiction of some other officer or Court

Criminal Law

Offenders to be punished under Indian Penal Code

29 And We do further ordain that all persons brought for trial before the High Court of Judicature at Rangoon either in exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of Appeal reference or revision charged with any offence for which provision is made by the Indian Penal Code being an Act passed by the Governor General in Council and being Act No XLV of 1860 or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents shall be liable to punishment unde the said Act or Acts and not otherwise

Admiralty Jurisdiction

Civil

30 And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such civil and maritime jurisdiction as might be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty immediately before the date of the publication of these presents and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as might be exercised by the said High Court at the said date

Criminal

31 And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such criminal jurisdiction as might immediately before the publication of these presents be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty or otherwise in connection with maritime matters or matters of prize

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction

32 And We do further ordain that the High Court of Judicature at Rangoon shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Burma by the Chief Court of Lower Burma and the Court of the Judicial Commissioner of Upper Burma in relation to the granting of probates of last wills and testaments and letters of administration of the goods chattels credits and all other effects whatsoever of persons dying intestate Provided always that nothing in these *Letters Patent* contained shall interfere with the provisions of any law which has been made by competent legislative authority for India by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction

33 And We do further ordain that the High Court of Judicature at Rangoon shall have jurisdiction within the Province of Burma in matters matrimonial between Our subjects professing the Christian religion Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Letters Patent within the said Province which is lawfully possessed of that jurisdiction

Matrimonial jurisdiction

Powers of Single Judges and Division Courts

34 And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Rangoon in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division Court thereof appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act and if such Division Court is composed of two or more Judges and the Judges are divided in union as to the decision to be given on any point such point shall be decided according to the opinion of the majority of the Judges if there be a majority but if the Judges be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it

Single Judges and Division Courts

Amendment —The words in the last clause after the words equally divided were substituted for the words the opinion of the senior Judge shall prevail by the amended Letters Patent of 1928 See note under clause 36 of the Calcutta Letters Patent

Civil Procedure

35 And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court including proceedings in its Admiralty testamentary intestate and matrimonial jurisdiction respectively Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure being an Act passed by the Governor General of India in Legislative Council and being Act No V of 1908 and the provisions of any law which has been or may be made amending or altering the same by the local legislature or by competent legislative authority for India

Regulation of proceedings

Criminal Procedure

36 And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Rangoon shall be regulated by the Code of Criminal Procedure being an Act No V of 1898 passed by the Governor General of India in Legislative Council or by such further or other laws in relation to criminal procedure as have been or may be made by the local legislature or by competent legislative authority for India

Regulation of proceedings

Appeals to Privy Council

Power to appeal in civil cases

37 And We do further ordain that any person or persons may appeal to Us Our Heirs and Successors in Our or Their Privy Council in any matter not being of criminal jurisdiction from any final judgment decree or order of the High Court of Judicature at Rangoon made on appeal and from any final judgment decree or order made in the exercise of original jurisdiction of Judges of the said High Court or of any Division Court from which an appeal shall not lie to the said High Court under the provisions contained in the 13th clause of these presents

Provided in either case that the sum or matter at issue is of the amount or value of not less than 10 000 rupees or that such judgment decree or order involves directly or indirectly some claim demand or question to or respecting property amounting to or of the value of not less than 10 000 rupees or from any other final judgment decree or order made either on appeal or otherwise as aforesaid when the said High Court declares that the case is a fit one for appeal to Us Our Heirs and Successors in Our or Their Privy Council but subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Province of Burma except so far as the said existing rules and orders respectively are hereby varied and subject also to such further rules and orders as We may with the advice of Our Privy Council hereafter make in that behalf

Appeal from interlocutory judgment

38 And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon at its discretion on the motion or if the said High Court be not sitting then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment decree or order of the said High Court in any such proceeding as aforesaid not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us Our Heirs and Successors in Our or Their Privy Council subject to the same rules regulations and limitations as are herein expressed respecting appeals from final judgments decrees and orders

Appeal in criminal cases

39 And We do further ordain that from any judgment order or sentence of the High Court of Judicature at Rangoon made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner provided by the 24th clause of these presents by any Court which has exercised original jurisdiction it shall be lawful for the person aggrieved by such judgment order or sentence to appeal to Us Our Heirs and Successors in Our or Their Privy Council provided the said High Court shall declare that the case is a fit one for such appeal and that the appeal be made under such conditions as the said High Court may establish or require but subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Province of Burma

Rules as to transmission of copies of evidence and other documents

40 And We do further ordain that in all cases of appeal made from any judgment decree order or sentence of the High Court of Judicature at Rangoon to Us, Our Heirs and Successors in Our or Their Privy Council such High Court shall certify and transmit to Us Our Heirs and Successors in Our or Their Privy Council a true and correct copy of all evidence proceedings judgments decrees and orders had or made in such cases appealed so far as the same have

relation to the matters of appeal such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us Our Heirs and Successors in Our or Their Privy Council a copy of the reasons given by the Judges of such Court or by any of such Judges for or against the judgment or determination appealed against And We do further ordain that the said High Court shall in all cases of appeal to Us Our Heirs and Successors in Our or Their Privy Council conform to and execute or cause to be executed such judgments and orders as We Our Heirs and Successors in Our or Their Privy Council may think fit to make in the premises in such manner as any original judgment decree or decretal order or other order or rule of the said High Court should or might have been executed

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court

41 And We do further ordain that unless the Governor of Burma in Council otherwise directs one or more Judges of the High Court of Judicature at Rangoon as the Chief Justice may from time to time direct shall sit at Mandalay in order to exercise in respect of cases arising in such areas in Upper Burma as the Governor of Burma in Council may direct the jurisdiction and power by these Our Letters Patent or by or under the Government of India Act vested in the said High Court provided that the Chief Justice may in his discretion order that any particular case arising in the said areas in Upper Burma shall be heard at Rangoon

Special commissions and circuits

42 And We do further ordain that whenever it appears convenient to the Governor of Burma in Council that the jurisdiction and power by these Our Letters Patent or by or under the Government of India Act vested in the High Court of Judicature at Rangoon should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court or at several such places by way of circuit one or more Judges of the said High Court shall visit such place or places accordingly

Proceeding of Judges on special commission or circuit

43 And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Rangoon shall visit or sit at any place under the 41st or the 42nd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by the local legislature or by a competent legislative authority for India

Provisions regarding pending proceedings

44 And We do further ordain that all suits appeal revisions applications reviews executions and other proceedings whatsoever pending immediately before the publication of these presents in the Chief Court of Lower Burma or before the Judicial Commissioner of Upper Burma or in the Court of the Judicial Commissioner of Upper Burma in the exercise of any jurisdiction vested in them by any law shall be continued and concluded in the High Court of Judicature at Rangoon as if the same had been instituted in the said High Court and the said High Court shall in relation to all such proceedings exercise the jurisdiction given to it by these presents

Delegation of Duties to Officers

Power to delegate duties

45 The High Court of Judicature at Rangoon may from time to time make rules for delegating to any Registrar Prothonotary or Master or other official of the Court any judicial quasi judicial and non judicial duties

Calls for Records etc by the Government

High Court to comply with requisition from Government for records etc

46 And it is Our further will and pleasure that the High Court of Judicature at Rangoon shall comply with such requisitions as may be made by the Governor General of India in Council or by the Governor of Burma in Council for records returns and statements in such form and manner as he may deem proper

Powers of Indian Legislatures

Power of Indian Legislatures preserved

47 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the local legislature and of the Indian legislature and also of the Governor General in Council under section seventy one of the Government of India Act and also of the Governor General under section seventy two of that Act and may be in all respects amended and altered thereby

In Witness whereof We have caused these Our Letters to be made Patent.

Witness Ourself at Westminster the eleventh day of November in the Year of our Lord one thousand nine hundred and twenty two and in the thirteenth Year of Our reign

By Warrant under the King s Sign Manual

(Signed) SCHUSTER

APPENDIX III

Rules made by the High Court of Calcutta, under s 122

O 5 r 5 —*Insert the words* for the ascertainment whether the suit will be conte ted *after the words* issue only in rule ʋ Order V, Fir t Schedule to the Code of Civil Procedure 1908

O 5 rr 15 17 —*Cancel Rules* 1ʋ *and* 17 *Order* I *and substitute therefor the following* —

15 Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a rea onable time then unless he has an agent empowered to accept service of the summons on his behalf service may be made on any adult male member of the family of the defendant who is residing with him

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant a summons so served shall be deemed for the purposes of the third column of Article 164 of Schedule I of the Limitation Act 1908 not to have been duly served

Explanation —A servant is not a member of the family within the meaning of this rule

17 Where the defendant or his agent or such other persons as afore aid refuses to sign the acknowledgment or where the defendant is ab ent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf nor any other person upon whom service can be made the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was i sued with a report endor ed thereon or annexed thereto stating that he has so affixed the copy the circumstances under which he did so and the name and addre s of the person (if any) by whom the hou e was identified and in whose presence the copy was affixed

O 5 r 19 —*Cancel Rule* 19 *Order* I *and substitute therefor the following* —

19 Where a summons is returned under rule 17 the Court shall if the return under that rule has not been verified by the declaration of the serving officer and may if it has been o verified examine the serving officer on oath or cau e him to be so examined by another Court touching his proceeding and may make such further inquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit

O 5 r 19A —*Insert the following after Rule* 19 *Order* V —

19A A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons

O 6 r 14 —*In ert the following after Rule* 14 *Order* VI —

14 (a) Every pleading when filed shall be accompanied by a statement in a prescribed form signed as provided in rule 14 of thi Order of the party s ad lre s for service Such address may from time to time be changed by lodging in court a

Rules—Cal.

App III duly filled up and stating the new address of the party and accompanied by a verified petition The address so given shall be called the registered address of the party and shall until duly changed as aforesaid be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purpose of execution and shall hold good subject as aforesaid for a period of two years after the final determination of the cause or matter Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat

O 7 r 3—*After O 7 r 3 add the words—*

and when the area is mentioned such description shall further state the area according to the notation used in the record of settlement or survey with or without at the option of the party the same are in terms of the local measures

O 7 r 9—*Cancel clause* (1) *Rule* 9 *Order VII and substitute therefor the following* —

(1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it

(1) (*a*) The plaintiff shall present with his plaint —

(i) as many copies on plain paper of the plaint as there are defendants unless the Court by reason of the length of the plaint or the number of the defendants or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made or of the relief claimed in the suit in which case he shall present such statements

(ii) a petition for service of summons to appear and answer together with the fees and draft forms of summons

O 7 r 11—*Add the following as clause* (e) *to Rule* 11 *Order VII* —

(e) Where any of the provisions of Rule 9 (1) (a) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court fails to do so

O 16 r 2—*Cancel clauses* (1) *and* (2) *of Rule* 2 *Order XVI and substitute therefor the following* —

(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend and for one day's attendance

(2) In fixing such an amount the Court may in the case of any person summoned to give evidence as an expert allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case

O 16 r 3—*Cancel Rule* 3 *Order XVI and substitute therefor the following* —

3 The sum so fixed shall be tendered to the person summoned at the time of serving the summons if it can be served personally

O 16 r 4—*Cancel clause* (1) *of Rule* 4 *Order XVI and substitute therefor the following* —

(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration the Court may direct such further sum to be paid to the person summoned as appears

to be necessary on that account and in case of default in payment may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons or the Court may discharge the persons summoned without requiring him to give evidence or may both order such levy and discharge such person as aforesaid

O 16 r 7 A —*Insert the following after Rule 7 Order XVI* —

Rule 7 (a) (i) Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant the Court shall make over for service all summonses under this Order to the party applying therefor The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court

(ii) Rules 16 and 18 of Order V shall apply to summons personally served under this rule as though the person effecting service were a serving officer

(iii) If such summons when tendered is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally the Court shall on the application of the party re issue such summons to be served by the Court in like manner as a summons to a defendant

O 16 r 8 —*Cancel Rule 8 Order XVI and substitute therefor the following* —

8 (1) Every summons under this Order not being a summons made over to a party for service under Rule 7 (a) (i) of this Order shall be served as nearly as may be in the same manner as a summons to a defendant and the rules in Order V as to proof of service shall apply thereto

(2) The party applying for a summons to be served under this rule shall before the summons is granted and within a period to be fixed pay into Court the sum fixed by the Court under Rule 2 of this Order

O 16 r 21 —*Cancel Rule 21 Order XVI and substitute therefor the following* —

21 (1) When any party to a suit is required by any other party thereto to give evidence or to produce a document the provision as to witnesses shall apply to him so far as applicable

(2) When any party to a suit gives evidence on his own behalf the Court may in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing

O 18 r 2 A —*Insert the following as Rule 2A Order XVIII* —

2A Notwithstanding anything contained in clauses (1) and (2) of Rule 2 the Court may for sufficient reason go on with the hearing although the evidence of the party having the right to begin has not been concluded and may also allow either party to produce any witness at any stage of the suit

O 22 r 11 —*Add the following to Rule 11 Order XXII* —

Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under Order XLI Rule 14 (3) the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party

O 32 r 4 —*Substitute the word* Except as otherwise provided in this Order *for the words* Where there is no other person fit and willing to act as guardian for the suit in Clause (4) rule 4 Order XXXII First Schedule to the Code of Civil Procedure 1908

O 41 r 14 —*Insert the following as clause (3) to Rule 14 Order XLI* —

(3) It shall be in the discretion of the Appellate Court to make an order at any stage of the appeal whether on its own motion or ex parte dispensing with service of such notice on any respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on the legal representatives of any such respondent

Provided that—

(a) The Court may require notice of the appeal to be published in any newspaper or newspapers as it may direct

(b) No such order shall preclude any such respondent or legal representative from appearing to contest the appeal

Schedule I —Appendix B No 1 A —*Insert the following form in Appendix B and number it as IA* —

No IA

Summons to defendant for ascertainment whether the suit will be contested (Order 5 rules 1 and 5)

(*Title*)

To

(Name description and place of residence)

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed and able to answer all material questions relating to the suit on the day of 19 at o clock in the noon in order that on that day you may inform the Court whether you will or will not contest the claim either in whole or in part and in order that in the event of your deciding to contest the claim either in whole or in part directions may be given you as to the date upon which your written statement is to be filed and the witness or witnesses upon whose evidence you intend to rely in support of your defence are to be produced and also the document or documents upon which you intend to rely

Take notice that in default of your appearance on the day before mentioned the suit will be heard and determined in your absence and take further notice that in the event of your admitting the claim either in whole or in part the Court will forthwith pass judgment in accordance with such admissions

Given under my hand and the seal of the Court this day of 19

Judge

Seal

NOTICE —If you admit the claim either in whole or in part you should come prepared to pay into Court the money due by virtue of such admission together with the costs of the suit to avoid execution of any decree which may be passed against your person or property or both

Schedule I —Appendix B —Form No 10 —*Insert the words* (or proof of the above having been duly made by the declaration of) *after the words* proof of the above having been duly taken by me on the oath of in Form No 10 Appendix B

Schedule I—Appendix B —Form No 11 —*Substitute the following for the end of Form No 11 Appendix B* —

Declaration of process server to accompany Return of a Summons or Notice (Order 5 Rule 18)

(*Title*)

I a process server of this Court declare —(1) On the day of 19 I received a summons/notice issued by the Court of in suit No of 19 in the said Court dated day of 19 for service on (2) The said was at the time personally known to me and I served the said summons/ notice on him/ her on the day of 19 at about o clock in the noon at by tendering a copy thereof to him/her and requiring his/her signature to the original summons notice

(*a*)

(*b*)

(*a*) Here state whether the person served signed or refused to sign the process and in whose presence

(*b*) Signature of process server

Or

(2) The said not being personally known to me pointed out to me a person whom he stated to be the said and I served the said summons notice on him her on the day of 19 at about o clock in the noon at by tendering a copy thereof to him/her and requiring his/her signature to the original summons/ notice

(*a*)

(*b*)

(*a*) Here state whether the person served signed or refused to sign the process and in whose presence

(*b*) Signature of process server

Or

(?) The said and the house in which he ordinarily resides being personally known to me I went to the said house in and there on the day of 19 at about o clock in the noon I did not find the said

(*a*)

(*b*)

(*a*) Enter fully and exactly the manner in which the process was served with special reference to Order 5 Rules 15 and 17

(*b*) Signature of process server

Or

( ) One at pointed out to me which he said was the house in which ordinarily resides I did not find the said there

(*a*)

(*b*)

(*a*) Enter fully and exactly the manner in which the process was served with special reference to Order 5 Rules 15 and 17

(*b*) Signature of process server

Rules—Cal

App III

Or

(3) If substituted service has been ordered state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service

Schedule I —Appendix A —Form No 13 —In the form of *Breach of agreement to purchase land* No 13 of Appendix A to the First Schedule *cancel* the word bighas and *substitute* therefor the words $\frac{\text{acres}}{\text{bighas}}$

Schedule I —Appendix D —Form No 1 —*Cancel* the table under the head costs of suit in form No 1 Appendix D *ibid* and *substitute* therefor the following —

	Plaintiff	Rs a p		*Defendant*	Rs a p
1	Stamp for plaint		1	Stamp for power	
2	Stamp for power		2	Stamp for petitions and affidavits	
3	Stamp for petitions and affidavits		3	Cost of exhibits including copies made under the Banker's Books Evidence Act 1891	
4	Cost of exhibits including copies made under the Banker's Books Evidence Act 1891		4	Pleaders fee	
5	Pleaders fee on Rs		5	Subsistence and travelling allowances of witnesses (including those of party if allowed by *Judge*)	
6	Subsistence and travelling allowances of witnesses (including those of party if allowed by Judge)		6	Process fees	
	Process fees		7	Commissioner's fees	
8	Commissioner's fees		8	Demi paper	
9	Demi paper		9	Cost of transmission of records	
10	Cost of transmission of records		10	Other costs allowed under the Code and General Rules and Orders	
11	Other costs allowed under the Code and General Rules and Orders		11	Adjournment costs not paid in cash (to be deducted or added as the case may be)	
12	Adjournment costs not paid in cash (to be added or deducted as the case may be)				

Schedule I —Appendix D—Form No 2 —*Cancel* the table under the head costs of suit in form No 2 Appendix D *ibid* and *substitute* therefor the following —

	Plaintiff	Rs a p		*Defendant*	Rs a p
1	Stamp for plaint		1	Stamp for power	
2	Stamp for power		2	Stamp for petition and affidavits	
3	Stamp for petitions and affidavits		3	Cost of exhibits including copies made under the Banker's Books Evidence Act 1891	
4	Cost of exhibits including copies made under the Banker's Books Evidence Act 1891		4	Pleader's fee	
5	Pleaders fee on Rs		5	Subsistence and travelling allowances of witnesses (including those of party if allowed by Judge)	
6	Subsistence and travelling allowances of witnesses (including those of party if allowed by Judge)		6	Process fees	
7	Process fees		7	Commissioner's fees	
8	Commissioner's fees		8	Demi paper	
9	Demi paper		9	Cost of transmission of records	
10	Cost of transmission of records		10	Other costs allowed under the Code and General Rules and *Orders*	
11	Other costs allowed under the Code and General Rules and *Orders*		11	Adjournment *costs* not paid in cash (to be deducted or added as the case may be)	
1	Adjournment costs not paid in cash (to be added or deducted as the case may be)				

Schedule I —Appendix G —Form No 9 —In the form of "Decree in Appeal" No 9 of Appendix G to the First Schedule *cancel* the words from *Memorandum of Appeal* to the following reasons namely —

APPENDIX IV

Rules made by the High Court of Bombay, under s 122

O 3 r 2 clause (a) —*O 3 r 2 cl (a) be amended to read as follows* —

Persons holding general power of attorney from parties not resident within the local limits of the juri diction of the Court within which limits the appearance application or act is made or done authorising them to make and do such appearances applications and acts on behalf of such parties (*a*)

O 3 r 4 —In sub rule 3 of rule 4 of Order III as amended by Act XXII of 1926 the words or any application relating to such appeal shall be inserted between the words order in the suit and and any application or act

O 5 r 22 —*The following proviso be added to O 5 r 22* —

Provided that where any such summons is to be served within the limits of the town of Bombay it may be addres ed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknow ledgment An acknowledgment purporting to be signed by the defendant or an endor e ment by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary

O 9 r 4 —*Order IX rule 4 shall be numbered Order IX rule 4 (1) and the sub rule (2) shall be added to it namely* —

(2) The provisions of section 5 of the Indian Limitation Act 1908 shall apply to applications under this rule

O 9 r 9 —*The following shall be added as sub ule (3) to Order IX rule 9 namely* —

(3) The provisions of section 5 of the Indian Limitation Act 1908 shall apply to applications under this rule

O 9 r 13 —*Rule 13 of Order IX shall be numbered as rule 13 (1) and the following sub rule shall be added to it namely* —

(2) The provi ions of section 5 of the Indian Limitation Act 1908 shall apply to applications made under this rule

O 9 r 15 —*The following shall be added to Order IX as rule 15* —

In the application of this Order to appeals so far as may be the word plaintiff shall be held to include an appellant the word defendant a respondent and the word suit an appeal

O 13 r 9 —*Between the fir t and second proviso to sub rule (1) of rule 9 of Order XIII the following proviso shall be inserted namely* —

Provided also that a copy of the decree and of the judgment filed with the memo randum of appeal under Order XLI rule 1 may be returned after the appeal has been di po ed of by the Court

O 16 r 1 (a) —*The following shall be added as rule 1 A to Order XVI* —

1 A (1) The Court may on the application of any party for a summons for the attendance of any per on permit that service of such summons shall be effected by such party

(*a*) See I nd ju v Ch drapja (191) 41 B m 40 36 I C 805

Rules—Bom

App IV

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected the Court may if it is satisfied that reasonable diligence has been used by such party to effect such service permit service to be effected by an officer of the Court

O 16 r 2 (1)—*The following shall be inserted as proviso to sub rule (1) of rule of Order 16* —

Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation apply for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge or of matters with which he has had to deal as a public officer or to produce any document from public records the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness

O 16 r 3—*The following shall be inserted as proviso to rule 3 of Order 16* —

Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has had to deal in his official capacity or to produce a document from public records the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him

O 21 r 22—In rule 22 of Order XXI the words two years shall be substituted for the words one year wherever they occur

O 21 r 44A—*After r 44 of O 21, the following shall be inserted namely* —

44A Where the property to be attached is agricultural produce a copy of the warrant or order of attachment shall be sent by post to the Office of the Collector of the District in which the land is situate

O 21 r 45—*The following words shall be added to sub rule (1) of rule 45 of Order XXI after substituting a semicolon for the full stop* —

and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time

O 21 r 54—*The following shall be added to sub rule (1) of rule 54 of Order XXI* —

Such order shall take effect where there is no consideration for such transfer or charge from the date of such order and where there is consideration for such transfer or charge from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged

O 21 r 69 (2) —

In sub rule (2) of rule 69 of Order XXI thirty days shall be substituted for seven days

O 21 r 72A—*After r 72 of O 21 the following shall be inserted namely* —

72A If leave to bid is granted to the mortgagee of immovable property a reserve price as regards him shall be fixed (unless the Court shall otherwise think fit) at a sum not less than the amount then due for principal interest and costs in case the property is sold in one lot and not less in respect of each lot (in case the property is sold in lots) than such figure as shall appear to be properly attributable to it in relation to the amount aforesaid

Rules—

O 21 r 91 —*The following rule shall be added as rule 91A in Order XXI of the Code of Civil Procedure* — Ap

Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector an application under rules 89 90 or 91 and in the case of an application under rule 89 the deposit required by that rule if made to the Collector or the Officer to whom the decree is referred for execution in accordance with any rule framed by the local Government under section 0 of the Code shall be deemed to have been made to or in the Court within the meaning of rules 89 90 and 91

O 25 r 2 —*The following shall be added as sub rule (4) to Order XXI rule 2 namely* —

(4) The provisions of section 5 of the Indian Limitation Act 1908 shall apply to applications under this rule

O 32 r 3 (4) —

The words to the minor and in line 2 of sub rule (4) of rule 3 of Order XXXII shall be deleted

O 33 r 1 —*The following sentence shall be added to the Explanation to rule 1 of Order XXXIII Civil Procedure Code namely* —

In determining whether he is possessed of sufficient means the subject matter of the suit shall be excluded

O 34 r 2 (d) —*Substitute for clause (d) of rule 2 of Order XXXIV the following* —

(d) that if such payment is not made on or before the day to be fixed by the Court the plaintiff shall be entitled to apply for a final decree for foreclosure under rule 3

O 34 r 4 (1) —

In sub rule (1) of rule 4 of Order XXXIV after the words as therein mentioned substitute the plaintiff shall be entitled to apply for a final decree for sale under rule 5

O 34 r 5 (2) —

In sub rule (2) of rule 5 of Order XXXIV after the words proceeds of the sale substitute (after defraying the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at such rate as the Court deems reasonable and subsequent costs and that the balance (if any) be paid to the defendants or other persons entitled to the same

Provided that the Court may upon good cause shown and upon such terms (if any) as it thinks fit from time to time postpone the day fixed for such payment

O 34 r 7 (d) —

For clause (d) of rule 7 of Order XXXIV substitute (d) that if such payment is not made on or before the day to be fixed by the Court the defendant shall be entitled to apply for a final decree for sale or foreclosure under rule 8

O 37 r 2 —*In sub rule (1) of rule 2 of Order XXXVII after the words promissory notes the following words shall be inserted namely* —

and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest arising on a contract express or implied or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty or on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only

Rules—Bom

App IV

(3) The provisions of section 5 of the Indian Limitation Act 1908 shall apply to applications under sub rule (1)

O 37 r 3—*In rule 3 of Order XXXVII the following sub rule (3) shall be inserted* —

(3) The provisions of section 5 of the Indian Limitation Act 1908 shall apply to applications under sub rule (1)

O 41 r 3 A— *After rule 3 of Order XLI the following rule shall be inserted namely* —

3 A Where an appellant applies for delay to be excused notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under rule 13

In sub rule (2) of rule 3 of Order XLV after the words to show cause why the said certificate should not be granted the following words shall be inserted namely — unless it thinks fit to refuse the certificate

O 43 r 1—

Clause (w) of rule 1 of Order XLIII shall be deleted

O 45 r 3 (2) —

In sub rule (2) of rule 3 of Order XLV after the words to show cause why the said certificate should not be granted the following words shall be inserted namely — unless it thinks fit to refuse the certificate

O 45 r 7 A—*After rule 7 of Order XLV the following rule shall be inserted namely* —

7 A No such security as is mentioned in rule 7 (1) clause (a) shall be required from the Secretary of State for India in Council or where the local Government has undertaken the defence of the suit from any public officer sued in respect of an act alleged to be done by him in his official capacity

O 47 r 5—

In Order XLVII rule 5 for the word six the word two shall be substituted

O 49 r 3—

In rule 3 of Order XLIX the word and immediately preceding paragraph (6) shall be omitted and the following paragraph shall be inserted between paras (5) and (6) namely —

(5a) rule 72A of Order XXI and

O 49 r 3—

For the words rule 35 occurring below item (6) of rule 3 of Order XLIX the words rules 31 and 35 shall be substituted.

O 49 r 4—*The following rule made under s 128 (2) (i) to be added as r 4 in O 49* —

Where on a memorandum of appeal presented within the time prescribed for the same the whole or any part of the fee prescribed by the law for the time being in force relating to Court fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court fees and may admit the appeal to the register even though the subsequent payment of Court fee may have been made after the time prescribed for presentation of the appeal.

Rules—
Ap

Schedule I—Appendix B—Form No 10—*Form No 10 in Appendix B Schedule I be amended to read as follows* —

To accompany Returns of Summons of another Court (Order V r 23)

(*Title*)

Read proceeding from the forwarding for service on in Suit No of 19 of that Court

Read Serving Officer s endorsement stating that the and proof of the above having been duly taken by me on the oath of and it is ordered that the be returned to the with this proceeding

I hereby declare that the said summons on has been duly served

Judge

NOTE —This form will be applicable to process other than summons the service of which may have to be effected in the same manner

Schedule I—Appendix D—Form No 4—

In line 4 of Form No 4 in Appendix D for realization substitute the day hereinafter referred to

For clause (2) of the said form substitute (2) That if such payment is not made on or before the said day of 19 the plaintiff shall be entitled to apply to the Court for a final decree for sale

Delete Clause (3) of the said form

Schedule I—Appendix D—Form No. 5

For clause (2) of Form No 5 in Appendix D substitute (2) That if such payment is not made on or before the said day of 19 the defendant shall be entitled to apply for a final decree for foreclosure or sale

Schedule I—Appendix D—Form No 10-A—*Add the following form as Form No 10A* —

No 10 A.

Final Decree for sale

(*Title*)

Upon reading the decree pa ed in the above suit on the day of 19 and the application of the plaintiff dated the day of 19 and after hearing pleader for the plaintiff and pleader for the defendant and it appearing that the payment directed by the said decree has not been made

It is hereby decreed as follows —

(1) That the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent intere t at per cent per annum and subsequent co t and that the balance if any be paid to the defendant

(2) That if the net proceeds of the sale are in ufficient to pay such amount and such subsequent interest and costs in full the plaintiff shall be at lib e t o apply for a personal decree for the amount of the balance

APPENDIX V

Rules made by the High Court of Allahabad, under s 1??

Order IV

1 (1) *For rule 1 (1) substitute the following* —

Every suit shall be instituted by presenting to the court or such officer as it appoints in this behalf a plaint together with a true copy for service with the summons upon each defendant unless the Court for good cause shown allows time for filing such copies

(2) The Court fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for

And *re number* the present sub rule (2) as sub rule (3)

Order V

2 *Omit* the words or if so permitted by a concise statement

Add the following rules 4A —

4A Except as otherwise provided in every interlocutory proceeding and in every proceeding after decree in the trial Court the Court may either on the application of any party or of its own motion dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement

15 *For* the word Where in any suit the defendant cannot be found *read* When the defendant is absent or cannot be personally served

25 *For* the word shall in the third line *read* the word may

Add the following rule 25A —

25A When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh the Court may in addition to or in substitution for any other mode of service send the summons by post to the defendant at the place where he is residing or carrying on business An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service

26 *After* the word the summons may *insert* the words in addition to or in substitution for the method permitted by rule 25

27 *To O V r 27 add the following as note 1 and note 2* —

1 A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these Provinces is given in Appendix (2) to the General Rules (Civil) of 1911

2 In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order XVI simultaneously with the issue of the summons notice shall be sent to the head of the office in which the person concerned is employed in order that arrangements may be made for the performance of the duties of such person.

Rule
App

Illustration If the Court sees fit to issue a summons to a kanungo or patwari it shall inform the Collector of the district and if to a sub registrar it shall inform the District Registrar to whom the sub registrar is subordinate

Add the following rules at the end of O 5 —

28 1 The present rule 28 shall be numbered 28 (1)

2 *Add the following as rule* 28 (2) —

Where the address of such Commanding Officer is not known the Court may apply to the officer commanding the station in which the defendant was serving when the cause of action arose to supply such address in the manner prescribed in sub rule (4) of this rule

3 *Add the following sub rules* (3) (4) *and* (5) —

(3) Where the defendant is an officer of His Majesty's military force wherever it is practicable service shall be made on the defendant in person

(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted or outside British India the Court may apply over the seal and signature of the Court to the Officer Commanding the station in which the defendant was residing when the cause of action arose for the address of such defendant and the Officer Commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give as may lead to the discovery of his address

(5) Where personal service is not practicable the Court shall issue the summons to the defendant at the address so supplied by registered post

29 In rule 29 sub rule (1) line 2 *for* the word rule 28 *read* rule 28 (1)

31 An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose No other forms shall be received by the Court

32 Ordinarily every process except those that are to be served on Europeans shall be written in the Court vernacular But where a process is sent for execution to the Court of a district where a different language is in ordinary use it shall be written in English and shall be be accompanied by a letter in English requesting its execution

In cases where the return of service is in a language different from that of the district from which it is issued it shall be accompanied by an English translation.

Order VII

9 *In rule* 9—*(a)*—*for* the *semicolon* after it in clause (1) *substitute* a *fullstop* and *delete* the rest of this clause as well as clause (2) and (3) and

(b) *Renumber* clause 4 as clause ( ) *deleting* the words or statement therein

17 At the end of clause 2 of rule 17 of Order VII *add* the following proviso —

Provided that if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use the person producing it or someone on his behalf shall attest it as a true copy and in that case the Court or its officer need not examine or compare the copy with the original.

APPENDIX V

Rules made by the High Court of Allahabad, under s 1[22]

Order IV

1 (1) *For rule 1 (1) substitute the following* —

Every suit shall be instituted by presenting to the court or such officer as it appoints in this behalf a plaint together with a true copy for service with the summons upon each defendant unless the Court for good cause shown allows time for filing such copies

(2) The Court fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for

And *re number* the present sub rule (2) as sub rule (3)

Order V

2 *Omit* the word or if so permitted by a concise statement

Add the following rules 4 A —

4A Except as otherwise provided in every interlocutory proceeding and in every proceeding after decree in the trial Court the Court may either on the application of any party or of its own motion dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement

15 *For the words Where in any suit the defendant cannot be found read* When the defendant is absent or cannot be personally served

25 *For* the word shall in the third line *read* the word may

Add the following rule 25 A —

25A When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh the Court may in addition to or in substitution for any other mode of service send the summons by post to the defendant at the place where he is residing or carrying on business An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie proof* of service

26 *After* the words the summons may *insert* the words in addition to or in *substitution for the method permitted by rule 25*

27 *To O V r 27 add the following as note 1 and note 2* —

1 A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these Provinces is given in Appendix (2) to the General Rules (Civil) of 1911

2 In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order XVI simultaneously with the issue of the summons notice shall be sent to the head of the office in which the person concerned is employed in order that arrangements may be made for the performance of the duties of such person.

Rule
App

Illustration If the Court sees fit to issue a summons to a kanungo or patwari it shall inform the Collector of the district and if to a sub registrar it shall inform the District Registrar to whom the sub registrar is subordinate

Add the following rules at the end of O 5 —

28 1 The present rule 28 shall be numbered 28 (1)

2 *Add the following as rule 28 (2)* —

Where the address of such Commanding Officer is not known the Court may apply to the officer commanding the station in which the defendant was serving when the cause of action arose to supply such address in the manner prescribed in sub rule (4) of this rule

3 *Add the following sub rules* (3) (4) *and* (5) —

(3) Where the defendant is an officer of His Majesty's military forces wherever it is practicable service shall be made on the defendant in person

(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted or outside British India the Court may apply over the seal and signature of the Court to the Officer Commanding the station in which the defendant was residing when the cause of action arose for the address of such defendant and the Officer Commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give as may lead to the discovery of his address

(5) Where personal service is not practicable the Court shall issue the summons to the defendant at the address so supplied by registered post

29 In rule 29 sub rule (1) line 2 *for* the words rule 28 *read* rule 28 (1)

31 An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose No other forms shall be received by the Court

32 Ordinarily every process except those that are to be served on Europeans shall be written in the Court vernacular But where a process is sent for execution to the Court of a district where a different language is in ordinary use it shall be written in English and shall be be accompanied by a letter in English requesting its execution

In cases where the return of service is in a language different from that of the district from which it is issued it shall be accompanied by an English translation.

Order VII

9 *In rule* 9—(*a*)—*for* the *semi colon* after it in clause (1) *substitute* a *fullstop* and *delete* the rest of this clause as well as clauses (2) and (3) and

(*b*) *Renumber* clause 4 as clause (2) *deleting* the words or statements therein

17 At the end of clause 2 of rule 17 of Order VII *add* the following proviso —

Provided that if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use the person producing it or someone on his behalf shall attest it as a true copy and in that case the Court or its officer need not examine or compare the copy with the original

s—All
p V

Add the following rules at the end of O 7 —

19 Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice summons or other process may be made on the plaintiff or petitioner Plaintiffs or petitioners subsequently added shall immediately on being so added file a proceeding of this nature

20 An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed or of the District Court within which the party ordinarily resides if within the limits of the United Provinces of Agra and Oudh

21 Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect and the Court may make such order as it thinks just

22 Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present a copy of the notice or process shall be affixed to the outer door of the house If on the date fixed such party is not present another date shall be fixed and a copy of the notice summons or other process shall be sent to the registered address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served

23 Where a party engages a pleader notices or processes for service on him shall be served in the manner prescribed by Order III rule 5 unless the Court directs service at the address for service given by the party

24 A party who desires to change the address for service given by him as aforesaid shall file a verified petition and the Court may direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform and may be either served upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit

25 Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner if for any reasons it thinks fit to do so

Order VIII

Add the following rules at the end of O 8 —

11 Every party whether original added or substituted who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing file in Court a proceeding stating his address for service and if he fails to do so he shall be liable to have his defence if any struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just

12 Rules 20 22 23 24 25 and 26 of Order VII shall apply so far as may be to addresses for service filed under the preceding rule

Order IX

13 (2) *Add the following proviso —*

Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons if the Court is satisfied that the defendant knew or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff s claim.

Rules-
App

After the words in the fourth line for such service *insert* the words or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant

Order XIII

Add the following rules at the end of O 13 —

12 Every document not written in the Court vernacular or in English which [illegible] produced (*a*) with a plaint or (*b*) at the first hearing or (*c*) at any other time tendered in evidence in any suit appeal or proceeding shall be accompanied by a correct translation of the document into the Court vernacular If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character

13 When a document included in the list prescribed by rule 1 has been admitted in evidence the Court shall in addition to making the endor ement prescribed in [illegible] (1) mark such document with serial figures in the case of documents admitted [illegible] dence for a plaintiff and with serial letters in the case of documents admitted [illegible] dence for a defendant and shall initial every such serial numb r or letter When [illegible] are two or more parties defendants the documents of the first party defendant [illegible] marked A1 B1 C1 &c AA1 BB1 &c and those of the second A2 B2 C2 & [illegible] BB2 &c When a number of documents of the ame nature is admitted as [illegible] a series of receipts for rent the whole series shall bear one figure or capital letter [illegible] and a small figure or small letter shall be added to distinguish each paper of the [illegible]

Order XVI

1 *The following proviso to be added —*

Provided that no party who has begun to call his witnesses shall be [illegible] obtain process to enforce the attendance of any witness against whom [illegible] previously issued or to call any witness not named in a list which must be [illegible] before the hearing of evidence on his behalf has commenced without an order [illegible] made in writing and stating the *reasons* therefor

8 *For* the words in line 1 under this order shall be served [illegible] order may by leave of the Court be served by the party or his agent, [illegible] same by personal service and failing such service shall be served.

Add the following to O 16 r 2 —

2 (4) *This rule shall not apply* in cases to which Government [illegible] case of witnesses who are Government servants whose salary exceeds Rs [illegible] and who are summoned to give evidence in their public capacity at a [illegible] more than five miles from their headquarters

Add the following rules at the end of O 16 —

22 (1) Save as provided in this rule and in rule 2 the Court [illegible] ling and other expenses on the following scale —

(*a*) In the case of witnesses of the class of cultivators labourers [illegible] six annas a day

(*b*) In the case of witnesses of a better class such as zamindars [illegible] and persons of corresponding rank from eight annas [illegible] a day as the Court may direct and

—All
V

(c) In the case of witnesses of superior rank including officers of Government in receipt of salary of not less than Rs 200 a month from three to five rupees a day

(2) If a witness demands any sum in excess of what has been paid to him such sum shall be allowed if he satisfies the Court that he has actually and necessarily incurred the additional expense

Illustration

A post office employee summoned to give evidence is entitled to demand from the party on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip which the witness will present to the Court from which the summons was issued

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate not usually exceeding that payable under clause (1) of this rule as may seem to the Court to be reasonable and proper

Provided that the Court may for reasons stated in writing allow expenses on a higher scale than that hereinbefore prescribed

23 In cases to which Government is a party Government servants not being police constables whose salary exceeds Rs 10 per mensem and who are summoned to give evidence in their official capacity at a Court situated more than five miles from their headquarters shall be given a certificate of attendance by the Court in lieu of travelling and other expenses

Order XVII

1 (2) *Add the following further proviso* —

Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named nor shall any adjournment be utilised by any party for such purpose unless the Judge has made an order in writing under the proviso to Order XVI rule I

2 *Order XVII add to rule 2* —

Where on any such day the evidence or a substantial portion of the evidence of any party has been recorded and such party fails to appear the Court may in its discretion proceed with the case as if such party were present and may dispose of it on the merits

Explanation —No party shall be deemed to have failed to appear if he is either present or is represented in court by an agent or pleader though engaged only for the purpose of making an application

3 *Amend rule 3* —

Where any party to a suit to whom time has been granted fails without reasonable excuse to produce his evidence or to cause the attendance of his witnesses or to comply with any previous order or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may whether such party is present or not proceed to decide the suit on the merits

Order XVIII

Add the following rules at the end of O 18 —

19 (1) The Judge shall record in his own hand in English all orders passed on applications other than orders of a purely routine character

(2) The Judge shall record in his own hand in English all admissions and denials of documents and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them

(3) The Judge shall record the issues in his own hand in English and the issues shall be signed by the Judge and shall form part of the English proceedings

Order XIX

Add the following rules at the end of O 19 —

4 Affidavits shall be entitled in the Court of at (naming such Court) If the affidavit be in support of or in opposition to an application respecting any case in the Court it shall also be entitled in such case If there be no such case it shall be entitled *In the matter of the petition of*

5 Affidavits shall be divided into paragraphs and every paragraph shall be numbered consecutively and as nearly as may be shall be confined to a distinct portion of the subject.

6 Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly and where necessary for this purpose it shall contain the full name the name of his father of his caste or religious persuasion his rank or degree in life his profession calling occupation or trade and the true place of his residence

7 Unless it be otherwise provided an affidavit may be made by any person having cognizance of the facts deposed to Two or more persons may join in an affidavit each shall depose separately to those facts which are within his own knowledge and such facts shall be stated in separate paragraphs

8 When the declarant in any affidavit speaks to any fact within his own knowledge he must do so directly and positively using the words I affirm or I make oath and say

9 Except in interlocutory proceedings affidavits shall strictly be confined to such acts as the declarant is able of his own knowledge to prove In interlocutory proceedings when the particular fact is not within the declarant s own knowledge but is stated from information obtained from others the declarant shall use the expression I am informed and if such be the case and verily believe to be true and shall state the name and address of and sufficiently described for the purposes of identification the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of document produced from any Court of Justice or other source the declarant shall state what is the source from which they were produced and his information and belief as to the truth of the facts disclosed in such documents.

10 When any place is referred to in an affidavit it shall be correctly described. When in an affidavit any person is referred to such person the correct name and address of such person and such further description as may be sufficient for the purpose of the identification of such person shall be given in the affidavit.

es—All
pp V

11 Every person making an affidavit for use in a Civil Court shall, if not personally known to the person before whom the *affidavit is made be identified to* that person by some one known to him and the person before whom the affidavit is made shall state at the foot of the affidavit the name address and description of him by whom the identification was made as well as the time and place of such identification.

11A Such identification may be made by *a person*—

(a) personally acquainted with the person to be identified or

(b) satisfied from papers in that person s possession or otherwise of his identity

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form after there has been affixed to such declaration in his presence the thumb *impression of the person so identified* —

Form

I (name address and description) *declare that the* person verifying *this petition* (or making this affidavit) and alleging himself to be A B has satisfied me (here state by what means *e g* from papers in his possession or otherwise) that he is A. B

12 No verification of a petition and no affidavit purporting to have been made by a *pardah nashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an *affidavit of identification of such woman made at the time* by the person who identified her

13 The person before whom any affidavit is about to be made shall before the same is made ask the person proposing to make such affidavit if he had read the affidavit and understands the contents thereof and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to *understand the contents thereof* or appears to be illiterate the person before whom the affidavit is about to be made shall read and explain or cause some other competent person to read and explain in his presence the affidavit to the person proposing to make the same and when the person before whom the affidavit is about to be made is thus *satisfied that the person* proposing to make such *affidavit* understands *the contents* thereof the affidavit may be made

14 The person before whom an affidavit is made shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the *time and place* when and where it was made and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit

15 If it be found necessary to correct any clerical error in any affidavit such *correction may be made in the presence of the person* before whom the *affidavit is about* to be made and before but not after the affidavit is made Every correction so made shall be initialled by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to *read the original* word or words figure or figures in respect of which the correction may have been made

Order XX

Add the following rule at the end of O 20 —

21 (1) Every decree and order as defined in section 2 other than a *decree* or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes shall be drawn up in the *Court* vernacular As soon as such

decree or order has been drawn up and before it is signed the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up and that any party or the pleader of any party may within six working days from the date of such notice peruse the draft decree or order and may sign it or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error Such objection shall state clearly what is the error defect or variance alleged and shall be signed and dated by the person making it

(2) If any such objection be filed on or before the date specified in the notice the Munsarim shall enter the case in the earliest weekly list practicable and shall on the date fixed put up the objection together with the record before the Judge who pronounced the judgment or if such Judge has ceased to be the Judge of the Court before the Judge then presiding

(3) If no objection has been filed on or before the date specified in the notice or if an objection has been filed and disallowed the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8

(4) If an objection has been duly filed and has been allowed the correction or alteration directed by the Judge shall be made Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed

Order XXI

5 *For* the word District where it occurs *after* the words same and different *read* Province

Rule 6

6 *Rule 6 be re numbered 6 (1) and the following sub rule 6 (2) be added* —

Such copies and certificates may at the request of the decree holder be handed over to him or to such person as he appoints in a sealed cover to be taken to the court to which they are to be sent

11 *For clause (f) of sub rule ( ) of this rule substitute the following* —

(*f*) The date of the last application if any And *add* the following proviso to sub rule (2) —

Provided that when the applicant files with his application a certified copy of the decree the particulars specified in clauses (*b*) (*c*) and (*h*) need not be given in the application

17 Between the words been complied with and the court may *insert* the words and if the decree holder fails to remedy the defect within a time to be fixed by the court

22 *For* the words one year wherever they occur in this rule *read* the words " three years

Rules—All

App V

To sub rule (2) of this rule shall be added the following proviso —

Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule unless the judgment debtor has sustained substantial injury by reason of such omission

24 (3) *After* the words at the end of the sub rule be executed *add* the words and a day shall be specified on or before which it shall be returned to court

Substitute the following for paragraph (2) in rule 25 —

25 (2) 2 Where the endorsement is to the effect that such officer is unable to execute the process the Court may examine him personally or upon affidavit touching his alleged inability and may, if it thinks fit summon and examine witnesses as to such inability and shall record the result

26 (3) *For* the words the court may *read* the words the court shall unless good cause to the contrary is shown

29 *After* the words the person against whom the decree was passed," insert the words or any person whose interests are affected by the decree or by any order made in execution thereof

31 (2) and (3) *For the words wherever they occur in each sub rule six months read* the words three months or such extended time as the court may for good cause direct

32 (3) *For the words* one year *read the words* three months and after the words at the end of the sub rule on his application *add* the words the court may for good cause extend the time

39 (5) *Delete* the words in the Civil Prison.

53 In sub rule (1) (*b*) in the third line and in sub rule (4) in the eighth line after the words to such other court *add* the words and to any other court to which the decree has been transferred for execution.

And in sub rule (6) *for* the words after receipt of notice thereof *read* the words after receipt of notice or with the knowledge thereof

54 *Add the following sub rule* (54) (3) —

The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment debtor from the date on which such order is made

Substitute the following for rule 55 —

55 (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under section 73 (1) in respect of the property of the same judgment debtor by persons other than the holder of the decree for the execution of which the original order was passed

(2) Where—

(*a*) the amount decreed (which shall include the amount of any decree passed against the same judgment debtor) notice of which has been sent to the sale officer under sub section (1) with cost and all charges and expenses resulting from the attachment of any property are paid into Court or

(*b*) satisfaction of the decree (including any decree passed against the same judgment debtor) notice of which has been sent to the sale officer under subsection (1) is otherwise made through the Court or certified to the Court or

Rule App

(c) the decree (including any decree passed against the same judgment debtor) notice of which has been sent to the sale officer under sub section (1) is set aside or reversed

the attachment shall be deemed to be withdrawn and in the case of immovable property the withdrawal shall if the judgment debtor so desires be proclaimed at his expense and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

58 *Add the following words to sub rule (58) (2)* —

(or objection) or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation And in no case shall the sale become absolute until the claim or objection has been decided

68 *For* the words fifteen days *read* the words seven days

69 (2) *For* the word seven *read* the word fourteen and *add* the following proviso —

Provided that the court may dispense with the consent of any judgment debtor who has failed to attend in answer to a notice issued under rule 66

72 In sub rule (2) *for* the words with such permission *read* the words property sold and *re number* this sub rule 72 and delete sub rules (1) and (3)

89 In sub rule (1) of this rule *for* the words any person before such sale *read* the words the judgment debtor or any person deriving title through the judgment debtor or any person holding an interest in the property

90 *For* the words Provided that no *read* the words provided that—

(a) no

and add the following proviso —

(b) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up

92 In sub rule (1) *after* the words the court shall *insert* the words subject to the provisions of rules 58 (2)

After the words at his instigation wherever they occur *add* the words or on his behalf and *after* the words at the end of the rule thirty days *add* the words (thirty days) and may order the person or persons whom it holds responsible for such resistance or obstructions to pay jointly or severally in addition to cost reasonable compensation to the decree holder for the delay and expense caused to him in obtaining possession The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree

99 *For* the words in brackets (other than the judgment debtor) *read* the words in brackets (other than the persons mentioned in rules 95 and 98 hereof)

Add the following rules at the end of O 21 —

104 When the certificate prescribed by section 41 is received by the Court which sent the decree for execution it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room

Rules—All

App V

105 Every attachment of movable property under rule 43 of Negotiable Instruments under rule 51 and of immovable property under rule 54 shall be made through a Civil Court Amin or bailiff unless special reasons render it necessary that any other agency should be employed in which case those reasons shall be stated in the hand writing of the presiding Judge himself in the order for attachment

106 When the property which it is sought to bring to sale is immovable property within the definition of the same contained in the law for the time being in force relating to the registration of documents the decree holder shall file with his application a certificate from the sub registrar within whose sub district such property is situated, showing that the sub registrar has searched his book nos I and II and their indices for the past twelve years and stating the encumbrances if any which he has found on the property

107 Where an application is made for the sale of land or of any interest in land the Court shall before ordering sale thereof call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No 18841—23 I dated 7th October 1911 of the Local Government and shall fix a date for determining the said question

On the day so fixed or on any date to which the enquiry may have been adjourned the Court may take such evidence by affidavit or otherwise as it may deem necessary and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land

After considering the evidence and the report if any the Court shall determine whether such land or any and what part of it is ancestral land.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting

108 When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land and the decree is not sent to the Collector for execution under section 68 the Court before ordering a sale shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and if so to what) outstanding claims on the part of Government

109 The certificate of the sub registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders free of charge between the time of the receipt by the Court and the declaration of the result of the enquiry

No fees are payable in respect of the report by the Collector

110 The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting The Court may in its discretion adjourn the enquiry provided that the reasons for the adjournment are stated in writing and that no more adjournments are made than are necessary for the purpose of the inquiry

111 If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know the Court shall cause the same to be notified to intending purchasers when the property is put up for sale

112 The costs of the proceedings under rules 66 106 and 108 shall be paid in the first instance by the decree holder but they shall be charged as part of the costs of the execution unless the Court for reasons to be specified in writing shall consider that they shall wholly or in part be omitted therefrom

113 Whenever any Civil Court has sold in execution of a decree or other order any hou e or other building situated within the limits of a Military Cantonment or station it shall as soon as the sale has been confirmed forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office a written notice that such sale has taken place and such notice shall contain full particulars of the property sold and of the name and address of the purchaser

114 Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court the Court directing the sale shall give due notice to the Magi trate of the district of the names and addre ses of the purchasers and of the time and place of the intended delivery to the purchasers of such arms so that proper steps may be taken by the police to enforce the require ments of the Indian Arms Act

115 When an application is made for the attachment of live tock or other mov able property the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days If within three clear days before the expiry of any such period of fifteen days the amount of such co ts or such further period as the Court may direct be not paid into Court the Court on receiving a report thereof from the proper officer may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid

116 Live stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment debtor on his furni hing security or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court

117 If the custody of live stock cannot be provided for in the manner de cribed in the last preceding rule the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act 1871 and committed to the custody of the pound keeper who shall enter in a register—

(a) the number and description of the animals

(b) the day and hour on and at which they were committed to his custody

(c) the name of the attaching officer or his subordinate by whom they were com mitted to his cu tody and shall give such attaching officer or subordinate a copy of the entry

118 For every animal committed to the custody of the pound keeper as aforesaid a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such cu tody continue according to the scale prescribed under section 1_ of Act No 1 of 1871

And the sum so levied shall be sent to the Treasury for credit to the Municipal or District Board as the case may be under whose juri diction the pound is All such sums shall be applied in the same manner as fine levied under section 12 of the said Cattle Trespass Act

119 The pound keeper shall take charge of feed and water animals attached and committed as aforesaid until they are withdrawn from his cu tody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be from time to time prescribed under proper authority Such rates shall for animals spe ified in the section mentioned in the la t preceding rule not exceed the rates for

the time being fixed under section 5 of the same Act In any case for special reasons to be recorded in writing the Court may require payment to be made for maintenance at higher rates than those prescribed

120 The charges herein authorized for the maintenance of live stock shall be paid to the pound keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody and thereafter for such further period as the Court may direct at the commencement of such period Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound keeper shall be refunded by him to the attaching officer

121 Animals attached and committed as aforesaid shall not be released from custody by the pound keeper except on the written order of the Court or of the attaching officer or of the officer appointed to conduct the sale the person receiving the animals on their being so released shall sign a receipt for them in the register mentioned in rule 118

122 For the safe custody of movable property other than live stock when under attachment the attaching officer shall subject to approval by the Court make such arrangements as may be most convenient and economical

123 With the permission of the Court the attaching officer may place one or more persons in special charge of such property

124 The fee for the services of each such person shall be payable in the manner prescribed in rule 116 It shall not be less than two annas and shall ordinarily not be more than three and a half annas per diem The Court may at its discretion allow a higher fee but if it do so it shall state in writing its reasons for allowing an exceptional rate

125 When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him and on the presentation of such certificate to the Court which ordered the attachment the amount shall be paid to him in the presence of the presiding Judge Provided that where the amount does not exceed Rs 5 it may be paid to the Sahna by money order on requisition by the Amin and the presentation of the certificate may be dispensed with

126 When in consequence of an order of attachment being withdrawn or for some other reasons the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services the fee paid shall be refunded in whole or in part as the case may be

127 Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments

128 When any sum levied under rule 119 is remitted to the treasury it shall be accompanied by an order in triplicate (in the form given as form 9 of the Municipal Account Code) of which one part will be forwarded by the Treasury Officials to the District or Municipal Board as the case may be A note that the same has been paid into the Treasury as rent for the use of the pound will be recorded on the extract from the pass book.

129 The cost of repairing attached property for sale or of conveying it to the place where it is to be kept or sold shall be payable by the decree holder to the attaching officer In the event of the decree holder failing to provide the necessary funds the

attaching officer shall report his default to the Court and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid

130 Nothing in the e rules shall be deemed to prevent the Court from issuing and erving on the judgment debtor simultaneously the notices required by Order XXI rules 2_ 66 and 107

Add the following rules —

Garnishee order

131 The court may in the case of any debt due to the judgment debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument or a debt recoverable only in a revenue court) or any movable property not in the possession of the judgm nt debtor i sue a notice to any person (hereinafter called the garnishee) liable to pay such debt or to deliver or account for such movable property calling upon him to appear before the court and show cause why he should not pay or deliver into court the debt due from or the property deliverable by him to such judgment debtor or so much thereof as may be sufficient to sati fy the decree and the co t of execution

132 If the garnishee does not forthwith or within such time as the court may allow pay or deliver into court the amount due from or the property deliverable by him to the judgment debtor or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver such movable property or if he does not appear in answer to the notice then the court may order the garnishee to comply with the terms of such notice and on such order execution may issue as though such order were a decree against him

133 If the garnishee dispute his liability the court instead of making such order may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit and upon the determination of such issue shall pass such order upon the notice as shall be just

134 Whenever in any proceedings under these rules it is alleged or appears to the court to be probable that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon or an intere t in it the court may order such third person to appear and state the nature of his claim if any upon such debt or property and prove the same if neces ary

135 After hearing such third person and any other per on who may subsequently be ordered to appear or in the case of such third or other per on not appearing when ordered the court may pa s such order as is hereinbefore provided or make such other order as it shall think fit upon such term in all ca es with respect to the lien charge or interest if any of such third or other person as to such court shall seem just and reasonable

136 Payment or delivery made by the garni hee whether in execution of an order under the e rul s or otherwi e shall be a valid discharge to him as again t the judgment debtor or any other per on ordered to appear as afore aid for the amount paid, delivered or realized although such order or the judgment may be set a ide or rever ed

137 Debts owing from a fi m carrying on busine s within the juri diction of the court may be attached under the e rules although one or more members of such firm may be resi lent out of the juri diction Provided that any per on having the control or management of the partner hip bu iness or any member of the firm within the juris dicti n is served with the garnishee order An appearance by any member pursuant to an or ler hall be a suffi ient appearance by the firm

Rules—All.

App. V

[illegible] The [illegible] of any application [illegible] these rules and of any [illegible] or [illegible] or any order made thereon, shall be in the [illegible] of the court.

[illegible] (1) Where the [illegible] of any [illegible] has been [illegible] under these rules, the order shall have the same force and be [illegible] with [illegible] or otherwise as if it were a decree.

(2) Orders not covered by clause (1) shall be [illegible] as orders [illegible]

Illustration.—An application for a [illegible] order [illegible] that the debt is [illegible] by a charge or [illegible] dismissed. This order is appealable as an order in execution.

Add the following rule [illegible] —

[illegible] All the rules in this Order [illegible] addresses filed or subsequently altered under Order VII or Order VIII [illegible] all proceedings taken under order XXI or section 47.

The following form shall be used under the provisions of rule [illegible] of Order [illegible]

Suit No. of 19

Plaintiff

versus

Defendant

To

Judgment-debtor

Whereas it is alleged that a debt of Rs. [illegible] due to [illegible] the judgment-debtor

Or that you are liable to deliver to the aforenamed judgment-creditor the [illegible] set forth in the schedule hereto attached. Take notice that you are hereby required on or before the day of 19 to pay into this court the said sum of Rs.

Or

to deliver or account to the [illegible] of this court for the movable property [illegible] attached schedule or otherwise to appear in person or by a [illegible] and take [illegible] in this court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary in default whereof an order for the payment of the said sum or for delivery of the said property may be passed against you.

Dated this *day of* 19

Hand

Subordinate Judge

[illegible]

Order XXV

1. *After the words* [illegible] *and* [illegible] property in suit [illegible] the words [illegible] plaintiff is being financed by a person not a party to the suit [illegible]

Order XXVI.

16 In clause (1) *after* the words agents and pleaders *substitute* a the full stop and *add* the following words and shall direct the party apply examination of the witness or in its discretion any other party to the suit to Commissioner with a copy of the pleadings and issues

Order XXVII

Add the following rule at the end of O 27 —

9 In every case in which the Government Pleader appears for the (as a party on its own account or for the Government as undertaking und sions of rule 8 (1) the defence of a suit against an officer of the Governme in lieu of a vakalatnama file a memorandum on unstamped paper signed l stating on whose behalf he appears Such memorandum shall be as nearly in the terms of the following form

TITLE OF THE SUIT ETC

I A B Government Pleader appear on behalf of the Secretary of Sta in Council (*or* the Government of the United Provinces *or* as the case m pondent (*or* &c) in the suit

or on behalf of the Government [which under Order 27 rule 8 (1) of of 1908 has undertaken the defence of the suit] respondent (*or* &c) in the

Order XXXII

3 *Add the following proviso to rule 3 (4)* —

Provided that if the minor is under ten years of age no such notice shal to him

Substitute the following for rule 4 —

4 (1) Where a minor has a guardian appointed or declared by compe rity no person other than such guardian shall act as next friend except by court

(2) Subject to the provisions of sub-rule (1) any person who is of s and has attained majority may act as next friend of a minor unless the inte person is adverse to that of the minor or he is a defendant or the court for ot to be recorded considers him unfit to act

(3) Every next friend shall except as otherwise provided by clause (5) be entitled to be reimbursed from the estate of the minor any expenses incu while acting for the minor

(4) The court may in its discretion, for reasons to be recorded a of the suit or compensation under section 35A or section o against the personally as if he were a plaintiff

(5) Costs or compensation awarded under clause (4) shall not be by the guardian from the estate of the minor unless the decree expressly direc shall be so recoverable

Add the following rule 4A —

4A (1) Where a minor has a guardian appointed by competent au person other than such guardian shall be appointed his guardian for the suit court considers for reasons to be recorded that it is for the minor s welfare th person be appointed

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Order [illegible]

[illegible]

[illegible]

Order [illegible]

[illegible]

[illegible]

Order [illegible]

[illegible]

[illegible]

[illegible]

Order [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Rules— App.

shall within two weeks of the admi sion of the appeal or within such time as the court may for pecial rea ons allow depo it in the appellate court security for the costs of the appeal and for all costs ordered by the courts below to be paid by him which remain unpaid

2 *Add* (-) —

(2) In the econd provi o to clau e (1) of this rule costs of the appeal mean advocate s fee calculated on the valuation of the appeal together with a sum of Rs for Court fee on Vakalatnama to be filed by the respondent Re 1 in pection fee and in ca e of second of appeals outside the juri diction of a single Judge a further sum of Rs 10 for printing charges payable by Respondent

3 Clau e (-) of the rule shall be numbered as (3)

14 *Add the following sub rule* (3) —

(3) *Notwithstanding anything in sub rule* (1) *it hall not be nece sary t* serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the appellate court unle s he has appeared and filed an address for ervice either in the trial court or in the ca e of a second appeal in the lower appellate court or has appeared in the appeal

Add the following rule at the end of O 41 —

38 (1) An address for ervice filed under Order VII rule 19 or O ... rule 11 or sub equently altered under Order VII rule 24 or Order VIII ... hold good during all appellate proceedings arising out of the original suit or ...

(2) Every memorandum of appeal shall state the addresses for service ... the opposite parties in the Court below and notices and proces es shall ... appellate Court to such addre es

(3) Rules 21 22 23 and 24 of Order VII shall apply so far as may be ... proceedings

Order XLII

Sub titute the following for r 1 —

1 The rules of Order XLI shall apply so far may be to appeals ... *Procedure* decrees subject to the following provisions ...

Every memorandum of appeal from an appellate decree shall be ... a copy of the decree appealed from and (unless the Court dispenses the... ment on which it is founded and also of the judgment of the Court ...

Order XLIII

1 (u) *For the words* an order under rule 23 of Order XLI ...

Add the following rule at the end of O 43 —

3 In every appeal under rule 1 in every miscellaneous ... *dismissed for default* a formal order shall be drawn up statin ...

les—All

App V of the appeal or case the costs incurred and the parties if any by whom such costs are to be paid

Order XLV

For Order XLI rule 15 (1) *substitute* —

15 (1) Whoever desires to obtain —

(*a*) execution of any order of His Majesty in Council or

(*b*) where an appeal has been dismissed by His Majesty in Council for want of prosecution an order of the Court from which the appeal to His Majesty was preferred terminating proceedings and determining the costs

shall apply to the said Court by a petition accompanied by a certified copy of the decree passed or order made by His Majesty in Council of which execution is desired or to which effect is to be given and a memorandum of all costs incurred in India that are claimed in pursuance thereof

Order XLVI

Add the following rule at the end of O 46 —

8 Rule 35 of Order XLI shall apply so far as may be to proceedings under this order

Order XLVII.

Add the following rule at the end of O 47 —

10. Rule 35 of Order XLI shall apply so far as may be to proceedings under this order

Order XLVIII.

1 *Before* the words Every process issued" *prefix* the words Except as provided in Order IV rule 1 (2)

Order LII.

1 Rule 35 of Order XLI shall apply so far as may be to proceedings under section 110 of the Code

FORMS.

APPENDIX B.

[illegible]

Form No [illegible] (Order [illegible] rule 21) is hereby cancelled.

APPENDIX E.

[illegible]

Form No 1[illegible] [illegible] return of summons [illegible] 5 rule 25 is cancelled.

Rule
Ap

APPENDIX B

No 20

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS

No OF SUIT

Name of parties
In the Court of the
Date fixed for hearing

1	2	3	4		5		6
			Distance of residence from Court		Cash paid for		
Number of witnesses to be summoned	Name and full address of each person to be summoned	Rank or occupation	Rail	Road	Travelling expenses	Diet expenses	Name and address of person to whom unexpended travelling expenses and diet money should be returned

APPENDIX E

No 29

In form no 29 (Proclamation of Sale) of Appendix E to the Code of Civil Procedure 1908 *delete* the sentence "No bid by previously given" in the paragraph above conditions of sale

No 43

The security to be furnished under section 55 (4) shall be as nearly as may be by a bond in the following form —

In the Court of at

Suit No of 19

against

Plaintiff

C D of Defendant

WHEREAS in execution of the decree in the suit aforesaid the said C D has been arrested under a warrant and brought before the Court of and whereas the said C D has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No III of 1907 to be declared an insolvent and the said Court has ordered that the said C D shall be released from custody if the said C D furnish good and sufficient security in the sum of Rs that he will appear when called upon and that he will within one month from this date apply under section 5 of Act No III of 1907 to be declared an insolvent Therefore I E F inhabitant of have voluntarily become security and do hereby bind myself my heirs and executors to as Judge of the said Court and his successors in office that the said C D will appear at any time when called upon by the said Court and will apply in the manner and within the time hereinbefore set forth and in default of such appearance or of such application I bind myself my heirs and executors to pay to the said Court on its order the sum of Rs

Witness my hand at this day of 19

(Sd) E F

Witnesses Surety

Rules—All

App V

APPENDIX F

No 11

The security to be furnished under Order XXXVIII rule 9 shall be as nearly as may be by a bond in the following form —

In the Court of at

Suit No of 19

Plaintiff
Defendant

Amount of suit Rupees

WHEREAS in the suit above specified the plaintiff aforesaid has applied to the said Court that the said defendant may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit or that on his failure so to do certain property of the said defendant may be attached

And whereas on the failure of the said defendant to furnish such security or show cause why it should not be furnished the property aforesaid of the said defendant has been attached by order of the said Court

Therefore I inhabitant of have voluntarily become security and hereby bind myself my heirs and executors to as Judge of the said Court and his successors in Office that the said defendant shall produce and place at the disposal of the said Court when required the property herein below specified namely (*here give description of property or refer to an annexed schedule*) of the value of the same or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment and in default of his so doing I bind myself my heirs and executors to pay to as Judge of the said Court and his successors in office on its order such sum to the extent of rupees (*here enter a sufficient sum to cover the amount of suit with costs and the costs of the attachment*) as the said Court may adjudge against the said defendant

Witness my hand at this day of 19

(Signed)
Surety

Witnesses (Signed)

No 12

The security to be furnished under Order XXXIX rule 2 (2) shall be as far as may be by a bond in the following form —

In the Court of at

Suit No of 19

Plaintiff
Defendant

WHEREAS in the suit above specified instituted by the said plaintiff to restrain the said defendant from (*here state the breach of contract or other injury*) the said Court has on the application of the said plaintiff granted an injunction to restrain the said defendant from the repetition (*or the continuance*) of the said breach of contract (*or wrongful act complained of*) and required security from the said defendant against such repetition (*or continuance*) :

Rule
Ap

Therefore I inhabitant of have voluntarily become ecurity and do hereby bind myself my heirs and executors to as Judge of the aid Court and his successors in office that the said defendant shall abstain from the repetition (*or continuance*) of the breach of contract aforesaid (*or wrongful act or from the committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right*) and in default of his o ab taining I bind myself my heirs and executors to pay into Court on the order of the Court such sum to the extent of rupees as the Court shall adjudge against the said defendant

Witness my hand at this day of 19

Witnesses

Surety

APPENDIX H

No 4

Notice to show cause (General Form)

IN THE COURT OF

AT DISTRICT

CIVIL SUIT NO OF 19

Miscellaneous No of 19

resident of

versus

resident of

To

WHEREAS the abovenamed has made application to this Court that you are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 at o clock in the forenoon to show cause against the application failing wherein the said application will be heard and determined *ex parte* and it will be presumed that you consent to be appointed guardian for the suit

Given under my hand and the seal of the Court this day of 19

Judge

APPENDIX H

No 5

(List of documents produced by $\frac{\text{plaintiff}}{\text{defendant}}$ Order 13, rule 1)

IN THE COUPT OF AT DISTRICT

SUIT NO OF 19

Plaintiff.

versus

Defendant

Rules—All.

App V

List of documents produced with the plaint (or at first hearing) on behalf of plaintiff (or defendant)

This list was filed by this day of 19

1	2	3			4
Serial number	Description and date if any of the document	What became of the document			Remarks
		If brought on the record the exhibit mark put on the document	If rejected date of return to party and signature of party or pleader to whom the document was returned	If it remains on the record after decision of the case and is enclosed in an envelope under rule 24 Chapter III the date of enclosure in the envelope	

Signature of party or pleader producing the list

APPENDIX H

No 11

Notice to minor defendant and guardian

In the Court———at———district.

Suit No ———of 19

———————————

———————————

resident of——————— ———————*Plaintiff*

versus

———————————

———————————

resident of——————— ———————*Defendant*

To—

(1)—————————————*Minor defendant*

and

(2)————————— Or ——————— *Natural* / *Certificated* guardian the person in whose care the minor is alleged to be Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to he minor defendant you said minor and you (2)————————————the *natural* / *certificated* guardian or the person in whose care the minor is alleged to be are hereby required to take notice that unless within———days from the service upon you of this notice an application is made to this Court to show cause why the person named below should not be appointed or for the appointment of any other person willing to act as guardian for the suit the Court will proceed to appoint the person named below or some other person to act as the guardian of the minor for the purposes of the said suit

Proposed guardian son of resident of

Given under my hand and the seal of the Court this day of 19

Judge

NOTE.—*Cut out the word natural if the certificated guardian is named cut out the word certificated if the natural guardian be intended and cut out both natural and certificated and the word OR if the guardian be of neither class but one with whom the minor lives

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APPENDIX H

No 16

The security to be furnished under Order XXI rule 1 shall be as nearly as may be by bond in the following form —

In the Court of at

Suit No of 19

Plaintiff

Defendant

WHEREAS a suit has been instituted in the said Court by the said plaintiff to recover from the said defendant the sum of rupees and the said plaintiff is residing out of British India (or is a woman) and does not possess any sufficient immovable property within British India independent of the property in the suit

Therefore I inhabitant of have voluntarily become security and do hereby bind myself my heirs and executors to as Judge of the said Court and to his successors in office that the said plaintiff his heirs and executors shall whenever called on by the said Court pay all costs that may have been or may be incurred by the said defendant in the said suit and in default of such payment I bind myself my heirs and executors to pay all such costs to the said Court on its order

Witness my hand at this day of 19

(Signed)

Witnesses *Surety*

APPENDIX H.

No 17

ADDRESS FOR SERVICE

Under Order VII rules 19 to 26 Order VIII rules 11 and 12 Order XLI rule 38 Order XLVI rule 8 Order XLVII rule 10 Order LII rule 1

IN THE COURT OF THE OF

ORIGINAL Suit or Case No OF 19

Plaintiff

versus

Defendant.

This address shall be within the local limits of the district Court within which the suit is filed or of the district Court within which the party ordinarily resides if within the limits of the United Provinces of Agra and Oudh but not within the limits of any other province —

Name parentage and caste	Residence	Pargana or tahsil	Post office	District

Dated

Any summon notice or process in the case may henceforward be issued to me at the above address until I file notice of change If this address is changed I shall forthwith file a notice of change containing all the new particulars

Signature of party { Plaintiff / Defendant / Appellant / Respondent

Or

I file the above address according to the instructions given by my client (name)——————(and capacity)——————

Signature of pleader

N B—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter

APPENDIX H

No 18

Notice of Change of Address for Service

Under Order VII rules 19 to 26 Order VIII rules 11 and 12 Order XLI rule 38 Order XLVI rule 8 Order XLVII rule 10 Order LII rule 1

In the Court of the of

Original Suit or Case No of 19

Plaintiff

versus

Defendant

This address shall be within the local limits of the district Court within which the suit is filed or of the district Court within which the party ordinarily resides if within the limits of the United Provinces of Agra and Oudh but not within the limits of any other provinces —

Name parentage and caste	Residence	Pargana or tahsil	Post office	District

Dated

Any summons notice or process in the case may henceforward be issued to me at the above address until I file notice of change If this address is again changed I shall forthwith file a notice of change containing all the new particulars

Signature of party { Plaintiff / Defendant / Appellant / Respondent

Or

I file the above address according to the instructions given by my client (name)————————(and capacity)————————

Signature of pleader

N B—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter

APPENDIX VI

Rules made by the High Court of Madras under s 122

Order III

4 *Insert the following words at the commencement of sub rule (3) of rule 4 of Order III in the First Schedule*

No Government or other Pleader appearing on behalf of the Secretary of State for India in Council and

Add the following as sub rule (4) to O 3 r 4 —

(4) Notwithstanding the termination of all proceedings in the suit so far as regards the client the appointment of a pleader shall unless otherwise provided therein or determined by the death of the client or the pleader or by revocation in accordance with the provisions of clause (2) of this rule be deemed to authorise him to appear or to make any application or to do any act in connection with getting copies of documents and obtaining return of documents produced or filed in the suit or refund of money paid into Court in the suit

Order IV

2 *In O 4 r 2 number the present rule 2 (1) and add as rule 2 (2)—*

Registers in accordance with Forms Nos 14 15 16 17 and 18 in Appendix here prescribed for use in all Civil Courts having jurisdiction over the classes of suits and cases specified therein

[NOTE —*For the New Forms Nos* 14 15 16 17 *and* 18 *see below Appendix* H]

Order V

Substitute the following for rr 25 and 26 in O 5 —

Service where defendant resides out of British India and has no Agent

25 Where the defendant resides out of British India and has no Agent in British India empowered to accept service the summons may be addressed to the defendant at the place where he is residing and sent to him by post if there is postal communication between such place and the place where the Court is situate

Provided that if by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon

Service in foreign territory through Political Agent or Court or by special arrangement

26 Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor General in Council a Political Agent has been appointed or a Court has been established or continued with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides or

(b) the Governor General in Council has by notification in the *Gazette of India* declared in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service or

Substituted by Act XVIII of 1914

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory

the summons may be sent to such Political Agent or Court or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise for the purpose of being served upon the defendant and if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner herein before directed such endorsement shall be deemed to be evidence of service

Make the following amendments and additions to O 5 —

27 *In rule 27 after the words* send it *insert the words* by registered post prepaid for acknowledgment

28 *In rule 28 after the words* shall send *insert the words* by registered post prepaid for acknowledgment

29A *Insert as rule 29 A*—

Notwithstanding anything contained in the foregoing rules where the defendant is a public officer (not belonging to His Majesty's Military or Naval forces or His Majesty's Indian Marine Service) sued in his official capacity service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons which the defendant shall sign and return to the Court which issued the summons

Order IX

13 —*Make the following amendments to O 9 r 13* —

(1) Re number rule 13 as rule 13 (1)

(2) Add the following as sub rule (2) to rule 13 —

(2) The provisions of Section 5 of the Indian Limitation Act 1908 shall apply to applications under sub rule (1)

Order XIII

7 —*Add the following proviso to rule 7 (2)* —

Provided that no document shall be returned which by force of the decree has became wholly void or useless

9 —*Add the following as sub rule* (3) —

Every application under the first proviso to sub rule (1) above shall be made by a verified petition setting forth facts justifying the immediate return of the original and the Court may make such order as it thinks fit for costs of any or all the parties to the application including any costs incidental to the preparation of the certified copy to be substituted for the original and may further direct that any party against whom any order for costs is made shall have such costs if paid included as costs in the cause

Rules—Mad.

App VI

Order XVI

Insert as rule 4 A —

4 A (1) Notwithstanding anything contained in the foregoing rules in any suit by or against the Secretary of State for India in Council no payment in accordance with rule 2 or rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit

Special provision for public servants summoned as witnesses in suits to which the Government is a party

(2) When any other party to such a suit applies for a summons to such an officer he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed in the Civil Service Regulations and shall also pay any further sum that may be required under rule 4 according to the same scale and the money so deposited or paid shall be credited to Government

(3) In all cases where a Government servant appears in accordance with this rule the Court shall grant him a certificate of attendance

Order XX.

1 —*Make the following amendments to O 20 r 1* —

(1) Re number rule 1 as sub rule (1)

(2) Add the following as sub rule (2) —

(2) The judgment may be pronounced by dictation to a shorthand writer in open Court where the presiding Judge has been specially empowered in that behalf by the High Court

3 —*For O 20 r 3 substitute the following rule* —

The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and when once signed shall not afterwards be altered or added to save as provided by section 152 or on review provided also that where the presiding judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court the transcript of the judgment so pronounced shall after such revision as may be deemed necessary be signed by the judge

12 —*Add the following to O 20 r 12* —

(3) Where an Appellate Court directs such an inquiry it may direct the Court of first instance to make the inquiry and in every case the Court of first instance shall on the application of the decree holder inquire and pass the final decree

Order XXI

17 —*In O 21 r 17 add as r 17 (5)* —

5 Registers in accordance with Forms Nos 19 20 and 21 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of cases specified therein

[NOTE —*For the new Forms Nos 19 20 and 21 see below Appendix H*]

25 (2)—(1) *Amend O 21 r 25 (2) as follows* —

Insert the words or cause him to be examined by any other Court *after the words* examine him

(2) *Add the following proviso to r 25 (2)* —

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause

39 *Delete the present sub rules 4 and 5 of rule 39 of Order XXI and substitute the following* —

(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment debtor for his journey from the Court house to the civil prison and from the civil prison on his release to his usual place of residence together with the first of the payments in advance under sub rule (3) for such portion of the current months as remains unexpired shall be paid to the proper officer of the Court before the judgment debtor is committed to the civil prison and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison

(5) Sums disbursed under this rule by the decree holder for the subsistence and cost of conveyance (if any) of the judgment debtor shall be deemed to be costs in the suit

40 *Add the following as a proviso to O 21 r 40 (5)* —

Provided that in order to give the judgment debtor an opportunity of satisfying the decree the Court before making the order of committal may leave the judgment debtor in the custody of an officer of the Court for a specified period not exceeding ten days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied

Add the following as sub rule (6) to O 21 r 40 —

(6) No judgment debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub rule (-) unless and until the decree holder pays into Court such sum as the judge may think sufficient to meet the travelling and subsistence expenses of the judgment debtor and the escort for the journey to and from the prison

Sub-rule (5) of rule 39 shall apply to such payments

For O 21 r 43 substitute the following rules —

43 (1) Where the property to be attached is movable property other than agricultural produce in the possession of the judgment debtor the attachment shall be made by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates and shall be responsible for the due custody thereof

provided that when the property seized is subject to speedy and natural decay or when the expenses of keeping it in custody is likely to exceed its value the attaching officer may sell it at once and

provided also that when the property attached consists of live stock agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule he may at the instance of the judgment debtor or of the decree holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place if such person enters into a bond in the form No 15-A of Appendix E to this schedule with one or more sufficient sureties for its production when called for or

(b) in the charge of an officer of the Court if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rule 55 or rule 57 or rule 60 of this order the Court may order the restitution of the attached property to the person in whose possession it was before attachment

Insert the following rules —

43 A (1) Whenever attached property is kept in the village or place where it is attached the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the Court house and delivered to the proper officer of the Court.

43 B (1) Whenever attached property kept in the village or place where it is attached is live stock the person at whose instance it is retained shall provide for its maintenance and if he fails to do so and if it is in charge of an officer of the Court it shall be removed to the Court house

Nothing in this rule shall prevent the judgment debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him if not duly deposited or paid be recovered from the proceeds of property if sold or be paid by the persons declared entitled to delivery before he receives the same The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings

[NOTE —*An Additional form being form No 15 A has been inserted in Appendix E*]

53 *Add the following as sub rule* 1 (c) *to O* 21 *r* 53 —

(c) If the decree sought to be attached has been sent for execution to another Court the Court which passed the decree shall send a copy of the said notice to the former Court and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it

5 *Add the following as a proviso to O* 22 *r* 5 —

Provided that an appellate Court before determining it may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question

11 A —*In O* 22 *after r* 11 *add the following as r* 11 *A* —

11 A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction except in cases under appeal to the King in Council shall be deemed to be a quasi judicial act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar provided that contested applications and applications presented out of time shall be posted before a Judge for disposal

Rule
A

Order XXVI-A

1 The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court

2 The report of the Commissioner shall be evidence in the suit and shall form part of the record

3. Before issuing any commission under this Order the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be within a time to be fixed paid into Court by the party at whose instance or for whose benefit the commission is issued

Order XXVII

5—*For O 27 r 5 substitute the following rule* —

The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion

Order XXIX

1 A—*Insert as Rul 1 A of Order 29* —

In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months time between the day of summons and the date for appearance

Order XXXII

3—*For O 32 r 3 substitute the following rule* —

3 (1) Where the defendant is a minor the Court on being satisfied of the fact of his minority shall appoint a proper person to be guardian for the suit for the minor

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff

(3) The application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed The affidavit shall further state the name of the person or persons on whom notice has to be served under the provisions of sub-rule (5)

(4) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representative of a deceased plaintiff or defendant *The application shall be by separate petitions*

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no guardian upon notice to the father or other natural guardian of the minor or where there is no father or other natural guardian to the person

 in whose care the minor is and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule The notice required by this sub rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in form No 11 set forth in appendix H hereto

4 —*For O 32 r 4 substitute the following rule* —

4 (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit

Provided that the interest of that person is not adverse to that of the minor and that he is not in the case of a next friend a defendant or in the case of a guardian for the suit a plaintiff

(2) Where a minor has a guardian appointed or declared by competent authority no person other than the guardian shall act as the next friend of the minor or be appointed as guardian for the suit unless the Court considers for reasons to be recorded that it is for the minor s welfare that another person be permitted to act or be appointed as the case may be

(3) No person shall without his consent be appointed guardian for the suit Whenever an application is made proposing the name of a person as guardian for the suit a notice in form No 11 A set forth in appendix H hereto shall be served on the proposed guardian unless the applicant himself be the proposed guardian or the proposed guardian consents

(4) Where there is no other person fit and willing to act as guardian for the suit the Court may appoint any of its officers to be the guardian and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested and may give directions for the repayment or allowance of the costs as justice and the circumstance of the case may require

(5) When a guardian for the suit of a minor defendant is appointed and it is made to appear to the Court that the guardian is not in possession of any or sufficient funds for the conduct of the suit on behalf of the defendant and that the defendant will be prejudiced in his defence thereby the Court may from time to time order the plaintiff to advance moneys to the guardian for the purpose of his defence and all moneys so advanced shall form part of the costs of the plaintiff in the suit The order shall direct that the guardian as and when directed shall file in Court an account of the moneys so received by him

7 —*Add the following in O 32 r 7* —

Rule —(1 A) Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability A decree or order for the compromise of a suit appeal or matter to which a minor or other person under disability is a party shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in the following Form which shall be numbered as Form No 24 in Appendix D to this Schedule

14A —*In O 32 after r 14 add the following as rule 14 A* —

14 A The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its appellate jurisdiction except in ca e under appeal to the King in Council shall be deemed to be a quasi judicial act within the meaning of ection 128 (2) (i) of the Code of Civil Procedure and may be performed by the Regi trar provided that contested applications and applications presented out of time shall be po ted before a judge for disposal

17 —*Add as rule 17 of Order 32* —

In suit relating to the per on or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not le s than two months time between the date of summons and the date for appearance

Order XLI

1 —(1) *Add the following entence to sub r (1) of r 1* —

The copy of the judgment shall be a printed copy in every ca e in which the High Court has pre cribed that the judgment shall be printed when a copy is applied for the purpo e of appeal

Add the following as a proviso to O 41 r 1 (1) —

Provided that in appeals from decrees or orders under any special or local Act to which the provi ions of Parts II and III of the Limitation Act IX of 1908 do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal the Appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court

(2) *Add the following sentence to sub-r (2) of r 1* —

The memorandum shall also contain a statement of the valuation of the appeal for the purpo e of the Court Fees Act

(3) When an appeal is presented after the period of limitation pre cribed therefore it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to sati fy the Court that he had sufficient cause for not prefer ring the appeal within such period and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice had been given to the respondent and his objection if any to the Court acting under the provisions of section 5 of Act of 1908 have been heard

9 —*Substitute the following for r 9 (2)* —

Regi ters in accordance with Forms Nos 22 23 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the cla ses of suits specified therein

[NOTE —*For the new forms Nos 22 23 24 and 25 see Appendix H below*]

18 —*In O 41 r 18 after the words* cost of serving the notice *insert the words* or if the notice is returned unserved to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice

31 —*Substitute the following for r* 31 —

31 The judgment of the Appellate Court shall be in writing and shall state—

(*a*) the points for determination

(*b*) the decision thereon

(*c*) the reasons for the decision and

(*d*) where the decree appealed from is reversed or varied the relief to which the appellant is entitled

and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein provided that where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court the transcript of the judgment so pronounced shall after such revision as may be deemed necessary be signed by the Judge

Order XLI-A (*new*)

Appeals to the High Court from original decrees of Subordinate Courts

1 The rules contained in Order XLI shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order

2 (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court

(2) Notwithstanding anything contained in rule 22 of Order XLI the period prescribed for entry of appearance by the respondent and filing by him of Memorandum of Cross Objections if any shall unless otherwise ordered be thirty days from the service of notice upon him

3 (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filing in Court a memorandum of appearance

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub rule above he shall not be allowed to translate or print any part of the record

Provided that a respondent may apply by petition for further time and the Court may thereupon make such order as it thinks fit The application shall be supported by evidence to be given on affidavit as to the reason for the applicant s default and notice thereof shall be given to the appellant and all parties who have entered an appearance Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application

4 (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the City of Madras at which service of any notice order or process may be made on the party filing such memorandum

(2) If a party appears in person the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred.

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the City of Madras and shall give notice thereof to each party who has appeared.

(3) If a party appears by a pleader his address for service shall be that of his pleader and all notices to the party shall be served on his pleader at that address

5 The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court Provided that after a party has given notice of an address for service in accodance with Rule 4 service of any notice or process shall be made at such address

6 All notices and process other than a notice of appeal shall be sufficiently served if left by a party or his pleader or by a person employed by the pleader or by an officer of the Court between the hours of 11 a m and 5 p m at the address for service of the party to be served

7 Notices which may be served by a party or his pleader under Rule 6 or which are sent from the office of the Registrar may unless the Court otherwise directs be sent by registered post and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service

8 If there are several respondents and all do not appear by the same pleader they shall give notice of appearance to such of the other respondents as appear separately

9 A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered

10 (1) If upon a case being called on for hearing by the Court it appears that the record has not been translated and printed in accordance with the rules of Court the Court may hear the appeal or dismiss it or may adjourn the hearing and direct the party in default to pay costs or may make such order as it thinks fit

(2) If the Court proceeds to hear the appeal it may refuse to read or refer to any part of the record which is not included in the printed papers

11 When costs are awarded unless the Court otherwise orders the costs of a party appearing upon any application before the Registrar or the Court shall be Rs 15 and the cost of appearing when the appeal is in the daily cause list for final hearing and is adjourned shall be Rs 30 At the request of any party the Registrar shall cause the order to be drawn up and the said costs to be inserted therein

Memorandum of Objections

12 (1) If the acknowledgment mentioned in Rule 22 (3) of Order XLI is not filed the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar

13 If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in Rule 22 (3) of Order XLI the respondent may file an affidavit stating the facts and the Registrar may dispense with service of the copies mentioned in Rules 12 (1)

14. Rule 31 of Order XLI shall not apply to the High Court. If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and a *transcript made by him shall be signed or initialled by the Judge or by the Judges concurring* therein after making such corrections as may be considered necessary.

Order XLI-B (*new*)

1. The rules of Order XLI A shall apply so far as may be to appeals to the High Court of Madras under clause 15 of the Letters Patent of the said Court.

Provided that it shall not be necessary to file copies of the judgment and decree appealed from.

2. Notice of the appeal shall be given in manner prescribed by Order XLI A Rule 6, or if the party to be served has appeared in person, in manner prescribed by Rule 5 of the said order.

Order XLII (*new*)

Appeals from appellate decrees.

1. The rules of Order XLI and Order XLI A shall apply so far as may be to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this Order.

2. (1) The memorandum of appeal shall be printed or type-written and shall be accompanied by the following papers:—

A copy thereof, one certified copy and one plain printed or type-written copy of the decrees of Court of first instance and of the Appellate Court and four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy.

(2) If any ground of appeal is based upon the construction of a document, a printed or type-written copy of such document shall be presented with the memorandum of appeal.

Provided that if such document is not in the English language and the appellant appears by a pleader an English translation of the document certified by the pleader to be a correct translation shall be presented.

(3) If the appellant fails to comply with this rule the appeal may be dismissed.

Order XLIII.

2.—*Substitute the following for r. 2*:—

2. The rules of Order XLI and of Order XLI A shall apply so far as may be to appeals from the orders specified in Rule 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law.

Provided that in the case of appeals against interlocutory orders made prior to decree the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court.

3.—*Add the following as r. 3 of O. 43*:—

3. A memorandum of appeal of an appellate order shall be accompanied by a printed or typed copy of the memorandum or application and of any papers filed therewith.

Appendix B to Schedule I

Form No 1 —*Insert the following note in red ink in form No 1 namely* —

Also take notice that in default of your filing an address for service before the day before mentioned you are liable to have your defence struck out

Form No 13 A —*Insert the following as form No 13 A after form No 13 in Appendix B of Schedule I* —

No 13 A

Certificate of attendance to an officer of Government summoned as a witness in a suit to which the Government is a party

(ORDER XVI r 4 A)

(CAUSE TITLE)

This is to certify that (name) (designation) being a Government servant was summoned to give evidence in his official capacity on behalf of the $\frac{\text{plaintiff}}{\text{defendant}}$ in the above $\frac{\text{suit}}{\text{matter}}$ and was in attendance in this court from the day of to the day of 19 (inclusive) and that a sum of Rupees has been paid into Court by the $\frac{\text{plaintiff}}{\text{defendant}}$ towards his travelling and subsistence allowance for days according to article 1133 of the Civil Service Regulations and that the said amount $\frac{\text{has been}}{\text{will be}}$ remitted to the Government treasury at to be credited to Government under the head XXIA—Miscellaneous Fees and Fines

Dated the day of 19

Presiding Judge or Chief Ministerial Officer

Appendix D to Schedule I

Form No 10 A —*Insert in Appendix D the following as Form No 10 A* —

FORM No 10 A

FINAL DECREE FOR SALE [ORDER 34 RULE 5 (2) OR ORDER 34 RULE 8 (4)]

(*Title*)

Upon reading the preliminary decree passed in the above suit and the application of the $\frac{\text{plaintiff}}{\text{defendant}}$ dated and upon hearing Mr for plaintiff and Mr for defendant and it appearing that the payment directed by the said decree has not been made

It is hereby decreed as follows —

(1) that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be applied in payment of what is declared due to $\frac{\text{plaintiff}}{\text{defendant}}$ in the aforesaid preliminary decree together with subsequent interest and subsequent cost and that the balance if any be paid

to the $\frac{\text{defendant}}{\text{plaintiff}}$ or other person entitled to receive it (2) that if the net proceeds of the sale is insufficient to pay such amount and such subsequent interests and costs in full the $\frac{\text{plaintiff}}{\text{defendant}}$ be at liberty to apply for a personal decree for the amount of the balance and (3) that the $\frac{\text{defendant}}{\text{plaintiff}}$ do also pay $\frac{\text{plaintiff}}{\text{defendant}}$ Rs for the costs of this application.

(Here enter description of mortgaged property in English or in the language of the Court)

NOTE —(1) In the case of a decree under Order 34 rule 5 (2) score out the words plaintiff and defendant below the lines and in the case of a decree under Order 34 rule 8 (4) score out the same words occurring above the lines

(2) Direction No (2) should be struck out if the personal liability has not been adjudicated in the suit or has been declared not to exist

Form No 10 B —*Insert in Appendix D the following as Form No 10 B* —

FORM No 10 B

FINAL DECREE FOR REDEMPTION [ORDER 34 RULE 3 (1) ORDER 34 RULE 5 (1) AND ORDER 34 RULE 8 (1)]

(Title)

Upon reading the preliminary decree in the above suit on and the application of the $\frac{\text{defendant}}{\text{plaintiff}}$ I A No dated and after hearing Mr pleader for the and Mr pleader for the and it appearing that the payment directed by the aforesaid decree has been made —

It is hereby decreed as follows —

That the $\frac{\text{plaintiff}}{\text{defendant}}$ do deliver up to the $\frac{\text{defendant}}{\text{plaintiff}}$ or to such person as he appoints all documents in his possession or power relating to the mortgaged property and do also retransfer the property to the $\frac{\text{defendant}}{\text{plaintiff}}$ free from the mortgage and from all incumbrances created by the $\frac{\text{plaintiff}}{\text{defendant}}$ or any person claiming under him (or by those under whom he claims) and do also put the $\frac{\text{defendant}}{\text{plaintiff}}$ in possession of the property

SCHEDULE

Description of the mortgaged property

The costs of the $\frac{\text{defendant}}{\text{plaintiff}}$ in these proceedings —

Particulars.	Amount

NOTE.—(1) In the case of a decree under Order 34 rule 8 (1) score out the words plaintiff and defendant above the lines in the case of decree under Order 34 rule 3 (1) and rule 5 (1) score out the words plaintiff and defendant below the lines

(2) The words or by those under whom the claims will be inserted only if the mortgagee derives title from an original mortgagee

Form No 24 —*Add the following as Form No 24 in Appendix D* —

FORM No 24

[DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR LUNATIC]

(Title)

This suit coming on this day for final di po al in the presence of etc and C D the defendant a minor by E F his guardian *ad litem* applying that this suit may be compromi ed in the terms of an agreement in writing dated the day of and made between A B the plaintiff of the one part and the said C D by the said guardian *a l l tem* of the other part (or on terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the aid minor this Court doth sanction the said compromise on behalf of the said minor and with the consent of all parties hereto It is ordered as follows —

(Set out th terms of the compromise)

Appendix E to Schedule I

Form No 15 —*For the word* Dated *substitute the words* given under my hand and the seal of the Court this day of

Form No 15 A —*Add the following as Form No 15 A in Appendix E* —

FORM No 15 A

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES

(Order XXI rule 43)

In the Court of————————at————

Civil Suit No of

A B of————————

against

C D of————————

Know all men by the e presents that we I J of————————etc and K L of————————etc and M N of————————etc are jointly and severally bound to the Judge of the Court of————————in Rupees————————to be paid to the said Judge for which payment to be made we bind ourselves and each of us in the whole our and each of out heirs executors and administrators jointly and severally by these presents

Dated this————————day of————————19————

AND WHEREAS the movable property specified in the schedule hereunto annexed had been attached under a warrant from the said Court dated the———————— day of————19———— in execution of a decree in favour of———————— in suit No————————of————19————————on the file of————————and the said property has been left in the charge of the said I J

Now the condition of this obligation is that if the above bounden I J shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof then this obligation shall be void otherwise it shall remain in full force

I J

K L

M N

Signed and delivered by the above bounden————————in the presence of————————

Form No 17—*Add* the following as a Note to Form No 29—(Proclamation of Sale)—of Appendix E to Schedule I of the Code of Civil Procedure 1908 —

Note —The title deeds relating to the property have not been filed in Court and the purchaser will take the property subject to the risk of there being mortgage by deposit of title deeds or mortgages not disclosed in the encumbrance certificate

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Appendix F to Schedule I

Form No 9 —*For Form No 9 of Appendix F substitute*—

FORM No 9

APPOINTMENT OF A RECEIVER

(O XL r 1)

(*Title*)

WHEREAS it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below (or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the day of 19 in favour of

It is hereby ordered that AB be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents issues and profits thereof under Order XL of the Code of Civil Procedure 1908 with all power under the provisions of that order except that he shall not without leave of the Court (1) grant leases for a term exceeding three years or (2) institute suits in any Court (except suits for rent) or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs 1 000 or (4) expend on the repairs of any property in any period of two years more than half of the net annual rental of the property to be repaired such rental being calculated at the amount at which the property to be repaired would be let when in a fair state of repair provided that such amount shall not exceed Rs 1 000

And it is further ordered that the $\frac{\text{parties}}{\text{defendant}}$ to the above suit and all persons claiming under them to deliver up quite possession of the properties movable and immovable specified below together with all leases agreements for lease kabuleats account books papers memoranda and writings relating thereto to the said receiver And it is further ordered that the receiver do take possession of the said property movable and immovable and collect the rents issues and profits of the said immovable property and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver

And it is further ordered that the said receiver do out of the first monies to be received by him pay the debts due from the said and shall be entitled to retain in his hands the sum of Rs for current expenses but subject thereto shall pay his net receipts as soon as the same come to his hand into Court to the credit of this suit He shall once in every months file his accounts and vouchers in Court the first account to be filed on the day of

and to be passed on the day of He shall be entitled to commission at the rate of R per cent on the net amounts collected by him or to the sum of Rs per month (or as the case may be) as his remuneration (or he shall act without any remuneration)

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the State in addition to his own office establishment the following further establishment —

(Here enter specification of property)

Given under my hand and the seal of the Court this day of 19

Appendix G to Schedule I

Form No 6 —*Insert the following note in red ink in Form No 6 namely* —

Also take notice that if an address for service is not filed before the aforesaid date this appeal is liable to be heard and decided as if you had not made an appearance

Form No 6 A —*In Appendix G insert the following as Form No 6 A* —

Form No 6 A (Order XLI A rule 2)

NOTICE TO RESPONDENT

(*Cause title*)

Appeal from the of the Court of dated the day of

To

Respondents

Take notice that an appeal from the above decree (*order*) has been presented by the abovenamed appellants and registered in this Court and that if you intend to defend the same you must enter an appearance in this Court and give notice thereof to the appellant or his pleader within 30 days after service of this notice on you

If no appearance is entered on your behalf by yourself your pleader or some one by law authorized to act for you in this appeal it will be heard and decided in your absence

The address for service of the appellant is that of his pleader Mr A B of (*insert address*) *Madras*

(*If the appellant appears in person insert his address for service*)

Given under my hand and the seal of the Court this day of 19

Registrar

[Interlocutory application No of 19 has been made by appellant and execution has been stayed (*or other order made*) by order dated the day of 19]

Rules—Mad

App VI

Form No 6 B —*In Appendix G insert the following as Form No 6 B* —

FORM No 6 B (Order XLI A rule 3)

MEMORANDUM OF APPEARANCE.

(Cause title)

Take notice that the Respondent intends to appear and defend the above appeal and that his address for service of all notices and process is (*insert address*)

The said respondent requires a list of the papers which the appellant proposes to translate and print

Dated the day of 19

(Signed) C D

Vakil for Respondent

To the Registrar High Court of Judicature Madras

APPENDIX G

No 9

Omit from Form 9 in Appendix G to the First Schedule to the Code of Civil Procedure the entire portion beginning with the words Memorandum of Appeal and ending with the words the following reasons namely

CODE OF CIVIL PROCEDURE 1908

APPENDIX G

No 12 A

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

O XLV r 7 C C P

(In cases where the subject matter of the appeal is of sufficient value and the findings of the courts are not concurrent)

Read petition presented under O XLV r 3 of the Code of Civil Procedure praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree/final order of this Court in suit No of 19

The petition coming on for hearing upon perusing the petition and the ground of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this court doth certify that the amount/value of the subject matter of the suit in the court of first instance is Rs 10 000/upwards of Rs 10 000 and the amount/value of the subject matter in dispute on appeal to His Majesty in Council is also of the value of Rs 10 000/upwards of Rs 10 000 or that the decree/final order appealed from involves directly/indirectly some claim or question to/respecting property of the value of Rs 10 000/upwards of Rs 10 000 and that the decree/final order appealed from does not affirm the decision of the lower court.

APPENDIX G

No 12 B

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

O XLV r 7 C C P

(In cases where the subject matter is of sufficient value and the findings of the court are concurrent)

Read petition presented under O XLV r 3 of the Code of Civil Procedure praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree/final order of this court in suit No of 192

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this court doth certify that the amount/value of the subject matter of the suit in the court of first instance is Rs 10 000/upwards of Rs 10 000 and the amount/value of the subject matter in dispute on appeal to His Majesty in Council is also of the value of Rs 10 000/upwards of Rs 10 000 or that the decree/final order appealed against involves directly/indirectly some claim or question to/respecting property of the value of Rs 10 000/upwards of Rs 10 000 and that the affirming decree/final order appealed from involves the following substantial question (s) of law viz —

(1)
(2)

APPENDIX G

No 12 C

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

O XLV r 7 C C P

(In cases where the subject matter in dispute is either not of sufficient value or if incapable of money valuation)

Read petition presented under O XLV r 3 of the Code of Civil Procedure praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree/final order of this court in suit No of 19

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this court doth certify that the amount/value of the subject matter of the suit both in the court of first instance and in this court is below Rs 10 000 in v 1 e/incapable of money valuation this court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below viz —

(1)
(2)

Appendix H to Schedule I

Form No 11 —*Substitute the following for Form No 11 of Appendix H* —

FORM No 11

NOTICE TO GUARDIAN APPOINTED OR DECLARED OR TO FATHER OR OTHER NATURAL GUARDIAN OR TO THE PERSON IN CHARGE OF THE MINOR.

[Order XXXII rule 3 (5)]

(*Title*)

To

Guardian appointed or declared or father or other natural guardian or person in charge of the minor

Whereas an application has been presented on the part of the in the above suit for the appointment of a guardian for the suit for the said minor you are hereby required to take notice that unless within days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said minor to act as $\frac{\text{his}}{\text{her}}$ guardian for the purposes of the said suit the Court will proceed to appoint some other person to act as guardian of the said minor for the purposes of the said

Given under my hand and the seal of the Court the day of 19

Form No 11 A —*In Appendix H insert the following Form as Form No 11 A* —

FORM No 11 A

NOTICE TO PROPOSED GUARDIAN OF A MINOR $\frac{\text{DEFENDANT}}{\text{RESPONDENT}}$

[Order XXXIII r 4 (3)]

To

(Name description and place of residence of proposed guardian.)

Take notice that X—$\frac{\text{plaintiff}}{\text{appellant}}$ in has presented a petition to the Court praying that you be appointed guardian *ad litem* to the minor $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ and that the same will be heard on the day of 19

2. The affidavit of X has been filed in support in this application.

3 If you are willing to act as guardian for the said $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ you are requested to sign (or affix your mark to) the declaration on the back of this notice

4 In the event of your failure to signify your express consent in the manner indicated above take further notice that the Court may proceed under Order XXXII r 4 Code of Civil Procedure to appoint some other suitable person or one of its officers as guardian *ad litem* of the minor $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ aforesaid.

Dated the day of 19

(Signed)

(*To be printed on the reverse.*)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian of the minor $\frac{\text{defendant ( )}}{\text{respondent ( )}}$ therein mentioned.

Witnesses. (Signed) Y.Z.

1

2.

Rules-
App

Form No 14 —*For Form No 14 of Appendix H substitute* —

FORM No 14

REGISTER OF ORDINARY SUIT INSTITUTED

Court—

Year—

Instructions

If the suit has been received by transfer or instituted under Order XXXVII Schedule I C C P a note should be made to that effect at the head of the page

2 If a suit is remanded under rule 23 Order XLI or restored to file under rule 9 or rule 13 Order IX Schedule I C C P note under item 2 the date of restoration to file

3 Under the head *Particulars of claim* enter particulars required by *clauses (g) and (h)* of rule 1 Order VII Schedule I C C P and also the *value* of the suit as required by clause (i) of that Order and with special reference to Judicial Statements Nos VII and VIII and H C Circulars Nos 1054 of 1870 and 2253 of 1894 Entries under heads 3 4 and 5 should be full for embodiment in the decree as required by rule 6 Order XX Schedule I C C P

4 Note carefully the new heads 8 and 10 and fresh additions to heads 9 and 12

5 The certified copies of Judgment and Decree in Second Appeal sent to the lower Appellate Court should be forwarded by it to the Court of First Instance which will return them to the former Court after recording the necessary entries under head 9 of this Register

6 A note should be made of all parties brought on or struck off the record under Order I or XXII Schedule I C C P and also of any withdrawal of the claim or a portion of the claim against any of the defendants

7 Any amendments or alterations made during the progress of the suit in the value or particulars of the claim or as to the date or place of cause of action should appear under head 5

1 *Ordinary Suit No* *of* 19

2 Date of {Presentation / Filing}

3 PLAINTIFF—Name description and place of abode

4 DEFENDANT—Name description and place of abode

5 PARTICULARS OF CLAIM—*Claim* for
Cause of action arose at

6 Da *Defendant s first appearance*

Vakil f {Plaintiff / *Defendant*}

7 Date of JUDGMENT and result

8 Number of application (for review or re hearing) with result and date
Fresh Judgment if any with date

Rules—Mad

App VI

11 *Execution* —

No	Date of application	Order and date	Against whom	For what and amount if for money	Amount of costs		
					Rs	A	P

12 *Return of Execution* —

Amount paid into Court			Persons arrested	Minute of other return than payment or arrest and date of every return
Rs.	A	P		

Form No 16 — *Add the following as Form No 16 in App II* —

FORM No 16

REGISTER OF SUITS DISPOSED OF

Court—

Year—

Instructions

1 Separate register must be kept for ordinary and small cause suits

2 If the presiding officer of the Court is invested with extended small cause powers the remarks column should show whether the value of the suit is between Rs 50 and Rs 100 or between Rs 100 and Rs 00

3 The date to be entered in column 3 will always be the latest date In the case of suits restored to file the date of original institution should be entered

4 When a suit is after contest compromised or withdrawn a note of the fact should be made in the column of remarks It should also be stated whether the decree is appealable and if so to what Court

Serial number	Number of the suit disposed of	Date of institution or of receipt of order of transfer	Date of disposal	Transferred to another Court	Disposed of											Actual number of days intervening between institution and disposal		Amount decreed	REMARKS
					Without trial	Without contest				With contest									
						Compromised	Decreed on confession	Ex parte		Decreed on reference to arbitration		Decreed on oath		Decreed after trial					
								Decreed	Dismissed	In whole or part for plaintiff	For defendant	For plaintiff	For defendant	In whole or part for plaintiff	For defendant	Uncontested (columns 7 to 10)	Contested (columns 11 to 16)		
1	2	3	4	5	6	7	8	9	10	11	1	13	14	15	16	17	18	19	
				7	9	10	11	1	13	14	15	16	17	18	19	3	5	30	Corresponding columns of statement No IX Part I (a)

Rules—Mad

App VI

Form No 17 —*Add the following as Form No 17 in App II* —

FORM No 17

Register of Civil Miscellaneous cases received

(On the Side)

Court—

Year—

Instructions

1 In this register must be entered all cases ordered by H C Circular No 557 of 1888 to be shown as miscellaneous applications for purposes of Judicial Statement No IX Part 2 as well as cases of contempt of Court (*vide* H C Circular No 2928 of 1891).

2 In the matter of references under the Land Acquisition Act enter in column 3 the number and date of letter of reference in column 4 the designation of the officer making the reference in column 5 of the name of the claimant and in column 6 whether the reference is under section 18 29 or 30 of the Act

3 In the matter of references under section 16 of Madras Regulation III of 180 enter in column 3 the number and date of letter of reference in column 4 the designation of the officer making the reference and the name of the deceased in column 5 the name of the claimant if any in column 6 the words Section 16 Madras Regulation III of 1802 and in the last column the number and date of reference if any made to Government *and its result*

Number of miscellaneous cases	Date of presentation	Number of connected case if any	Name of petitioner if any and of his vakil	Name of defendant and of his vakil	Purport of case and section of law	Final order with date	Number of appeal with result and date
1		3	4	5	6	7	8

Form No 18—*Add the following as Form No 18 in App H* —

FORM No 18

REGISTER OF MISCELLANEOUS CASES DISPOSED OF

Court—

Year—

Instructions

1 This register will show all miscellaneous cases of every kind whether instituted on the application of parties or of the Court's own motion including cases of contempt of Court (H C Circulars Nos 517 of 1888 and 298 of 1892)

2 The date to be entered in column 3 will always be the latest date In the case of petitions restored to file the date of original institutions should be entered and the date of restoration noted in the column of remarks

Serial No	Number of the miscellaneous case disposed of	Date of institution or of receipt of the order of transfer	Date of disposal	Transferred or registered as suit	Disposed of — Without trial	Disposed of — Without contest — Compromised	Disposed of — Without contest — Ordered on confession	Disposed of — Without contest — Ex parte — Ordered	Disposed of — Without contest — Ex parte — Dismissed	Disposed of — With contest — Order on reference to arbitration — In whole or in part for petitioner	Disposed of — With contest — Order on reference to arbitration — For respondent	Disposed of — With contest — On oath — In whole or in part for petitioner	Disposed of — With contest — On oath — For respondent	Disposed of — With contest — After trial — In whole or in part for petitioner	Disposed of — With contest — After trial — For respondent	Disposed of — With contest — Party committed for contempt of Court	Actual number of days intervening between institution and disposal — Uncontested (columns 7 to 10)	Actual number of days intervening between institution and disposal — Contested (columns 11 to 16)	REMARKS
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
				7	9	10	11	12	13	14	15	16	17	18	19	Remarks	3		Corresponding columns to Statement No IX Part 2 (a)

Rules—Mad

App VI

Form No 19—*Add the following as Form No 19 in App II*—

FORM No 19

REGISTER OF EXECUTION PETITIONS RECEIVED

(ON THE SIDE)

Court—

Year—

Instructions

Applications for tran mission of decree for execution beyond the juri diction of the Courts passing them should not be entered in this Register but must be entered in the Register of Miscellaneous Ca es Received (Form No 17)

Number of Execution Petition	Date of presentation	Number of connected suit and of last previous application	Name of decree holder and of his pleader	Name of judgment debtor and of his pleader	Items of decree or order to be executed with date of any proceedings from which time runs for this application	Mode of assistance and section of Code or law prescribing it	Order with reasons for closing [illegible]	Number of [illegible]
1		3	4	5	6	7	8	9

Form No 20—*Add the following as Form No 20 in App II*—

FORM No 20

REGISTER OF DECREES OF OTHER COURTS RECEIVED FOR EXECUTION UNDER SECTIONS 38 AND 39 C C P

Court—

Year—

Date of receipt	Serial number	Name of the decree ing Court	Number of suit on the file of that Court	Number of connected execution or miscellaneous petitions if any presented in that Court	Lower Court to which sent for execution	Nature and date of communication to the decreeing Court (see section 41 C C P)	Amount of postage if any received	Remarks
1	2	3	4	5	6	7	8	9
							Rs. a p	

Form No 21—*Add the following as Form No 21 in App II* —

FORM No 21

REGISTER OF EXECUTION PETITION DISPOSED OF

Court—
Year—

In tructions

1 The date to be entered in column 4 will always be the latest date In the case of petitions restored to file the date of original in titution should be entered and the date of restoration noted in the column of remark

2 Note in the remarks column the number of judgment debtors imprisoned in each ca e the value of decree under which judgment-debtor was impri oned and date when ent to jail and date of relea e for the purpo es of columns 34 to 37 of Statement No XI

Serial Number	Number of the execution petition	Number of connected case	Date of institution or of receipt of the order of transfer	Date when proceedings were finally closed	Withdrawn rejected or not prosecuted	Transferred	Application on which proceedings were finally closed — Satisfaction obtained — In full	In part	Execution wholly infructuous	Amount — Involved in execution applications disposed of	Realized	How the decree was executed — Judgment debtor — Imprisoned	Arrested but released
1	2		4	5	6	7	8	9	10	11	1	13	14
					6	7	8	9	10	15	16	17	18
										Rs	Rs		

Movable property — Sold	Attached but released (Rule 55 or 60 Order XXI)	Immovable property — Sold	Attached but released (Rule 58 or 60 Order XXI)	Otherwise dealt with (Rule 83 of Order XXI or Schedule III)	Possession given of — Movables (Rule 31 Order XXI)	Immovable (Rules 35 and 36 Order XXI)	Specific performance enforced	Partition effected (Section 54 C P C)	Executed not otherwise	Total number of days intervening between institution and disposal	REMARKS (If the petition is only for part satisfaction of the decree note the fact)
15	16	17	18	19	0	1		3	24		
19	0	1	2_	23	24	5	6	7	28	13	Corresponding columns to Statement No XI Part I

Rules—Mad

App VI

FORM NO 22 —*Add the following as Form No 22 in App H* —

FORM No 22

REGISTER OF APPEALS RECEIVED

Court—

Year—

Instructions

Appeals from orders which have the force of decrees should be shown in this register and not in the Register of Miscellaneous Appeals Received (Form No 24) in which appeals from other orders should be entered—*vide* H C Circular No 3400 dated 2 nd December 1893 and section 2 (2) and Rules . Order XXXXI Schedule I C C P

2 Under item 5 Particulars of suit and decree appealed from enter also Nature and Value of appeal with special reference to the information required by annual Statement No X Parts 3 and 4 and H C Circulars Nos 1054 of 18 0 and ...3 of 1894 In cases of appeals against orders having the force of decrees substitute the word *Order* for *Decree* and add after date the words *passed under C C P on M P No of* 19

3 If the appeal has been received by transfer a note should be made to that effect at the head of the page

4 If an appeal is remanded under Rule 23 Order XLI Schedule I C C P note under head 2 the date of restoration to file

5 A note should be made of all parties brought on or struck off the record under Order I or XXII Schedule I C C P

1 *Appeal No of* 19

2 Date of { Presentation / Filing

3 APPELLANT —Name description and place of abode

4 RESPONDENT—Name description and place of abode

5 PARTICULARS OF SUIT AND DECREE APPEALED AGAINST *Decree of the Court of dated* 19 *in Original Suit No of* 19

Value of relief

Particulars of relief	*Claimed*	*Decreed*	*Appealed against*
	Rs A P	Rs A P	R A P

6 Hearing if any under Rule 11 Order XLI Schedule I C C P and result with date

7 *Date for respondent s first appearance*

Vakil for { Appellant / Respondent

8 JUDGMENT result and date

9 Objection under Rule 2. Order XLI Schedule I C C P if any filed by whom and value

10 Number of Application for review (re hearing) with result and date
Fresh Judgment if any with date

11 Second Appeal No of 19 Result with date

Rul

Form No 23 — *Add the following as Form No 23 in App II* —

FORM No 23

Register of Appeals disposed of

Court—

Instructions

Year—

1 There must be three separate registers of appeals disposed of in (1) for money or movables (2) under the Madras Estates Land Act 1908 and (3) for title and other appeals

2 The date to be entered in column 2 will always be the latest date In the case of appeals restored to file the date of original institutions should be entered

Serial number	Number of the appeal disposed of	Date of institution or of the receipt of the order of transfer	Date of disposal	Transferred to another Court	Disposed of — Dismissed under Rule 11 Order XLI	Disposed of — Dismissed for default or otherwise not prosecuted	Disposed of — Without contest — Decree confirmed	Disposed of — Without contest — Decree modified	Disposed of — Without contest — Decree reversed	Disposed of — Without contest — Remanded	Disposed of — With contest — On oath or arbitration or compromise	Disposed of — With contest — After trial — Decree confirmed	Disposed of — With contest — After trial — Decree modified	Disposed of — With contest — After trial — Decree reversed	Disposed of — With contest — After trial — Remanded	Actual number of days intervening between institution and decree — Uncontested (column 8 to 11)	Actual number of days intervening between institution and decree — Contested (columns 12 to 16)	Objection under rule 22 Order XLI	Remarks (If appeals are decided on oath or by arbitration or compromise note whether the decree appealed against was confirmed modified or reversed)
1	2	3	4		6	7	8	9	10	11	1	13	14	15	16	17	18	19	
				8	10	11	12	13	14	15	16	17	18	19	_0	4	_6	31	Corresponding columns of Statement No X Part I (a)

Rules—Mad

App VI

Form No 24 — *Add the following as Form No 24 in App II* —

FORM No 24

REGISTER OF MISCELLANEOUS APPEALS RECEIVED

Court—

Year—

Instructions

Appeals from orders which have the force of decree *should not be shown* in this register Appeals from other appealable orders only should find place in this register

2 If necessary give value of appeal under head

3 A note should be made of all parties brought on or struck off the record under Order 1 or XXII Schedule I C C P

1 *Miscellaneous Appeal No* *of* 19

2 Date of {

3 APPELLANT—Name description and place of abode

4 RESPONDENT—Name description and place of abode

5 PARTICULARS OF ORDER APPEALED AGAINST—*Order of the* *Court of* *dated* 19 passed *on M P No* *of* 19 *in Original Suit No*

Appeal under of

6 Hearing if any under Rule 11 Order XLI Schedule I C C P and result with date

7 *Date for Respondent s first appearance*

Vakil for { Appellant / Respondent

8 JUDGMENT—Result and date

9 Objections under Rule 22 Order XLI Schedule I C C P if any filed by whom

10 Number of applications for review (or re-hearing) with result and date

Fresh Judgment if any with date

Form No. 25 — *Add the following as Form No. 25 in App. II* —

FORM No. 25

REGISTER OF MISCELLANEOUS APPEALS DISPOSED OF

Court— ar—

Instructions

The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file the date of original institution should be entered.

Serial number	Number of the miscellaneous appeal disposed of	Date of institution or of the receipt of the order of transfer	Date of disposal	Transferred to another Court	Disposed of: Dismissed under Rule 11 Order XLI	Dismissed for default or otherwise not prosecuted	Without contest: Order confirmed	Order modified	Order reversed	*Remanded*	With contest: On oath or by arbitration or compromise	After trial: Order confirmed	Order modified	Order reversed	Remanded	Actual number of days intervening between institution and disposal: Uncontested (columns 8 to 11)	Contested (columns 12 to 16)	Objections under Rule 22 Order XLI	Remarks
1		3	4	5	6	7	8	9	10	11	1	13	14	15	16	17	18	19	
				7	9	10	11	1	13	14	15	16	17	18	19	3	5	0	Corresponding columns to Statement No. V, Part (a)

APPENDIX VII

Rules made by the High Court of Lahore under s 122

Order II

8 —*After rule 7 of Order II insert* —

8 (1) Where an objection duly taken has been allowed by the Court the plaintiff shall be permitted to select the cause of action with which he will proceed and shall within a time to be fixed by the Court amend the plaint by striking out the remaining causes of action

(2) When the plaintiff has selected the cause of action with which he will proceed the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the Court fees that may be necessary Should the plaintiff not comply with the Court s order the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court Fees Act

Order V

10 Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court

Mode of service

Provided that in any case if the plaintiff so wishes the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule

15 Where in any suit the defendant cannot be found or is absent from his residence and has no agent empowered to accept service of the summons on his behalf service may be made on any adult male member of the family of the defendant who is residing with him.

Where service may be on male member of defendants family

Explanation —A servant is not a member of the family within the meaning of this rule

Order VII

2 Where the plaintiff seeks the recovery of money the plaint shall state the precise amount claimed

In money suits

But where the plaintiff sues for mesne profits or for an amount which will be found due to him on taking unsettled accounts between him and the defendant or for movables in the possession of the defendant or for debts of which the value he cannot after the exercise of reasonable diligence estimate the plaint shall state approximately the amount or value sued for

19 Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice summons or other process may be made on the plaintiff or petitioner Plaintiffs or petitioners subsequently added shall immediately on being so added file a proceeding of this nature

20 An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore

21 Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect and the Court may make such order as it thinks just

22 Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice summons or other process can be served is present a copy of the notice summons or other process shall be fixed to the outer door of the house If on the date fixed such party is not present another date shall be fixed and a copy of the notice summons or other process shall be sent to the registered address by registered post and such service shall be deemed to be as effectual as if the notice summons or other process had been personally served

23 Where a party engages a pleader notices summonses or other processes for service on him shall be served in the manner prescribed by Order III rule 5 unless the Court directs service at the address for service given by the party

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition and the Court may direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform and may be either served upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit

25 Nothing in these rules shall prevent the Court from directing the service of a notice summons or other process in any other manner if for any reasons it thinks fit to do so

Order VIII

1 (1) The defendant may and if so required by the Court shall at or before the first hearing or within such time as the Court may permit present a written statement of his defence and with such written statement shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set off

Written statement

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his defence or claim for set off he shall enter such documents in a list to be added or annexed to the written statement

11 Every party whether original added or substituted who appears in any suit or other proceeding shall on or before the date fixed in the summons notice or other process served on him as the date of hearing file in Court a proceeding stating his address for service and if he fails to do so he shall be liable to have his defence if any struck out and to be placed in the same position as if he had not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just

12 Rules 20 22 23 24 and 25 of Order VII shall apply so far as may be to addresses for service filed under the preceding rule

Order IX

9 (1) Where a suit is wholly or partly dismissed under rule 8 the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action But he may apply for an order to set the dismissal aside and if he satisfies the Court that there was sufficient cause for his non appearance when the suit was called on for hearing the

Decree against plaintiff by default bars fresh suit

Rules—Lahore

App VII Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage although a former suit may have been dismissed for default

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party

Order XIII

9 (1) Any person whether a party to the suit or not desirous of receiving back any document produced by him in the suit and placed on the record shall unless the document is impounded under rule 8 be entitled to receive back the same—

Return of admitted document

(*a*) where the suit is one in which an appeal is not allowed when the suit has been disposed of and

(*b*) where the suit is one in which an appeal is allowed when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or if an appeal has been preferred when the appeal has been disposed of

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so

Provided also that no document shall be returned which by force of the decree has become wholly void or useless

Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced

(2) On the return of a document admitted in evidence a receipt shall be given by the person receiving it

Order XVI

2 (1) The party applying for a summons shall before the summons is granted and within a period to be fixed pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend and for one day's attendance

Expenses of witness to be paid into Court on applying for summons

Exception—When applying for a summons for any of its own officers Government will be exempt from the operation of clause (1)

( ) In determining the amount payable under this rule the Court may in the case of any person summoned to give evidence as an expert allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case

Experts

(3) Where the Court is subordinate to a High Court regard shall be had in fixing the scale of such expenses to any rules made in that behalf

Scale of expenses

3 (1) The sum paid into a Court shall except in the ca e of a Government servant be tendered to the person summoned at the time of serving the ummons if it can be served personally

Tender of expen es to witness

(2) When the person summoned is a Government servant the sum so paid into Court shall be credited to Government

Exception (1)—In ca es in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters actual travelling expenses incurred by them may when the Court considers it nece sary be paid to them

Exception (2)—A Government servant who e salary does not exceed Rs 10 per mensem may receive his expenses from the Court

4 (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expen e or rea onab'e remuneration the Court may direct such further sum to be paid to the person summoned or when such per on is a Government servant to be paid into Court as appears to be neces sary on that account and in case of default in payment may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons or the Court may di charge the person summoned without requiring him to give evidence or may both order such levy and discharge such person as aforesaid

Procedure wh re in uffi cient sum paid in

Order XVII

1 (1) The Court may if sufficient cau e is shown at any stage of the suit grant time to the parties or to any of them and may from time to time adjourn the hearing of the suit

Court may grant time and adjourn h aring

(2) In every such ca e the Court shall fix a day for the further hearing of the suit and may make such order as it thinks fit with respect to the costs occa ioned by the adjournment

Provid d that when the hearing of evidence has once begun the hearing of the suit shall be continued from day to day until all the witnes es in attendance have been examined unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded

(3) Where sufficient cau e is not shown for the grant of an adjournment under sub rule (1) the Court shall proceed with the suit forthwith

Order XXI

29 A *Which was added by Chief Court Notification No 2212 G dated the 12th May* 1909 *has been omitted by High Court Notification No 563 G dated 24th November* 1924

75 (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day and the sale shall not be held until the crop has been cut or gathered and is ready for storing

Special provisions relat ing to growing crops

(2) Where the crop from its nature does not admit of being stored or can be sold to great advantage in an unripe state such as green wheat or gram it may be sold before it is cut and gathered and the purchaser shall be entitled to enter on the land and to do all that is necessary for the purpose of tending and cutting or gathering it

Rules—Lahore
App VII

104 For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service referred to in Order VIII rule 11 subject to the provisions of Order VII rule 24 provided that this rule shall not apply to the notice prescribed by Rule 22 of this Order

Order XXX

Suing of partners in name of firm

1 (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action partners in such firm to be furnished and verified in such manner as the Court may direct

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1) it shall in the case of any pleading or other document required by or under this Code to be signed verified or certified by the plaintiff or the defendant suffice if such pleading or other document is signed verified or certified by any one of such persons.

Explanation —This rule applies to a joint Hindu family trading partnership

Order XXXII

Minor to sue by next friend

1 Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor Such person may be ordered to pay any costs in the suit as if he were the plaintiff

Guardian for the suit to be appointed by Court for minor defendant

3 (1) Where the defendant is a minor the Court on being satisfied of the fact of his minority shall appoint a proper person to be guardian for the suit for such minor

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff

(3) The plaintiff shall file with his plaint a list of relatives of the minor and other persons with their addresses who *prima facie* are most likely to be capable of acting as guardian for the suit for a minor defendant The list shall constitute an application by the plaintiff under sub rule (2) above

(4) The Court may at any time after institution of the suit call upon the plaintiff to furnish such a list and in default of compliance may reject the plaint

(5) Any application for the appointment of a guardian for the suit and any list furnished under this rule shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that each person proposed is a fit person to be so appointed

(6) No order shall be made on any application under this Rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no such guardian upon notice to the father or other natural guardian of the minor or where there is no father or other natural guardian to the person in whose care the minor is and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule

Provided that the Court may if it sees fit issue notice to the minor also.

Rules—Lal
App

4 (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit

Who may act as next friend or be appointed guardian for the suit

Provided that the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend a defendant or in the case of a guardian for the suit a plaintiff

(2) Where a minor has a guardian appointed or declared by competent authority no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers for reasons to be recorded that it is for the minor s welfare that another person be permitted to act or be appointed as the case may be

(2) (A) Where a minor defendant has no guardian appointed or declared by competent authority the Court may subject to the proviso to sub rule (1) appoint as his guardian for the suit a relative of the minor

If no proper person be available who is a relative of the minor the Court shall appoint one of the other defendants if any and failing such other defendant shall ordinarily proceed under sub rule (4) of this Rule to appoint one of its officers

(3) No person shall without his consent be appointed guardian for the suit but the Court may presume such consent to have been given unless it is expressly refused

(4) Where there is no other person fit and willing to act as guardian for the suit the Court may appoint any of its officers to be such guardian and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be *borne either by the parties or by any one or more of the parties to the suit or out of any* fund in Court in which the minor is interested and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require

Order XXXVII

Summary Procedure on Negotiable Instruments

1 This Order shall apply only to—

Application of order

(a) the High Courts of Judicature at Fort William Madras and Bombay
(b) the Chief Court of Lower Burma
(c) the Court of the Judicial Commissioner of Sind
(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure 188? have been already applied and
(e) the Courts of the District Judge and Subordinate Judges of the First Class of the Delhi Province

Order XLI

35 (1) The decree of the appellate Court shall bear the day on which the judgment was pronounced

Date and contents of decree

(2) The decree shall contain the number of the appeal the names and descriptions of the appellant and respondent and a clear specification of the relief granted or other adjudication made

(3) The decree shall also state the amount of costs incurred in the appeal and by whom or out of what property and in what proportions such costs and the costs in the suit are to be paid

Rules—Lahore

App VII

(4) The decree shall be signed and dated by the Judge or Judges who passed it

Provided that where there are more Judges than one and there is a difference of opinion among them it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree

Judge dissenting from judgment need not sign decree

Provided also in the case of the High Court that in the absence of a Judge who passed a decree or one or more Judges who passed a decree either the Registrar or the Deputy Registrar of the Court shall sign the decree on behalf of such absent Judge or Judges but that neither the Registrar nor the Deputy Registrar shall sign such decree on behalf of a Judge who dissented from the judgment of the Court

38 (1) An address for service filed under Order VII rule 19 or Order VIII rule 11 or subsequently altered under Order VII rule 24 or Order VIII rule 12 shall hold good during all appellate proceedings arising out of the original suit or petition

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses

(3) Rules 21 22 23 24 and 25 of Order VII shall apply so far as may be to appellate proceedings

Order XLII

Add the following as Rule 2 —

2 —In addition to the copies specified in Order XLI Rule 1 the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance unless the appellate Court dispenses therewith

O 5 r 18—Form No 11 of Appendix B

No 11

Affidavit of Process server to accompany return of a Summons or Notice (O 5 r 18)

(TITLE)

The Affidavit of——————— son of ——————————————— I ——————————————— $\frac{\text{make oath}}{\text{affirm}}$ and say as follows —

(1) I am a process server of this Court

(2) *On the* ————— *day of* ————————— 19—— *I received a* $\frac{\text{summons}}{\text{notice}}$ issued by the Court of ——————————— in suit No —————— of 19——in the said Court dated the—————— day of——————19—— for service on———————————

(3) The said———————————was at the time personally known to me and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the ————day of————— at about——————o clock on the——————noon at——————————by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$ ——

(a) ————————————————

(b) ————————————————

(a) *Here state whether the persons served signed or refused to sign the process and in whose presence*

(b) Signature of process-server

Or

(3) The said——————————not being personally known to me——————————
accompanied to——————————and pointed out to me a person whom he stated to be the said——————————and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$——————on the————day of————
————19— at about ————o'clock in the ————noon at ——————————by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$

(a) ——————————

(b) ——————————

(a) Here state whether the person served signed or refused to sign the process and in whose presence.

(b) Signature of process-server.

Or

(3) The said——————————and his house in which he ordinarily resides being $\frac{\text{personally known to me}}{\text{pointed out to me by}}$ ——————
——————I went to the said house in——————
and there on the——————————day of
——————19———at——————o'clock
in the $\frac{\text{fore}}{\text{after}}$ noon I did not find the said——————

I enquired (a) —————— (b) —————— neighbours

I was told that——————had gone to——————and would not be back till——————

——————

Signature of process server

Or

If substituted service has been ordered state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service

$\frac{\text{Sworn}}{\text{Affirmed}}$ by the said——————before me this——————
——————day of ——————19———

Empowered under section 139 of the Code of Civil Procedure to administer the oath to deponents

APPENDIX VIII

Rules made by the High Court of Patna under s 122

Order III

4 Notwithstanding anything contained in Order III rule 4 (3) of the First Schedule of the Code of Civil Procedure, 1908 no advocate shall be entitled to make or do any appearance application or act for any person unless he presents an appointment in writing duly signed by such person or his recognised agent or by some other agent duly authorised by power of attorney to act in this behalf or unless he is instructed by an attorney or pleader duly authorised to act on behalf of such person

Order V

Add the following to rule 10 *Order V* —

(1) Provided that in any case the Court may of its own motion or on the application of the plaintiff send the summons to the defendant by post in addition to the mode of service laid down in this rule An acknowledgment purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take delivery may be deemed by the Court issuing the summons to be *prima facie* proof of service

Order VII

Add the following Rules to Order VII —

19 Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice summons or other process may be made on the plaintiffs or petitioner and every plaintiff or petitioner subsequently added shall immediately on being so added file a similar statement

20 An Address for service filed under the preceding rule shall state the following particulars —

1 the name of the street and number of the house (if in a town)
2 the name of the town or village
3 the post office
4 the district and
5 the munsifi (if in Bihar and Orissa) or the district Court (if outside Bihar and Orissa)

21 Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect and the Court may make such order as it thinks just

22 A party who desires to change the address for service given by him as aforesaid shall file a verified petition and the Court may direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform and may be either served upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit.

Order VIII

(1) *To Order VIII rule* 6 (1) *should be added the words*

and the provisions of Order VII rules 14 to 18 shall *mutatis mutandis* apply to a defendant claiming set off as if he were a plaintiff

Rules—
Ap

Add the following Rules to Order VIII —

11 Every party whether original added or substituted who appears in any suit or other proceedings shall at the time of entering appearance to the summons notice or other process served on him file in Court a statement stating his address for service and if he fail to do so he shall be liable to have his defence if any struck out and to be placed in the same position as if he had not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just

12 Rules 20 and 22 of Order VII shall apply so far as may be to addresses for service filed under the preceding rule

Order XII

Substitute the following for rule 6 in Order XII —

6 Where admissions of fact have been made either on the pleadings or otherwise the Court may at any stage of a suit on the application of any party or of its own motion without waiting for the determination of any other question between the parties make such order or give such judgment as it may think just

Order XIII

1 *In Order XIII Rule 1 after the words at the first hearing of the suit should be added the words*

or where issues are framed on the day when issues are framed or within such further time as the Court may permit

Add the following as sub rule (1 A) in rule 9 Order XIII —

9 (1A) Where a document is produced by a person who is not a party in the proceeding the Court may require the party on whose behalf the document is produced to substitute a certified copy for the original as hereinbefore provided

Order XVI

2 (1)—*Add the following proviso to O 16 r 2 (1)* —

Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons and the person to be summoned is an officer serving under Government who is summoned to give evidence of facts which have come to his knowledge or of matters with which he has had to deal in his public capacity

(3) —*Add the following proviso to rule 3* —

Provided that when the person summoned is an officer of Government who has been summoned to give evidence in a case to which Government is a party of facts, which have come to his knowledge or of matters with which he has had to deal in his public capacity then

(i) if the officer s salary does not exceed Rs 10 a month the Court shall at the time of the service of the summon make payment to him of his expenses as determined by rule 2 and recover the amount from the Treasury

(ii) if the officer s salary exceed Rs 10 a month and the Court is situated not more than 5 miles from his headquarter the Court may at its discretion on his appearance pay him the actual travelling expenses incurred —

(iii) if the officer's salary exceed Rs 10 a month and the Court is situated more than 5 miles from his headquarters no payment shall be made to him by the Court In such cases any expenses paid into Court under Rule 2 shall be credited to Government

8 *Add the following to Rule 8 Order XVI* —

Provided that a summons under this Order may by leave of the Court be served by the party or his agent applying for the same by personal service If such service is not effected and the Court is satisfied that reasonable diligence has been used by the party or his agent to effect such service then the summons shall be served by the Court in the usual manner

Order XXI

Add the following Rule to Order XXI —

104 For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in Order VIII rule 11 subject to the provisions of Order VII rule 22 provided that this rule shall not apply to the notice prescribed by rule 22 of this Order

Order XXXII

4 (4) *In sub rule (4) to rule 4 of Order XXXII for the words where there is no other person fit and willing to act as guardian for the suit in the first sentence of the sub rule substitute the following*

Where the person whom the Court after hearing objections if any under sub rule (4) of rule 3 proposes to appoint as guardian for the suit fails within the time fixed in a notice to him to express his consent to be so appointed

Order XLI

Add the following as rule 14 (A) in Order XLI —

14 (A) The appellate Court may in its discretion dispense with the service of notice hereinbefore required on a respondent or on the legal representative of a deceased respondent in a case where such respondent did not appear either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal

Add the following Rule to Order XLI —

38 (1) An address for service filed under Order VII rule 19 or Order VIII rule 11 or subsequently altered under Order VII rule 22 or Order VII rule 12 shall hold good for all notices of appeals and all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the Appellate Court to such addresses

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